

SOUTH AFRICA / JUDGMENT

Competition Commission v Copper Tubing Africa (Pty) Ltd (CR025May12/SA113Aug15) [2015] ZACT 124; [2015] 2 CPLR 532 (CT) (16 September 2015)

[2015] ZACT 124

COURT

Competition Tribunal

BEFORE

M Mazwai, A Roskam, A Ndoni

CASE / FILE NUMBER

CR025May12/SA113Aug15

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COMPETITION TRIBUNAL

REPUBLIC OF SOUTH AFRICA

Case No: CR025May12/SA113Aug15

In the matter between:

The Competition Commission Applicant

And

Copper Tubing Africa (Pty) Ltd Respondent

Panel

: M Mazwai (Presiding Member)

A Roskam (Tribunal Member)

A Ndoni (Tribunal Member)

Heard on

: 16 September 2015

Decided on

: 16 September 2015

Settlement Agreement

The Tribunal hereby confirms the settlement agreement as agreed to and proposed by the Competition Commission and Copper Tubing Africa (Pty) Ltd annexed hereto marked "A", read with the addendum marked "B".

16 September 2015

Date

Presiding Member

Ms M Mazwai

Concurring: Mr A Roskam and Ms A Ndoni

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

(HELOIN PRETORIA)

CT Case No: 56/CR/May 12

CC Case No: 2008 Nov4111

In the matter between

THE COMPETITION COMMISSION

Applicant

and

COPPER TUBING AFRICA (PTY) LTD Respondent

SETTLEMENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND COPPER TUBING AFRICA (PTY) TO IN REGARD TO AN ALLEGED

CONTRAVENTION OF SECTION 4(1)(B)(I) OF THE COMPETITION ACT NO. 89 OF 1998, AS AMENDED.

Preamble

The Competition Commission ("Commission") and Copper Tubing Africa (Pty) Ltd ("CTA") hereby agree that an application

be made to the Competition Tribunal ("Tribunal") for the confirmation of this Settlement Agreement as an order of the Tribunal in terms of section 490 as read with sections 58 (1)(a){iii} and 59{1}(a) of the Competition Act No. 89 of 1998, as amended ("the Act"). on the terms set out below.

1. Definitions

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

- 1.1. "Act" means the Competition Act, 1998 (Act No. 89 of 1998), as amended;
- 1.2. "Arkam" means Arkam Trading CC a close corporation duly incorporated in accordance with the company laws of the Republic of South Africa, with its principal place of business situated at 11 Springbok Road, Longdale, Johannesburg.
- 1.3. "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;
- 1.4. "Commissioner" means the Commissioner of the Competition Commission, appointed in terms of section 22 of the Act;
- 1.5. "Complaint" means the complaint initiated by the Commissioner in terms of section 49B(1) of the Act under case number: 2008 Nov4111;
- 1.6. "CTA" means Copper Tubing Africa (Pty) Ltd, a company duly registered and incorporated in terms of the company laws of the Republic of South Africa, having its principal place of business situated at 18 Cleveland Road, Cleveland, Johannesburg, Gauteng;
- 1.7. "Maksal" means Maksal Tubes (Pty) Ltd, a company duly registered and incorporated in terms of the company laws of the Republic of South Africa, having its principal place of business situated at Industry Road, New Era, 1559 Springs, Gauteng;
- 1.8. "Parties" means the Commission and CTA;
- 1.9. "Respondent" means CTA;
- 1.10. "Settlement Agreement" means this agreement duly signed and concluded between the Commission and CTA;
- 1.11. "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 Mulayo building (Block C), the DTI campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng; and
- 1.12. "WHS" means Wholesale Housing Supplies (Pty) Ltd, a private company duly incorporated in accordance with the company laws of the Republic of South Africa, with its principal place of business situated at 2 Eton Road, Parktown, Johannesburg.

2. The Complaint and Complaint Investigation

2.1. On 03 April 2009, the Commissioner initiated a complaint in terms of section 498 (1) of the Act against Maksal, CTA, WHS and Arkam for possible contravention of section 4(1)(b)(i), 4(1)(b)(ii) and 5(1) of the Act. The complaint was initiated pursuant to the investigation of a third party complaint which was lodged with the Commission but was later withdrawn.

2.2. On 14 March 2012, following receipt of a leniency application by Maksal dated 23 November 2011 in terms of the Commission's Corporate Leniency Policy ("CLP"). The Commissioner amended the initiation statement of 3 April 2009.

2.3. In its CLP application, Maksal submitted that it and CTA had engaged in price fixing and market division in the market for the manufacture and supply of copper plumbing tubes in contravention of section 4(1)(b) of the Act.

2.4. During the course of its investigation, the Applicant found that the section 4(1)(b)(ii) contravention i.e market division, had ceased in 2000 which is more than three years prior to the Commission's initiation. The Commission therefore non-referred this aspect of the complaint as it had prescribed in terms of section 87(1) of the Act. Regarding the alleged contravention of section 5(1) i.e restrictive vertical practices, the Commission took a decision not to refer a complaint with regard to this alleged contravention on the basis of insufficient evidence.

