



CORRUPTION WATCH CALLS FOR CRIMINAL CHARGES TO BE LAID AGAINST INDIVIDUALS INVOLVED IN THE CONSTRUCTION CARTEL COLLUSION

Here's a copy of the oral submission made by CORRUPTION WATCH today:

Good afternoon,

My name is Nicola Whittaker. I am an in-house lawyer at Corruption Watch. Thank you for the opportunity to make submissions to this Honourable Tribunal.

Corruption Watch is a non-profit civil society organisation registered as such in terms of the Companies Act. Corruption Watch has no political or business alignment. We are governed by an independent board of directors.

Commonly, corruption is defined as 'the abuse of public resources and public power for private gain'. Such abuses frequently implicate public officials alone. However, and particularly in the case of corruption in public procurement processes, such abuses involve a collusive vertical relationship between decision makers on both the selling and purchasing sides of a procurement contract. On rare occasions, corruption involves private sector players acting alone. Horizontal collusion of the sort proscribed by the Competition Act is the most significant of these cases of 'pure' private sector corruption in that it involves a conspiracy for private gain against the public.

From the perspective of those primarily concerned with combating corruption, including Corruption Watch, the most damaging form of horizontal collusion is the rigging of bids in response to public sector tenders. This is a particularly egregious form of collusion in part because it represents an assault on the living standards of those most dependent on the provision of public services and who can least afford a reduction in their living standards. Moreover bid rigging directly subverts a procurement system that is procurement by way of public tender, expressly intended to meet the constitutionally mandated requirement that public procurement be transparent, fair, equitable, cost-effective and competitive.

Confronting corruption, including horizontal collusion, requires an active and engaged citizenry that is prepared to hold leaders to account, including of course those in the private sector.

Apart from the importance of effective law enforcement, corruption, including anti-competitive collusion, cannot be effectively combated by serial acts of investigation and prosecution alone. The armory of sanctions must include public contempt, or, expressed positively, a culture which supports competition and vehemently opposes corruption.

Corruption Watch thus seeks to ensure that those who engage in corrupt activities are held accountable by developing and fostering tools for the public to report experiences of corruption. In addition we utilise the reports we receive to identify policy reforms that will reduce vulnerability to corruption in public procurement and other public resource management systems

WHY THE CONSENT AGREEMENTS SHOULD BE CONFIRMED:

Corruption Watch submits that the consent agreements between the Competition Commission and the companies should be confirmed.

We have noted that a considerable body of public opinion appears to favour the imposition of significantly higher administrative penalties amongst other things; however we accord a high level of deference to the Commission in the calculation of appropriate penalties.

We do this because we note that in settling the Commission has secured admissions of guilt from the respondents, thus opening the way to civil suits on the part of those directly damaged by the cartel. Agreement has also been secured as to the level of fines imposed. And the settlements require the parties to the settlement to co-operate in the prosecution of those companies that have not settled. We believe that these features of the settlement have been accorded insufficient weight by those calling for the Commission to recommend the imposition of higher penalties which we presume may, in the Commission's considered opinion, have jeopardised the achievement of a settlement.

In particular, those calling for higher penalties appear to have weighted insufficiently the resources that the Commission would have had to expend had it not achieved a settlement and were it thus obliged to investigate and prosecute collusion in each of the impugned construction projects. This would undoubtedly take several years to prosecute and cost millions of Rands in legal and other fees and in the management and investigation time that the Commission would have had to devote to these prosecutions, with the prospect of success uncertain. The settlement enables the Commission to devote its scarce resources to those firms that have not settled and to investigate and prosecute other cartels which still appear to be features of South Africa's economy.

However, while we urge confirmation of the settlement agreements we align ourselves with the sentiment that the punishment meted out to the companies by the imposition of administrative penalties does not sufficiently fit the offence, particularly this rigging of public sector tenders, and so may not constitute sufficient punishment or have an adequate deterrent effect. We note particularly that the settlement embodies no consequence for any individual officers of the companies involved.

BUT DOES COLLUSION PROHIBITED BY THE COMPETITION ACT ALSO AMOUNT TO CORRUPTION?

Corruption Watch submits that it does indeed, in many instances, some of which instances are relevant in the present matter.

