COMPETITION TRIBUNAL OF SOUTH AFRICA

Case no.: CR016APR18

In the *matter* between:

The Competition Commission of South Africa	Complainant
And	
Aranda Textile Mills (Pty) Ltd	First Respondent
Mzansi Blanket Supplies (Pty) Ltd	Second Respondent

Panel:	Yasmin Carrim (Presiding Member) Thando Vilakazi (Tribunal Member) Enver Daniels (Tribunal Member)
Heard on:	07, 08, 10, 11 and 14 October and 20 November 2019
Decided on:	04 December 2020

REASONS FOR DECISION AND ORDER

INTRODUCTION

[1] On 10 April 2019, the Competition Commission (the '**Commission**') referred to the Competition Tribunal a complaint against Aranda Textile Mills (Pty) Ltd ('**Aranda**') and Mzansi Blanket Supplies (Pty) Ltd ('**Mzansi**'); alleging that these firms engaged in price fixing and collusive bidding, in contravention of section 4(1)(b)(i) and (iii) of the Competition Act, No. 89 of 1998 (the '**Act**').

[2] Aranda is a vertically integrated firm that manufactures and supplies, amongst other products, blankets and throws. Mzansi primarily trades as a supplier or reseller of blankets and sources blankets from Aranda.

[3] The complaint referral flows from a complaint lodged with the Commission following an investigation conducted by National Treasury ('**Treasury'**) in respect of the respondents' conduct in relation to the Tender RT26-2015.

Background

[4] On 6 February 2015, Treasury invited prospective bidders to participate in a tender for the supply and delivery of blankets and household textiles to the State for the period 1 April 2015 to 31 March 2016 under Tender RT26-2015 (the '**2015 Tender**'). The invitation to participate closed on 9 March 2015. In accordance with the invitation to bid, parties had to fill out the requisite forms and supply the required supporting documentation. They were also required to disclose if they sourced products from a third party and the details of their sources.

[5] Aranda was approached by a number of prospective bidders that wished to submit bids in respect of the 2015 Tender. The tender permitted firms that themselves were not manufacturers to submit bids provided they disclosed their supplier details in their documents. These prospective bidders requested the required quotes and relevant supporting documentation from Aranda necessary to comply with the tender. The supporting documentation included reports of moth-proof tests and the South African Bureau of Standards ('**SABS**') specifications.

[6] On 18 February 2015, Aranda received two such requests from Ms Sumaya Paruk, owner of Mzansi, and Mr Mandla Vilakazi, a member of Vilankosi Marketing Enterprise CC ('**Vilankosi**').

[7] Ms Chantell Bell, a sales consultant at Aranda from 2003 to 2017, was responsible for corresponding with the prospective bidders and to provide them with the required information.

[8] On 2 March 2015, Aranda provided letters to a variety of firms authorising these firms to list Aranda as its supplier. The authorisation letter for all the firms, except Mzansi, contained terms, that required the bidder to (i) provide an irrevocable letter of credit ('**ILOC**') to Aranda, (ii) required payment of a 50% deposit prior to commencement of production, and (iii) required joint signatory rights on the bank account into which payment for the blankets would be made.

[9] Mzansi's authorisation letter was different. It did not contain all the terms described above. It only stated that, Mzansi was authorised to include Aranda products in its bid submission and it was confirmed: "*we have firm supply arrangements in place, and have familiarized ourselves with the item descriptions, specifications and bid conditions*".

[10] Another letter of the same date from Aranda to Treasury alluded to a "manufacturing agreement" concluded between Aranda and Mzansi, and that all terms and conditions had been finalised and mutually agreed upon between the two firms. In this letter it was expressly stated that, Aranda would manufacture the blankets and Mzansi would administer the 2015 Tender.

[11] On 6 March 2015, Aranda, by letter, provided Treasury with a table detailing the 14 companies that had received authorisation letters from it for the 2015 Tender.[1] The letter also explained that "*even though these letters stated that supply arrangements [were] in place, it is subject to the credit / financial / payment*

[1] Record File No. 2 pp172-173.

condition stipulated in each individual letter".[2] Aranda also offered to supply copies of the authorisation letters.[3]

[12] The 2015 Tender provided for the procuring of blankets, sheets, towels, face cloths, table cloths, pillowcases, pillows, pillow foam and sleeping bags on behalf of multiple State departments[4] and included 20 different contracts.[5] Aranda, and all the bidders that obtained supply letters from Aranda, responded to the invitation to bid for the supply of blankets. Treasury received bids from eight different firms in response to the six blanket contracts: Aranda and Mzansi respectively scored first and second for five out of the six contacts under the 2015 Tender.[6]

[13] Aranda's bid was dated 6 March 2015, but it was submitted by hand on the morning of 9 March 2015, being the closing date.

