

SOUTH AFRICA / JUDGMENT

Competition Commission v More Asphalt (Pty) Ltd (CR187Nov151SA052Jun19) [2019] ZACT 33 (10 July 2019) [2019] ZACT 33

COURT

Competition Tribunal

BEFORE

N Manoim, I Valodia, Y Carrim

CASE / FILE NUMBER

CR187Nov151SA052Jun19

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COMPETITION TRIBUNAL

REPUBLIC OF SOUTH AFRICA

Case No: CR187Nov151SA052Jun19

In the matter between:

The Competition Commission Applicant

And

More Asphalt (Pty) Ltd Respondent

Panel: N Manoim (Presiding Member)

I Valodia (Tribunal Member)

Y Carrim (Tribunal Member)

Heard on: 10 July 2019

Decided on: 10 July 2019

Consent Agreement

The Tribunal hereby confirms the consent agreement as agreed to and proposed by the Commission Commission and More Asphalt (Pty) Ltd annexed hereto marked "A".

Presiding Member

Mr Norman Manoim

10 July 2019

Date

Concurring: Prof. Imraan Valodia and Ms Yasmin Carrim

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

(HELD IN PETORIA)

CT CASE NO: CR187Nov15/SA052Jun19

CC CASE NO: 2011Nov0376

In the matter between:

THE COMPETITION COMMISSION

Preamble

and

MORE ASPHALT (PTY) LTD

Respondent

CONSENT AGREEMENT IN TERMS OF SECTION 49D READ WITH SECTION 58(1)(b) OF THE COMPETITION ACT, NO. 89 OF 1998, AS AMENDED, BETWEEN THE COMPETITION COMMISSION AND MORE ASPHALT (PTY) LTD, IN RESPECT OF A CONTRAVENTION OF SECTION 4(1)(b)(ii) OF THE COMPETITION ACT, 1998

Preamble

The Competition Commission and More Asphalt (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)(ii).

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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 "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 Meintjes Street, Sunnyside,

Pretoria, Gauteng;

1.3 "Consent Agreement" means this agreement duly signed and concluded between the Commission and More Asphalt;

1.4 "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);

1.5 "More Asphalt" means More Asphalt (Pty) Ltd, a private company duly registered and Incorporated in accordance with the company laws of the Republic of South Africa, with Its principal place of business at Tygerberg Valley Road, Durbanville, Western Cape;

1.6 "Much Asphalt" means Much Asphalt (Pty) Ltd, a private company duly registered and Incorporated in accordance with the company laws of the Republic of South Africa, with its principal place of business at Ryneveld Street, Eersterivier, Western Cape.

1.7 "Parties" means the Commission and More Asphalt collectively;

1.8 "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 27 November 2011, Mr Robin Edward Franks, lodged a complaint against the respondents for allegedly fixing prices, dividing markets and tendering collusively in the provision of hot mix asphalt products in the Western Cape in contravention of section 4(1)(b)(I), (ii) and (iii) of the Act.

2.2. On 27 November 2015 the Commission filed a complaint referral against More Asphalt and Much Asphalt, to the Tribunal, under case number 2011Nov0376.

2.3. In respect of this complaint, the Commission alleged that its investigation revealed the following:

2.3.1 From 1997 to 2004, More Asphalt and Much Asphalt were a party to an agreement, alternatively a concerted practice in terms of which they divided markets in respect of the provision of hot mix asphalt products in the Western Cape.

2.3.2 As part of the market division arrangement, the respondents also agreed to compensate each other In the amount of R16 per ton in the event of either party exceeding its allocated share or the market (i.e. 66% to Much Asphalt and 34% to More Asphalt).

2.3.3 From 1997 to 2004, the representatives of the respondents met on a quarterly basis to disclose and discuss the volume of hot mix asphalt supplied by each firm for the preceding quarter and to calculate the compensation due to a firm that supplied less than Its allocated share of the market. The meetings were used to monitor compliance with the compensation scheme in accordance with a 66/34 market share spill arrangement.

2.4. The Commission submits that this conduct Is in contravention of section 4(1)(b)(li) of the Act.

3. ADMISSION

More Asphalt admits that it engaged in the conduct set out in clause 2.3.1 to 2.3.3 above In contravention of section 4(1)(b)(il) of the Act.

4. CO-OPERATION

Insofar as the Commission Is aware, More Asphalt:

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

More Asphalt 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. with regard the competition law compliance programme referred to above, More Asphalt 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 56(1)(a)(iii) as read with section 59(1)(a), 59(2) and 59(3) of the Act, More Asphalt Is liable to pay an administrative penalty.

6.2. More Asphalt agrees and undertakes to pay an administrative penalty in the amount of R579 204.57 (five hundred and seventy-nine thousand two-hundred-and four rand and fifty-seven cents. This amount Is less than 10% of More Asphalt annual turnover in the Republic of South Africa for the financial year ended 2004.

6.3. More Asphalt shall pay the abovementioned amount to the Commission in 2 (two) Instalments. The first instalment equal to 58% of the administrative penalty In the amount of R329 204.57 (three hundred and twenty-nine thousand rand two hundred and four rand and fifty-seven cents) 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 42% of the administrative penalty in the amount of R250 000 (two hundred and fifty 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. No interest will be levied upon the administrative penalty for the first year from the date on which this Consent Agreement is made an order of the Tribunal. Thereafter Interest will be levied on the remaining outstanding balance at the prevailing Interest rate on debts owing to the State as prescribed by the Minister of Finance in terms of section 80(1)(b) of the Public Finance Management Act, 1 of 1999 as amended. At the time of the signature of 1hls Consent Agreement, the applicable Interest rate Is 10,5%.

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: 4087641778

Account type: Current Account

Branch Code: 632005

Reference: Case Number: 2011Nov0376/More Asphalt

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. MONITORING

7.1. All reports in relation to conditions set out in this agreement, including but not limited to Compliance programmes, Proof of payment(s) etc. shall be submitted lo the Commission at CartelSettlements@compcorn.co.za

8. FULL AND FINAL SIETTLEMENT

8.1. This Consent Agreement is concluded In full 1md final settlement of the Commission's investigation under Case No. 2011Nov0376 and upon confirmation as an order of the Tribunal, concludes all proceedings between the Commission and More Asphalt relating to the conduct that is the subject of the Commission's investigation under Case No. 2011Nov0376, Including the complaint referral under Competition Tribunal Case No. CR187Nov15.

FOR MORE ASPHALT (PTY) LTD

Dated and signed at Belville on the 28 day of May 2019.

FOR THE COMMISSION

Dated and signed at Midrand on the 2nd day of June 2019.

TEMBINKOSI BONAKELE

Commissioner

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