

SOUTH AFRICA / JUDGMENT

Competition Commission v GD Irons Construction (Pty) Ltd (CR143Nov14/SA241Jan19) [2019] ZACT 8 (6 February 2019) [2019] ZACT 8

COURT

Competition Tribunal

BEFORE

Y Carrim, M Mazwai, I Valodia

CASE / FILE NUMBER

CR143Nov14/SA241Jan19

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COMPETITION TRIBUNAL

REPUBLIC OF SOUTH AFRICA

Case No: CR143Nov14/SA241Jan19

In the matter between:

The Competition Commission

Applicant

And

GD Irons Construction (Pty) Ltd

Respondent

Panel: Y Carrim (Presiding Member)

M Mazwai (Tribunal Member)

I Valodia (Tribunal Member)

Heard on: 06 February 2019

Decided on: 06 February 2019

Settlement Agreement

The Tribunal hereby confirms the settlement agreement as agreed to and proposed by the Competition Commission and GD Irons Construction (Pty) Ltd annexed hereto marked "A".

Presiding Member Ms Yasmin Carrim

06 February 2019 Date

Concurring: Ms Mondo Mazwai and Prof. Imraan Valodia

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

(HELD IN PRETORIA)

CT CASE NO: CR143Nov14/020149 CC

CASE NO: 2009Sep4641

THE COMPETITION COMMISSION

Applicant

and

GD IRONS CONSTRUCTION (PTY) LTD

Respondent

CONSENT AGREEMENT IN TERMS OF SECTION 490 READ WITH SECTION 58(1)(b) OF THE COMPETITION ACT, NO. 89 OF 1998, AS AMENDED, BETWEEN THE COMPETITION COMMISSION AND GD IRONS CONSTRUCTION (PTY) LTD, IN RESPECT OF A CONTRAVENTION OF SECTION 4(1)(b)

(i) (ii) and (iii) OF THE COMPETITION ACT, 1998

Preamble

The Competition Commission and GD Irons Construction (Pty) Ltd hereby agree that an application be made to the Competition Tribunal for the confirmation of this Consent Agreement as an order of the Tribunal in terms of section 490 read with section 58(1)(b) of the Competition Act No. 89 of 1998, as amended, in respect of a contravention of section 4(1)(b) (i) (ii) and (iii).

1. DEFINITIONS

For the purposes of this consent agreement, the following definitions shall apply:

1.1 "Act" means the Competition Act No. 89 of 1998, as amended;

1.2 "BEE Company" means a company which meet the criteria set out in the Broad Based Black Economic Empowerment Act, 53 of 2003 and the codes of good practice thereunder;

1.3 "BATSA" means the British American Tobacco South Africa, a public company duly registered in accordance with the company laws of the Republic of South Africa, with its principal place of business at Waterway House South, No 3 Dock Road, V&A Waterfront, Cape Town;

1.4 "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 1st Floor, Mulayo Building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside. Pretoria, Gauteng;

1.5 "Consent Agreement" means this agreement duly signed and concluded between the Commission and GD Irons;

1.6 "CLP" means the Commission's Corporate Leniency Policy (Government Notice No. 628 of 23 May 2008, published in Government Gazette No.31064 of 23 May 2008);

1.7 "GD Irons" means GD Irons Construction (Pty) Ltd, a private company duly registered in accordance with the company laws of the Republic of South Africa, with its principal place of business at 430 Skilder Street, Silvertondale, Pretoria, 0127;

1.8 "Giuricich" means Giuricich Brothers (Pty) Ltd, a private company duly registered in accordance with the company laws of the Republic of South Africa, with its principal place of business at Cedarwood Office Park, Mount Lebanon Road, Off Western Service Road, Woodmead, Sandton;

1.9 "Parties" means the Commission and GD Irons collectively;

1.10 "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.

2. THE COMMISSION'S INVESTIGATION AND FINDINGS

2.1 On 01 September 2009, the Commissioner initiated a complaint against firms in the construction industry for collusive practices in

construction industry as regards price fixing, market division and collusive tendering in contravention of section 4(1)(b) (i), (ii) and (iii) of the Act GD Irons and Giuricich are part of the respondents in this complaint

2.2 The Commission's investigation under Case No. 2009Sept4641 revealed that around November 2006 GD Irons entered into an agreement

with Guiricich to tender collusively. More specifically the investigation found that during November 2006, Giuricich provided a

cover price to GD Irons in respect of a tender issued in relation to the construction of a new distribution depot for British American

Tobacco South Africa ("BATSA Project") and, in return, during or about September 2007 Giuricich paid GD Irons a losers fee.