[14] Following the award of the 2015 Tender, Mr Vilakazi enquired who the successful bidders were and discovered that the prices quoted by Mzansi were "*way below manufacturer prices he had received from Aranda*".[7] This triggered his suspicion that Aranda and Mzansi might have colluded in respect of the 2015 Tender. He raised his suspicion with Ms Yvette van Niekerk, the, then, Deputy Director: Textiles, Clothing, Leather and Footwear under Office of the Chief Procurement Officer at Treasury, who invited him to lodge a complaint, which he did. Ms Van Niekerk then referred the matter to the supply chain management monitoring and compliance division, to conduct an internal, preliminary investigation into Aranda and Mzansi's possible collusion in respect of the 2015 Tender.

[15] On 18 November 2015, Treasury's Transversal Contracting Unit ('**TCU'**)[8] requested the Specialised Audit Services ('**SAS'**)[9] division to investigate

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[2] Letter of 6 March 2015 (Record p172).
[3] Letter of 6 March 2015 (Record p173).
[4] Department of Correctional Services, the South African Police Services, South African Military Health Service, Emergency Medical Services and the South African Navy.
[5] Treasury's General Matrix report dated 17 April 2015 (Record File No 2 pp198-220).
[6] Vinprict Trading and Projects (Pty) Ltd was awarded the most points under contract RT26-01-009 (Treasury's General Scoring Matrix report dated 17 April 2015 (Record File No 2 p202)).
[7] Mr Vilakazi Witness Statement at para 7 (Aranda WS Bundle pp2-3, Record pp5177 – 5178).
[8] A unit within the Office of the Chief Procurement Officer ('OCPO' a division of Treasury) branch.
[9] A unit within the Office of the Accountant-General ('OAG' a division of Treasury) branch.

allegations of suspected collusive bidding or price fixing between Aranda and Mzansi. SAS met with the affected parties, including Mr Vilakazi. On 25 February 2016, the SAS produced a report (the '**SAS Report'**)[10] containing its conclusions and recommendations as follows:

a. The SAS was of the view that the agreement as per the letter between Aranda and Mzansi of 2 March 2015 could be viewed as collusive bidding, on the basis that it was in conflict with the declarations found in the Certificate of Independent Bid Determination Form / SBD9 Form (SBD9)[11]

b. The SBD9 is a "*certificate of declaration that would be used by institutions to ensure that, when bids are considered, reasonable steps are taken to prevent any form of bid-rigging*".[12] It included the following declarations:

    i. *The bidder has arrived at the accompanying bid independently from, and without consultation, communication, agreement or arrangement with any competitor. However communication between partners in a joint venture or consortium will not be construed as collusive bidding*.[13]

    ii. *In particular … there has been no consultation, communication, agreement or arrangement with any competitor regarding: prices; geographical area where product or service will be rendered (market allocation); methods, factors or formulas used to calculate prices; the intention or decision to submit or not to submit a bid; the submission of a bid which does not meet the specifications and conditions of the bid; or bidding with the intention not to win the bid*.[14]

[10] SAS Report (Record p106).
[11] SAS Report at para 3.2.4 (Aranda Core Bundle p50, Record p112).
[12] Form SBD9, clause 4 (Record File No 2, p191).
[13] Form SBD9, clause 6 (Record File No 2 p192).
[14] Form SBD9, clause 7 (Record File No 2 p192).

iii. *In addition, there have been no consultations, communications, agreements or arrangements with any competitor regarding the quality, quantity, specifications and conditions or delivery particulars of the products or services to which this bid invitation relates*.[15]

c. SAS found that Aranda "*tendered for the supply of blankets with the intention not to win the bid*", in conflict with the declaration in clause 7 of the SBD9 (reproduced above at (ii)).

d. Under the heading "Price Fixing", SAS recorded that bid prices quoted by Aranda were marginally ([redacted]%) lower than those quoted by Mzansi, with Mzansi's bid prices being "*way below*" the cost/manufacturer prices quoted to Vilankosi.

[16] In view of the foregoing circumstances, the SAS considered the conduct of Aranda and Mzansi in relation to the 2015 Tender to be a potential contravention of sections 4(1)(b)(iii) and/or 9(1)(c)(i) of the Act and recommended that the TCU report the matter to the Commission for further investigation, which it did.

The Complaint

[17] On 21 September 2016, the Commission initiated a complaint against Aranda and Mzansi based on the information received from Treasury. The complaint concerned allegations of prohibited price fixing and collusive bidding in relation to the 2015 Tender.

