

SOUTH AFRICA / JUDGMENT

Competition Commission v Cape Gate (Pty) Ltd (CR029Sep09; SA203Mar23) [2023] ZACT 62 (23 July 2023)

[2023] ZACT 62

COURT

Competition Tribunal

BEFORE

G Budlender, I Valodia, A Ndoni

CASE / FILE NUMBER

CR029Sep09

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CR029Sep09/SA203Mar23

In the matter between:

The Competition Commission Applicant

And

Cape Gate (Pty) Ltd Respondent

Panel: G Budlender (Presiding Member)

I Valodia (Tribunal Member)

A Ndoni (Tribunal Member)

Heard on: 23

June 2023

Decided on: 23

June 2023

Settlement Agreement

The Tribunal hereby confirms the settlement agreement as agreed to and proposed by the Competition Commission and Cape Gate (Pty) Ltd annexed hereto.

Presiding Member

Adv. Geoff Budlender SC

Date: 23 June 2023

Concurring: Prof. Imraan Valodia and Ms Andiswa Ndoni

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

(HELD IN PRETORIA)

CC Case No: 2008Apr3696

CT Case NO:

In the matter between

THE COMPETITION COMMISSION

Applicant

and

CAPE GATE (PTY) LTD

Respondent

SETTLEMENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND CAPE GATE (PTY) LTD IN RESPECT OF AN ALLEGED CONTRAVENTION OF SECTION 4(1)(b)(i), (ii) and (iii) OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998), AS AMENDED

1. PREAMBLE

The Competition Commission and Cape Gate (Pty) Ltd hereby agree that an application be made to the Competition Tribunal for the confirmation of this Settlement Agreement as an order of the Competition Tribunal in terms section 49D(1) read with section 58(1)(a)(i) of the Competition Act 89 of 1998, as amended, in respect of a contravention of section 4(1)(b)(i) and (ii) of the Act.

2. DEFINITIONS

For the purposes of this Settlement Agreement the following definitions shall apply:

2.1. "Act" means the Competition Act, 1998 (Act No. 89 of 1998), as amended;

2.2. "AMSA" means ArcelorMittal South Africa Limited, a company duly incorporated and registered in terms of the company laws of the Republic of South Africa, with its principal place of business at Roger Dyason Road, Pretoria West, Pretoria, Gauteng;

2.3. "Cape Gate" means Cape Gate (Pty) Ltd, a company duly incorporated and registered in terms of the company laws of the Republic of South Africa, with its principal place of business at Nobel Boulevard, Vanderbijlpark, Gauteng;

2.4. "Cisco" means Cape Town Iron Steel Works (Pty) Ltd, a company duly incorporated and registered in terms of the company laws of the Republic of South Africa, with its principal place of business at 1 Fabriek Street, Kuilsrivier, Cape Town, Western Cape;

2.5. "Commission" means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Act, with its principal place of business at Mulayo Building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;

2.6. "Commissioner" means the Commissioner of the Competition Commission, as appointed by the Minister of Trade and Industry and Competition in terms of section 22(1) of the Act;

2.7. "Days" means business days, being any day, which is not a Saturday, Sunday or public holiday gazetted in the Republic of South Africa from time to time;

2.8. "Long Steel Complaint" means the complaint initiated by the Commission on 22 April 2008 against Scaw, AMSA, Cisco and Cape Gate for alleged contravention of sections 4(1)(b)(i) and 4(1)(b)(ii) of the Act for fixing the price and dividing the market for long steel products, and referred to the Tribunal on 1 September 2009 under CT Case Number: CR029Sep09;

2.9. "Parties" means the Commission and Cape Gate;

2.10. "Respondents" means the following firms, as cited in the Commission's Referral Affidavit of 1 September 2009, AMSA, Scaw South Africa (Pty) Ltd, Cape Gate, Cisco and SAISI;

2.11. "SAISI" means the South African Iron and Steel Institute, a non-profit organisation or association which describes itself as serving the collective interests of the primary steel industry in South Africa, with its address at 21st floor SMU Building, corner Andries and Schoeman Streets, Pretoria;

2.12. "SARCEA" means the South African Reinforced Concrete Engineers' Association;

2.13.