Individuals who manipulate a tender process by way of cover pricing or any other form of collusion in contravention of the Competition Act may in fact also be in contravention of sections 12 and 13 of our anti-corruption statute – PRECCA. And thus liable to be prosecuted under this statute.

Thus where firms, through their employees and directors, participate in a bid-rigging cartel and engage in cover pricing to favour one or more firms in exchange for, for example a 'loser's fee'¹, this amounts, in Corruption Watch's view, to an offence under PRECCA². Those individuals who participated in this corrupt activity can and should be charged with this criminal offence, to which criminal sanctions, including imprisonment, attach.

In addition, where an individual participates in a bid-rigging cartel and it is agreed that his/her company will engage in cover pricing so that a rival firm can win the tender in exchange for a sub-contract, this too amounts to a corrupt activity under PRECCA³. Again, criminal charges can be laid and if such individual is found guilty of this offence, he/she may be liable on conviction to a fine and or imprisonment from between five years to life, depending on the Court in which the conviction is secured. In addition, the Court may impose a further fine of up to five times the value of the gratification involved in the offence.

It is however not only management level individuals, such as those potentially personally involved in bid rigging 'negotiations' that can be held to account under PRECCA. Section 34 of PRECCA mandates 'persons in positions of authority' to report any corrupt activity or suspected corrupt activity involving in excess of R100 000.00 to the police and makes the failure to report, even in instances where the person in authority 'ought reasonably to have known' about the corrupt activity, a criminal offence. A fine or up to ten years in prison attaches to this particular offence known as a 's34 offence'.⁴

Corruption Watch thus submits that in the present matter, the authorities should explore the possibility of prosecuting individuals in terms of Section 12, Section 13, and Section 34 of PRECCA and that the prescribed penalties on conviction of fines and or imprisonment as well as recordal on the Treasury's Register (which is a further sanctions that attaches to both individuals and companies) be meted out.

To date, a lack of co-ordination between competition law and anti-corruption law has allowed criminal acts committed by individuals to go unpunished. International experience in combatting corruption clearly indicates that it is necessary to hold individual perpetrators to account for their corrupt activities if these assaults on the public are to be effectively tackled and deterred.

ADDITIONAL SANCTIONS:

In this regard we submit that additional sanctions must be explored. Certain of these require action by other law enforcement authorities, others require active intervention by those directly damaged by the cartel. Others may be fruitfully incorporated into future settlement agreements or require policy and legislative interventions. We are fully cognisant that these are not all within the

¹ Which amounts to 'gratification' under PRECCA

² Section 12 in particular

³ Section 13 in particular

⁴ Persons in positions of authority' are defined in PRECCA and include Chief Executives and managers, secretaries and directors of companies, as defined in the Companies Act of 2008.

jurisdiction of the competition authorities. However we see this as an appropriate forum to air our recommendations in this regard.

CORRUPTION WATCH'S RECOMMENDATIONS

Corruption Watch thus:

1. Commends the Competition Commission for securing consent agreements with the 15 Respondent companies and recommends that the Competition Tribunal confirms these settlements;
2. Urges the Competition Commission to make provision in future consent agreements for 'naming and shaming' of individual perpetrators;
3. Calls on the Competition Commission to take swift action against those companies in the cartel who have not settled claims;
4. Calls on the relevant prosecuting authorities to lay criminal charges against those individuals who have contravened the Prevention and Combatting of Corrupt Activities Act; and in order to counter the tendency to pass the buck to individuals lower down the chain in the corporate hierarchy we urge criminal investigation and exploration of charges under S34 of PRECCA;
5. Call on Companies to claw back bonuses awarded to individuals implicated in the cartel;
6. Calls on the Respondent companies to take steps against those individuals implicated including employment-related sanctions and to cooperate with the authorities in bringing individual perpetrators to book;
7. Calls on companies and Government Entities who have suffered loss at the hands of the Respondent companies to institute damages actions to recover losses;
8. Calls on shareholders to hold directors of the companies in which they hold an interest to account;
9. Calls on the Courts and, if necessary, the policy- and law-makers to draw from international trends and provide for the trebling of damages in the case of corruption-related offences, including bid-rigging and;

And finally calls generally for a comprehensive and integrated approach to fighting corruption in South Africa, which approach demands the involvement of multiple stakeholders, most notably an engaged and active citizenry.

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