2.3 The Commission submits that this conduct is in contravention of section 4(1)(b)(i), (ii) and (iii) of the Act.

3. ADMISSION

GD Irons admits that it engaged in the conduct set out in clause 2 above in contravention of section 4(1)(b)(i)(ii) and (iii) of the Act.

4. CO-OPERATION

Insofar as the Commission is aware, GD Irons:

4.1 has provided the Commission with truthful and timely disclosure, including information in its possession or under its control, relating to the prohibited practice:

4.2 has ceased engaging in the prohibited conduct set out in clause 2 above;

4.3 has not destroyed, falsified or concealed information, evidence and documents relating to the prohibited practice; and

4.4 has not misrepresented or made a wilful or negligent misrepresentation concerning the material facts of any prohibited practice or otherwise acted dishonestly.

5. FUTURE CONDUCT

GD Iron agrees and undertakes to:

5.1 refrain from engaging in conduct in contravention of section 4(1)(b) of the Act, and from engaging in any prohibited practice in future;

5.2 circulate a statement summarising the contents of this Consent Agreement to its managers and directors within 30 days (thirty) from the date of confirmation of this Consent Agreement by the Tribunal;

5.3 to implement and monitor a competition law compliance programme. Such programme shall incorporate corporate governance designed to ensure the employees, management, directors and agents do not engage in future contraventions of the Act. In particular, such compliance programme will include mechanisms for the monitoring and detection of any contraventions of the Act;

5.4 as regards the competition law compliance programme referred to above, GD Irons undertakes to submit to the Commission a copy thereof within 90 days of confirmation of the Settlement Agreement as an Order of the Tribunal.

6. ADMINISTRATIVE PENALTY

6.1. Having regard to the provision of section 58(1)(a)(iii) as read with section 59(1)(a), 59(2) and 59(3) of the Act, GD Irons is Hable to pay an administrative penalty.

6.2. GD Irons agrees and undertakes to pay an administrative penalty in the amount of R4 000 000 (Four Million Rand). This arnount is less than 10% of GD Iron's annual turnover in the Republic of South Africa for the financial year ended 2013.

6.3. GD Irons shall pay the abovementioned amount to the Commission in 2 (two) instalments. The first instalment equal to 30% of the administrative penalty in the amount of R1 200 000 (one million two hundred thousand rand) shall be paid within 30 days from the date of confirmation of this consent agreement as an order of the Tribunal.

6.4. The remaining instalment equal to 70% of the administrative penalty in the amount of R2 800 000 (two million eight hundred thousand rand) shall be paid in full on the anniversary of the confirmation date of this consent agreement as an order of the Tribunal.

6.5. GD Irons, in its current ownership and its current shareholders, are jointly and severally liable for payment of the administrative penalty.

6.6. The administrative penalty shall be paid into the Commission's bank account, details of which are as follows:

Bank name: Absa Bank

Branch name: Pretoria

Account holder: Competition Commission Fees Account

Account number: [...]

Account type: Branch Code: Reference:

Current Account 632005

Case Number: 2009Sep4641/GD Irons

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

7. COMPLIANCE

7.1. All compliance reports and proof of payments relating to this matter shall be forwarded to the Commission at CartelSettlements@compcom.co.za;

8. FULL AND FINAL SETTLEMENT

This Consent Agreement is entered into in full and final settlement of the Commission's investigation under Case No. 2009Sep4641 and upon confirmation as an order of the Tribunal, concludes all proceedings between the Commission and GD Irons relating to the conduct that is the subject of the Commission's investigation under Case No. 2009Sep4641, including the complaint referral under Competition Tribunal Case No. CR143Nov14/020149.

FOR GD IRONS CONSTRUCTION (PTY) LTD

Dated and signed at Pretoria on the 27th day of November 2018

Full names: Geoffrey David Irons

Designation: Chief Executive Officer

FOR THE COMMISSION

Dated and signed at PRETORIA on the 19th day of December 2018

TEMBINKOSI BONAKELE

Commissioner

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