

SOUTH AFRICA / JUDGMENT

Competition Commission v Malesela Taihan Electric Cable (Pty) Ltd (CO085Jul15) [2015] ZACT 122; [2015] 2 CPLR 566 (CT) (2 September 2015) [2015] ZACT 122

COURT

Competition Tribunal

BEFORE

A Wessels, I Valodia, M Mokuena

CASE / FILE NUMBER

CO085Jul15

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COMPETITION TRIBUNAL

REPUBLIC OF SOUTH AFRICA

Case No: C0085Jul15

In the matter between:

The Competition Commission Applicant

And

Malesela Taihan Electric Cable (Pty) Ltd Respondent

Panel

: A Wessels (Presiding Member)

: I Valodia (Tribunal Member)

: M Mokuena (Tribunal Member)

Heard on

: 02 September 2015

Decided on

: 02 September 2015

Consent Agreement

The Tribunal hereby confirms the consent agreement as agreed to and proposed by the Competition Commission and Malesela Taihan Electric

Cable (Pty) Ltd annexed hereto marked "A".

02 September 2015

Date

Presiding Member

Mr A Wessels

Concurring: Prof. IValodia and Ms M Mokuena

IN THE COMPETITION TRIBUNAL OF SOUTH

HELD AT PRETORIA

CT Case No:

C Case no: 2010Mar4981

THE COMPETITION COMMISSION Applicant

MALESELA TAIHAN ELECTRIC CABLE (PTY) LIMITED Respondent

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND MALESELA TAIHAN ELECTRIC CABLE (PTY) LIMITED IN RESPECT OF ALLEGED CONTRAVENTIONS OF SECTIONS 4 (1)(b)(i),(ii) and (iii) OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998), AS AMENDED

Preamble

The Competition Commission and Malesela Taihan Electric Cable (Pty) Ltd hereby agree that application be made to the Competition Tribunal for confirmation of this Consent agreement as an order of the Competition Tribunal in terms of section 490 read with section 58(1)(a)(iii) and 58(1)(b) of the Competition Act, 1998 (Act No. 89 of 1998), as amended, in respect of alleged contraventions of sections 4(1)(b)(i) and (iii) of 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 "AECMSA" means the Association of Electric Cable Manufacturers of South Africa;

1.3 "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);

1.4 "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 Meinljies Street, Sunnyside, Pretoria, Gauteng;

1.5 "Commissioner" means the Commissioner of the Competition Commission, appointed in terms of section 22 of the Act;

1.6 "Complaints" means the complaints initiated by the Commissioner in terms of section 49B of the Act under case number 2010Mar4981;

1.7 "Consent Agreement" means this agreement duly signed and concluded between the Commission and M-Tec;

1.8 "Cover Pricing" means collusive tendering conduct wherein one or more firms agree that they will submit tenders in such a way that a designated winner will submit the lowest or most favourable bid and the other(s) will submit artificially high bids that are not intended to win the contract;

1.9 "Parties" means the Commission and M-Tec;

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 3rd Floor, Mulayo Building (Block C), the dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

1.11 "M-Tec" means Malesela Taihan Electric Cable (Pty) Limited, registration number 2000/007692/07;

2 The Complaint and Investigation

2.1 On 16 March 2010, the Commissioner, acting in terms of section 49B(1) of the Act, initiated a complaint under case number 2010MAR4981 against Aberdare, Tulisa, Alvern and SOEW for possible contravention

of section 4(1)(b) of the Act in the market for the supply of power cables.

2.2 The evidence obtained by the Commission through its investigation indicated that other companies, which were not part of the initial investigation, may also have been involved in the alleged conduct in contravention of the Act.

2.3 On 28 May 2010, the Commission expanded its investigations to include these firms: Alcon Marepha (Pty) Ltd, CBI-Electric: African Cables (Pty) Ltd, Kewberg Cables and Braids (Pty) Ltd, Malesela Taihan

Electric Cable (Pty) Ltd, Norco Cables (Pty) Ltd, Cabcon Technologies (Pty) Ltd Phoenix Power Cables (Pty) Ltd, Silcom (Pty) Ltd and the Association of Electric Cable Manufacturers of South Africa ("AECMSA") as being party to price fixing, market division and collusive tendering in the power cable market.

