

SOUTH AFRICA / JUDGMENT

# Competition Commission v Plasser South Africa (Pty) Ltd (CR078Aug16/SA276Feb18, 2014Aug0465) [2018] ZACT 13; [2018] 1 CPLR 198 (CT) (21 February 2018)

[2018] ZACT 13

## COURT

Competition Tribunal

## BEFORE

AW Wessels, M Mazwai, A Ndoni

## CASE / FILE NUMBER

CR078Aug16/SA276Feb18

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## COMPETITION TRIBUNAL

## REPUBLIC OF SOUTH AFRICA

Case No: CR078Aug16/SA276Feb18

In the matter between:

The Competition Commission

Applicant

And

Plasser South Africa (Pty) Ltd

Respondent

Panel

: AW Wessels (Presiding Member)

: M Mazwai (Tribunal Member)

: A Ndoni (Tribunal Member)

Heard on

: 21 February 2018

Decided on

: 21 February 2018

Settlement Agreement

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

Presiding Member

Mr Andreas Wessels

21 February 2018

Concurring: Ms Mondo Mazwai and Ms Andiswa Ndoni

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT CASE NO: CR078Aug16/SA276Feb18

CC CASE NO: 2014Aug0465

THE COMPETITION COMMISSION

Applicant

PLASSER SOUTH AFRICA (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 PLASSER SOUTH AFRICA (PTY) LTD, IN RESPECT OF A CONTRAVENTION OF SECTION 4(1)(b)(ii) AND (iii) OF THE COMPETITION ACT, 1998

Preamble

The Competition Commission and Plasser South Africa (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 49D 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) 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 "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;

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

1.4 "Days" mean business days;

1.5 "Lennings" means Lennings DEC Rail Service (Pty) Ltd, a subsidiary of Aveng (Africa) Limited, a public company duly incorporated in accordance with the company laws of the Republic of South Africa with its principal place of business at 1 Lily Van Niekerk Road, Dunswart Boksburg.

1.6 "Parties" means the Commission and Plasser collectively;

1.7 "Plasser" means Plasser South Africa (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 at 20 Lautre Road, Stonnill, Roodepoort (previously Plasser Railway Machinery (SA) (Pty) Ltd).

1.8 "RAMCO" means Railway Mechanised Maintenance Company (Pty) Ltd, a company incorporated in accordance with the Company Laws of the Republic of South Africa with its principal place of business 20 Laure Road, Stormill, Roodepoort.

1.9 "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.

## 2 INVESTIGATION AND FINDINGS OF THE COMMISSION

2.1 On 11 February 2014, the Commissioner initiated a complaint against Aveng (Africa) Limited, Lennings and Plasser for market division and collusive tendering in contravention of section 4(1)(b)(ii) and (iii) of the Act in the market for railway maintenance and services in South Africa. On 26 August 2014, the Commission amended the complaint initiation to include RAMCO as a respondent. Where appropriate Aveng, Lennings and Plasser shall be referred to as "the Respondents".

2.2 The Commission's investigation under Case No. 2014AUG0465 revealed the following:

2.2.1 Aveng, through its subsidiary Lennings, agreed with Plasser to engage in tender allocation and cover price arrangements, which amounted to collusive tendering, in respect of tenders for railway maintenance contracts issued by Transnet (SOE) Limited. This conduct is in contravention of section 4(1)(b)(ii) and (iii) of the Act. The contracts that were the subject of these collusive arrangements were concluded in 2004 each for a period of sixty (60) months. These contracts were

2.2.2 As part of these arrangements Lennings and Plasser agreed to collude in relation to the Dynamic Stabilizer Continuous Action Tampers ("Dynacat") tenders issued by Transnet in 2003 and 2004. The Dynacat tender was divided into two phases. Lennings and Plasser colluded with the intention that Plasser's subsidiary RAMCO would be awarded the first phase of the tender and Lennings would be awarded the second phase.

2.2.3 The first phase was awarded to Plasser's subsidiary, RAMCO, on 21 July 2004. The contract awarded for the first phase was concluded for a fixed period of 60 months from 10 February 2006, which period expired on 9 February

2011. The contract was subsequently renegotiated to extend to 2013.

2.2.4 The second phase was awarded to Aveng's subsidiary Lennings in or about August 2004. The contract awarded for the second phase was concluded for a fixed period of 60 months, which period expired on 23 April 2011. The contract was subsequently extended to 2013.

### 3 ADMISSION AND CO-OPERATION

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

### 4 CO-OPERATION

4.1 Plasser confirms that it has ceased engaging in the conduct set out in clause 2 above.

### 5 ADMINISTRATIVE PENALTY

5.1 Plasser agrees that it is liable to pay an administrative penalty in the sum of R8 427 625.92 (eight million four hundred and twenty seven thousand six hundred and twenty five rand and ninety two cents). This amount is less than 10% of its annual turnover for the financial year ended 31 December 2016.

5.2 Plasser shall pay the abovementioned amount to the Commission in three instalments. Plasser will also pay interest at the rate of 10.25% per annum on any balance then outstanding, from the 13th month on terms of the Public Finance Management Act's provisions on interest to be levied on debts owing to the state.

5.2.1 The first payment of R3 000 000 shall be made within 30 days of the confirmation of the Consent Agreement as a consent order by the Tribunal.

5.2.2 The second payment of R3 000 000 shall be made by no later than 12 months after confirmation of the Consent AGREEMENT AS A CONSENT ORDER BY THE Tribunal; and

5.2.3 the third instalment of R2 674 252.58 (which includes the interest at the prescribed rate of 10.25% on the outstanding amount from the 13th month) shall be made by no later than 24 months after confirmation of the Consent Agreement as a consent order by the Tribunal.

5.3 The payments shall be made 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: Current Account

Branch Code: 632005

Reference: Case Number: 2014Aug0465/Plasser

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

## 6 AGREEMENT REGARDING FUTURE CONDUCT.

6.1 Plassar..undertakes to refrain from engaging in conduct contravention of section 4(1)(b) of the Act in future.

6.2 Plasser shall 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.

6.3 As regards the competition law compliance programme referred to above, Plasser undertakes to submit to the Commission a copy thereof within 90 days of confirmation of the Settlement Agreement as an Order.

6.4 Plasser shall circulate a statement summarising the contents of this Consent Agreement to its managers and directors within 20 days from the date of confirmation of this Consent Agreement by the Tribunal.

## 7 FULL AND FINAL SETTLEMENT

This Consent Agreement is entered into in full and final settlement of the Commission's investigation under Case No. 2014Feb0048/2014Aug0465 and upon confirmation as an order of the Tribunal, concludes all proceedings between the Commission, Plasser and RAMCO relating to the conduct that is the subject of the Commission's investigation under Case No. 2014Feb0048/2014Aug0465.

ON BEHALF OF PLASSER

Dated and signed at ROODEPOORT on 23rd day of JANUARY 2018

For the Commission

TEMBINKOSI BONAKELE

Commissioner

Dated and signed at PRETORIA on 31st day of JANUARY 2018

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