2.5. The Commission's investigation however revealed that in the period from about early 2006 until at least 2009, CTA and Maksal agreed with each other in respect of price adjustments for copper plumbing tubes, as well as the timing to effect such adjustments.

3. The Complaint Referral

3.1. Following its investigation, the Commission concluded that the conduct by Maksal and CTA constituted a contravention of section 4(1)(b)(i) of the Act, in that they agreed, alternatively engaged in a concerted practice to directly or indirectly fix the purchase or selling price of copper plumbing tubes.

3.2. In light of its findings, the Commission decided to refer the complaint on 5 July 2012 to the Tribunal for determination.

4. Statement of Conduct

CTA admits that it has contravened section 4(1)(b)(i) of the Act, in that from the period commencing early 2006 until at least 2009, it agreed with its competitor, Maksal, to fix the selling price of copper plumbing tube products.

5. Agreement concerning the Respondent's future conduct

5.1. CTA agrees to:

5.1.1. the extent that it is in existence, provide evidence, written or otherwise, which is in its possession or under its control, concerning the alleged contraventions contained in this Settlement Agreement.

5.1.2. desist from the conduct described above.

5.1.3. develop, implement and monitor a competition law compliance programme incorporating corporate governance designed to ensure that its employees, management, directors and agents do not engage in future contraventions of the Act. In particular, such compliance programme will include the following:

5.1.3.1. a competition policy to be drafted and implemented by CTA;

5.1.3.2. provide specific training on competition law aspects particularly relevant to CTA;

5.1.3.3. ensure that such training will be made available to all new employees joining CTA. Furthermore, CTA will update such training annually to ensure on an on-going basis that it and its members cannot engage in any anti-competitive activities.

5.1.4. To submit a copy of such compliance programme to the Commission within 60 days of the date of confirmation of the Settlement

Agreement as an order by the Competition Tribunal;

5.1.5. To circulate a statement summarising the contents of this Settlement Agreement to all management and operational staff employed at CTA within 60 days from the date of confirmation of this Settlement Agreement by the Tribunal;

6. Administrative Penalty

6.1. Having regard to the provisions of sections 58(1)(a)(iii) as read with sections 59(1)(a), 59(2) and 59(3) of the Act, CTA accepts that it is liable to pay an administrative penalty.

6.2. The parties have agreed that CTA will pay an administrative penalty in the amount of R 8,000,000.00 (Eight million rand);

6.3. This amount does not exceed 10% of CTA's total annual income in the Republic and its exports from the Republic for its 2008 financial year;

6.4. CTA will pay the amount set out in paragraph 6.2 above to the Commission within one month from the date of confirmation of this Settlement Agreement as an order by the Tribunal.

6.5. The penalty must be paid into the Commission's bank account which is as follows:

Name:

The Competition Commission Fee Account

Bank:

Absa Bank, Pretoria

Account Number: [.....]

Branch Code: 323 345

Reference: CTA/ 2008 Nov4111

6.a. The penalty will be paid over by the Commission to the National Revenue Fund in accordance with the provisions of section 59(4) of the Act.

7. Full and Final Settlement

This agreement, upon confirmation as an order by the Tribunal, is entered into in full and final settlement and includes all proceedings

between the Commission and CTA relating to any alleged contravention of the Act by the respondent that is the subject of the Commission's

Investigation referred to the Tribunal under CT Case No. 2008 Nov4111.

Date and signed at Simonstown on the 17th day of August 2015

For Copper Tubing Africa (Pty) Ltd

David Machet (duly authorised)

Former CEO Of Copper Tubing Africa (Pty) Ltd

Dated and signed at Pretoria on the 24th day of August 2015

For the Competition Commission

Tembinkosi Bonakele

Competition Commissioner

IN COMPETITION TRIBUNAL OF SOUTH AFRICA

(HELD AT PRETORIA)

CT Case No: CR025May121SA113Aug15

THE COMPETITION COMMISSION Applicant

COPPER TUBING AFRICA (PTY) LTD Respondent

FILING SHEET

BE PLEASED TO TAKE NOTICE that the applicant hereby files the addendum to the settlement agreement concluded between the

Competition Commission and Copper Tubing Africa (Pty) Ltd.

Dated at PRETORIA on this the 16th day of September 2015.

COMPETITION COMMISSION

DTI Campus

77 Melnljies Street Sunnyside, Pretoria

Tel: 012 394 3335

Ref: K. Ayayee I J. Ngobeni

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And to: FLUXMANS INC.

Respondent's Attorneys

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Ref: Andile Nikani

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ADDENDUM TO THE SETTLEMENT AGREEMENT BETWEEN THE COMPETITION COMMISSION.
ANO COPPER TUBING AFRICA (PTY) LTD

The parties agree that the clause set out hereunder shall replace clause 3.2 of the attached
Settlement Agreement signed by the Competition

Commissioner dated 24 August 2015.

3.2 In light of its findings, the Commission decided to refer the complaint on 22 May 2012 to the Tribunal. for determination.

Dated and signed at Rosebank on the 16th day of Sept 2015

Andile Nikani (authorised)

Attorney for Copper Tubing Africa (Pty) Ltd

Dated and signed at Rosebank on the 16th day of Sept 2015

Bukhosibakhe Majenge (duly authorised)

Chief Legal Counsel

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