2.4 In the course of its investigation the Commission further amended its complaint initiation on 14 May 2012 to include further information and particulars in respect of the alleged conduct in contravention of the Act.

2.5 The Commission's investigation revealed that:

2.5.1 M-Tec, African Cables, Aberdare and Alcon Marepha agreed to tender collusively in respect of tenders issued by Eskom by allocating specific product lines and agreeing on the price to be charged per product line. M-Tec, African Cables, Aberdare and Alcon Marepha implemented and sustained their agreement by providing each other with cover prices.

The aforementioned conduct is in contravention of section 4(1)(b)(ii) and (iii).

2.5.2 Members of AECMSA, including M-Tec discussed and agreed, under the auspices of AECMSA, on a quotation (indices) basis which was used to escalate prices when bidding for short and long term tenders to supply electric cabling products. This conduct continued until January 2009. This conduct constitutes price fixing in contravention of section 4(1)(b)(i) of the Act

3 Admission

M-Tec admits that it entered into the agreements detailed in paragraph 2.5. 1 to 2.5.2 above with its competitors, African Cables, Aberdare and Alcon Marepha in contravention of section 4(1)(b)(i) and (iii) of the Act

4 Agreement concerning future conduct

M-Tec undertakes to:

4.1 fully cooperate with the Commission in relation to the prosecution of the complaint Without limiting the generality of the foregoing, M-Tec specifically agrees to:

4.1.1 testify in the complaint referral (if any) in respect of alleged contraventions covered by this consent agreement; and

4.1.2 to 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 consent agreement

4. 1.3 desist from the conduct described above.

4.1.4 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:

4.1.4.1 the identification by M-Tec of competition

risks relevant to its business and the monitoring thereof; and

4.1.4.2 provision of specific training on aspects of competition law of particular relevance to M-Tec, such training to be made available to all new employees joining M-Tec. Furthermore, M-Tec will update such training annually on an ongoing basis.

4.2 to submit a copy of such compliance programme to the Commission within 60 days of the date of confirmation of the consent agreement as an order by the Competition Tribunal;

4.3 to circulate a statement summarising the contents of this consent

agreement to all management and operational staff employed at M-Tec within 60 days from the date of confirmation of this consent

agreement by the tribunal;

5. Administrative Penalty

5.1 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, M-Tec accepts that it is liable to pay an administrative penalty.

5.2 The parties have agreed that M-Tec will pay an administrative penalty in the amount of R20 000 000 (Twenty Million, Two Hundred Thousand), which amounts to 2.5% of its turnover for its 2010 financial year, ending on 30 June 2010.

5.3 This amount does not exceed 10% of M-Tec's total annual income in the Republic and its exports from the Republic for its 2014 financial year;

6. Terms of payment

6.1 M-Tec will pay the amount and interest set out above [in paragraph 5.2] to the Commission in three payments over two years, the first such payment of R 2 020 000 within 30 days from the date of confirmation of this Consent Agreement as an order of the Tribunal;

6.2 M-Tec will make the second payment of R 6 060 000, exactly one year from the date of the previous payment;

6.3 M-Tec will make the third payment of R 12 120 000 plus 9.25% per annum interest on the latter amount, which is a total of R 13 241 100, exactly one year from the date of the second payment.

6.4 The penalty will 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

REF NO: 2010MAR4981M-TEC

6.5 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 concludes the proceedings

between the Commission and M-Tec relating to the alleged contraventions of the Act that is the subject of this consent agreement.

Dated and signed at PRETORIA on the 8th day of June 2015

For M-Tec (Pty) Limited

MERIKA JOHANNES MADUNGANDASA (DIRECTOR/ CHAIRMAN)

[FILL IN THE NAME AND POSITION OF PERSON THAT IS SIGNING]

Dated and signed at PRETORIA on the 9h day of July 2015

For the Commission

Tembinkosi Bonakele

Commissioner

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