[18] Whilst investigating the complaint, the Commission interrogated Mr Nicola Magni, Aranda's CEO, and Ms Paruk, the owner and sole director of Mzansi. The Commission also received reports from Treasury, and various documents from

[15] Form SBD9, clause 8 (Record File No 2 p192).

the respondents. At some point in its investigation the Commission met with Mr Vilakazi and Ms Van Niekerk.

[19] On 10 April 2019, the Commission referred its complaint to the Tribunal for adjudication, seeking a declaration that the respondents had contravened sections 4(1)(b)(i) and (iii) of the Act and the imposition of an administrative penalty.

Hearing

[20] The evidence in the matter was heard on 7, 8, 10, 11 and 14 October 2019, with closing argument on 20 November 2019.

[21] The Commission called two witnesses to give evidence in support of its case: Ms Van Niekerk formerly of Treasury, who had evaluated the bids in the 2015 Tender, and Mr Vilakazi, of Vilankosi.

[22] Aranda called three witnesses who were all involved in the preparation of Aranda's response to the 2015 Tender, including Aranda's pricing: Ms Bell, Mr Magni, and Mr Gary Hunter, COO of Aranda. Mzansi called Ms Paruk.

Commission's case

[23] The Commission alleges that despite Aranda being a manufacturer of blankets and Mzansi a distributor of blankets, the respondents submitted bids for the same tender thus making them competitors within the meaning of section 1(xiii) of the Act.[16]

[24] It alleges further that the respondents discussed and agreed how to bid for the 2015 Tender. In terms of this agreement Aranda would provide Mzansi with its tender documents including the pricing schedule which Mzansi will use to prepare

[16] Which reads: "*horizontal relationship means a relationship between competitors*."

its own tender including pricing.[17] The agreement further entailed that Mzansi will add [redacted]% from Aranda's prices to its bid prices.[18]

[25] This conduct was alleged to have contravened section 4(1)(b)(i) and (iii). In its notice of motion, the Commission sought an administrative penalty of 10% of the turnover of each respondent.

Respondents' case

Aranda's case

[26] Though Aranda accepted that it competed with Mzansi in submitting competing bids for the 2015 Tender it argued that because Mzansi was also a customer of Aranda, the interactions with Mzansi must be evaluated in their proper context. Aranda's case was that the engagements between it and Mzansi did not fall outside the bounds of legitimate interaction between parties that stood in a vertical relationship, despite the fact that they might be competitors for purposes of the 2015 Tender.

[27] It placed reliance on *Competition Commission v South African Breweries Ltd and Others*[19] (**SAB**), in support for its contention that the core relationship between Aranda and Mzansi was a vertical one and they ought to be permitted a justification for their conduct.

[28] It argued that it must be borne in mind that neither Mzansi, nor any other bidder, would have been able to compete for the 2015 Tender without obtaining a quote from Aranda, as well as certain supporting documentation. All prices given and documents exchanged were the sole consequence of this. Aranda and Mzansi (as well as other bidders) only <u>became</u> competitors because Mzansi and the other bidders sought supply from Aranda. Had they not obtained supply from Aranda,

[17] Referral Affidavit at para 15.
[18] Referral Affidavit at para 16.
[19] [2015] ZACAC 1; 2015 (3) SA 329 (CAC).

or had Aranda refused them supply of the blankets, they would not have become competitors.

[29] As to the alleged fixing of prices, Aranda submitted that while it had given Mzansi a lower price than it had given to other bidders, it had no knowledge of what Mzansi's bid price was and that this was independently decided by Mzansi.

[30] An explanation was provided for the preferential treatment given to Mzansi. It was submitted that Aranda had confidence in Mzansi because it had gained confidence in dealing with Mzansi, both in terms of implementing tenders and meeting its financial commitments.

[31] Aranda also raised an objection to what it alleged to be the Commission's changed case.

Mzansi's case

[32] Mzansi's position was similar to that of Aranda, in which it placed great reliance on the fact that the true economic nature of their relationship was vertical as between manufacturer and supplier. It denied the allegations of price fixing and bid rigging, maintaining that it had decided on its bid prices independently of Aranda.

[33] Mzansi also relied on *SAB*.[20] Mzansi submitted that without an arrangement with Aranda for the manufacturing of the requisite textiles, none of the bidders would be able to compete for the tender. Furthermore, there were valid economic and efficiency-related considerations underpinning Aranda's approach to the various bidders.