"Scaw" means Scaw South Africa (Pty) Ltd ("Scaw"), a company duly incorporated and registered in terms of the company laws of the Republic of South Africa, with its principal place of business at Union Junction, Johannesburg, Gauteng;

2.14. "Settlement Agreement" means this agreement duly signed and concluded between the Commission and Cape Gate;

2.15. "Steel mills" means AMSA, Scaw, Cape Gate and Cisco, who are steel mills that produce, inter alia, long steel products in South Africa, and who are members of SAISI; and

2.16. "Tribunal" means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Act, with its principal place of business at 1st Floor, Mulayo Building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

3.

BACKGROUND

TO THE LONG STEEL COMPLAINT INITIATION

3.1 The Long Steel Complaint emanates from a complaint that was initiated by the Commissioner in April 2008 (under CC Case Number: 2008Apr3696)

against producers of long and flat steel products in South Africa (i.e. "steel mills" and "steel merchants"}, for possible contraventions of sections 4(1)(b) and 5(1) of the Act. The Commissioner subsequently extended the April 2008 complaint

initiation by adding the SAISI as one of the parties to be investigated.

3.2 On 19 June 2008 the Commission conducted a search and seizure operation in terms of section 46 of the Act ("dawn raid") at the premises of Highveld, Cisco and SAISI. Subsequent to the dawn raid, Scaw applied for leniency in terms of the Commission's Corporate Leniency Policy for its involvement in alleged price fixing and market allocation in the market for in relation to rebar, wire rod, sections (including rounds, squares, angles and profiles).

3.3 In the leniency application, Scaw, inter alia, alleged that there has been a long- standing culture of cooperation amongst the steel mills regarding the prices to be charged, and discounts to be offered, for their steel products such as rebar, wire rod, sections (including rounds and squares, angles and profiles). The cooperation extended to arrangements on market division.

4. COMMISSION'S INVESTIGATION AND REFERRAL

4.1 In addition to information submitted by Scaw in its leniency application, the Commission conducted its own investigations which largely confirmed the allegations made by Scaw and provided further evidence of anticompetitive practices involving both price fixing and market division in the market for the production of long steel products, in contravention of section 4(1) (b) of the Act.

4.2 The available evidence suggests that this conduct has ceased.

4.3 On 1 September 2009 the Commission referred the Long Steel Complaint against four (four) steel mills namely, AMSA, Scaw, Cape Gate and Cisco, and SAISI. The steel mills are producers of long steel products in South Africa and is a non-profit organization representing all the primary steel producers in South Africa which functions mainly through its council and various committees. The steel mills are members of SAISI.

4.4 Cape Gate is cited as the 3rd {third} respondent in the Commission's Long Steel Complaint Referral.

4.5 There are four aspects to the allegations made against the respondents set out in the Commission's complaint referral:

4.5.1 The first aspect of the alleged contravention concerns price fixing in contravention of section 4(1)(b)(i) of the Act. The Commission alleges that representatives of the respondents attended meetings and/or engaged in informal discussions, sometimes by telephone or correspondence (including emails), through which:

- (i) information regarding the selling prices of long steel products was exchanged and/or discussed;
- (ii) information regarding discounts and/or discounting structures or levels in respect of long steel products was exchanged and/or discussed;
- (iii) agreements, arrangements and/or understandings were reached regarding the selling prices of long steel products and the discount structures or levels to be applied to them.

4.5.2 The second aspect of the alleged contravention concerns the fixing of trading conditions in contravention of section 4(1)(b)(i) of the Act. The Commission alleges that in respect of sections, the respondents had an understanding to follow Mittal's pricing or costing with regard to the transportation of such products.

4.5.3 The third aspect of the complaint concerns the division of markets by allocating customers, suppliers or specific types of goods or services in contravention of section 4(1)(b)(ii) of the Act. The Commission makes the following allegations in this regard:

- (i) The respondents reached a general understanding that certain customers belonged to certain of them. Targeting a customer which is regarded as a "traditional customer" of one of the other respondents could result in retaliation;
- (ii) The respondents reached agreements, arrangements and/or understandings regarding the supply of long steel products to downstream contractors or merchants who had been awarded contracts to three large construction projects. The respondents agreed and/or arranged to allocate amongst themselves to supply certain shares or quantities of the steel products required for each of the projects.

4.5.4 The fourth aspect relates to information sharing and collusion by the steel mills through SAISI. SAISI and SARCEA provided some platform through which the respondents could formally or informally facilitate the achievement of the agreements, arrangements and/or understandings referred to above.

4.6 On 29 April 2016 Cape Gate filed an answering affidavit opposing the Commission's referral.

5. ADMISSION

Cape Gate does not admit to a contravention of the Act in respect of the conduct alleged by the Commission.

6. ADMINISTRATIVE PENALTY

6.1 Cape Gate agrees to make payment of an administrative penalty in the amount of R1 375 344.32 (One million, three hundred and seventy-five thousand, three hundred and forty-four Rand and thirty-two cent} within 60 (sixty} days from the date of confirmation of this Settlement Agreement by the Tribunal.

6.2 This amount does not exceed 10% of Cape Gate's annual turnover in its most recent financial year.

6.3 The payment of the administrative penalty is made to secure finality to the Commission's complaint referral under CC Case Number: 2008Apr369

6.4 Payment of the administrative penalty shall not be construed as any admission of a contravention of the Act.

6.5 The payment shall be made into the Commission's bank account, details of which are as follows:

NAME: THE

COMPETITION COMMISSION

BANK: ABSA

BANK BUSINESS

BANK ACCOUNT NUMBER: [...]

BRANCH CODE: 632005

PAYMENT REF: 2008Apr3696CapeGate

6.6 The Commission shall pay the penalty over to the National Revenue Fund in accordance with section 59(4) of the Act.

7. AGREEMENT REGARDING FUTURE CONDUCT AND MONITORING

7.1 Cape Gate undertakes to refrain from engaging in any anti-competitive conduct in contravention of the Act in future.

7.2 Cape Gate will develop, implement, and monitor a competition law compliance programme as part of its corporate governance policy, which is designed to ensure that all employees, management and other functionaries do not engage in contravention of the Act. In particular, such compliance programme will include mechanisms for the identification, prevention, detection and monitoring of a contraventions of the Act.

7.3 Cape Gate shall submit a copy of the compliance programme to the Commission within 60 (sixty) days of the date of confirmation of the Settlement Agreement as an order of the Tribunal.

7.4 Cape Gate shall circulate a statement summarising the contents of this Settlement Agreement to all employees and management within 60 (sixty) days from the date of confirmation of the settlement Agreement as an order of the Tribunal, and report to the Commission once this obligation has been complied with.

7.5 All reports in relation to the conditions set out in this Settlement Agreement, including but not limited to, the provision of the

compliance programme and proof of payment of the administrative penalty contemplated in clause 7 above shall be submitted to the Commission at Collections@compcom.co.za.

8 FULL AND FINAL SETTLEMENT

8.1 This Settlement Agreement is entered into in full and final settlement of the Commission's complaint referral and shall upon confirmation as a consent order of the Tribunal, conclude all proceedings between the Commission and Cape Gate in respect of conduct contemplated under the Commission's complaint referral under CT Case Number: CR029Sep09.

FOR CAPE GATE (PTY) LTD:

Duly authorised signatory

BN COETZEE (Name)

CEO (Position)

FOR THE COMPETITION COMMISSION OF SOUTH AFRICA:

DORIS TSHEPE

The Commissioner

DATED AND SIGNED AT Pretoria ON THE 27th DAY OF March 2023

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Prepared on 9 October 2026 · Esheria