[34] Both respondents relied on the notion of 'characterisation' arguing that in accordance with the prevailing jurisprudence their conduct was nothing more than

[20] [2015] ZACAC 1; 2015 (3) SA 329 (CAC).

legitimate interactions between parties in a vertical relationship and did not fall within the purview of section 4(1)(b).

[35] Thus, we were asked by the respondents that we exercise caution in reaching for a section 4(1)(b) contravention, without clear evidence to propel it into that territory. It was argued that where the evidence was at best ambiguous, or could support one or the other, we should refrain from finding a contravention of section 4.

ANALYSIS

[36] Section 4(1)(b)(i) and (iii) of the Act, provides:

> *"An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if … it is between parties in a horizontal relationship and if it involves any of the following restrictive horizontal practices:*
> *(i) directly or indirectly fixing a purchase or selling price or any other trading condition; … and*
> *(iii) collusive tendering"*

[37] As a first requirement for section 4 to have application the respondents must be found to be parties in a horizontal relationship or competitors.

[38] Both Aranda and Mzansi emphasised that they were in an arrangement, of manufacturer and reseller and because of this vertical relationship of manufacturer and reseller between them the respondents would necessarily have to interact with each other. For example, Mzansi would necessarily have to engage with Aranda for documentation and pricing in order to submit the tender and it was likely that there would be phone calls, emails and even meetings between the two respondents.

[39] The Commission did not dispute that the respondents are in a vertical relationship, but submitted that they were <u>also</u> competitors for the 2015 Tender and in this

relationship, their engagement with each other suggests collusion and bid rigging in contravention of section 4(1)(b).

[40] We accept that the respondents were, and still are, in a vertical relationship for blankets. But so were all the other bidders in the 2015 Tender because Aranda was a supplier to all of them at that time. Hence Aranda would have had to engage with all of them in relation to supply terms, specifications and pricing.

[41] However, the fact that Mzansi or any other bidder that Aranda supplied might not be able to perform its supply obligations to Treasury without Aranda is not the relevant enquiry. What is relevant for our purposes is the respondents' conduct in relation to the 2015 Tender and not their vertical, manufacturer-reseller relationship in general.

[42] When Aranda and Mzansi both submitted bids for the 2015 Tender they were competing against each other and *vis-à-vis* the remaining bidders that also competed for this tender.

[43] In the 2015 Tender, when the respondents were vying for business by submitting bids, they were competing for business and were exercising competitive constraint against one another – and against the other bidders – in order to capture the custom of the State.

[44] In other words, despite the vertical arrangement between the two, the fact that both Aranda and Mzansi had submitted bids for the 2015 Tender placed them in a specific horizontal relationship with each other for purposes of that tender.

[45] Thus, it is not axiomatic that because the respondents are also in a vertical arrangement with each other we should confine our evaluation only or primarily through the lens of section 5.

[46] This issue was dealt with in some detail by the Tribunal in ***Berg River***.[21] In that case the respondents advanced a similar argument that because Berg River was a supplier to Eye Way Trading, and that Eye Way could not fulfil the tender without a joint venture with Berg River, the respondents were not competitors. The Tribunal rejected that argument and held–

"*Berg River and Eye Way were competitors for purposes of the 2011 and 2012 tenders for the supply of fabrics to Treasury as they each submitted a separate bid for the award of the respective tenders*"[22].

[47] The respondents, by submitting their separate bids held themselves out as competitors to Treasury and to the remaining bidders.

[48] Public tenders issued by Treasury, usually award the highest points to the lowest price submitted by a tenderer on a predefined scale,[23] where price constitutes the most significant parameter of competition.

[49] Indeed, Mr Magni himself conceded that although he had given Mzansi a preferential price, Aranda had put in a bid at a lower price so as to try to win the tender.

[50] Thus, for purposes of the 2015 Tender, their relationship was purely horizontal.

[51] Reliance on the approach of the CAC in *SAB* and characterisation does not assist the respondents because self admittedly they submitted competing bids for the 2015 Tender.

[52] We turn now to consider the conduct alleged to be in breach of section 4(1)(b)(i) and (iii).

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[21] *Competition Commission v Eye Way Trading (Pty) Ltd and Seardel Group Trading (Pty) Ltd t/a Berg River Textiles* Case No.: CR073Aug16/CR074Aug16 (22 February 2018) (***Berg River***) at paras 22, 40-43.

[22] At para 55.

[23] This could be 90/10 or 80/20 depending on the nature of the tender (Preferential Procurement Policy Framework Act No. 5 of 2000).

Undisputed facts

[53] To avoid prolixity, we summarise the evidence which, by and large, was not placed in dispute.

[54] Aranda is a manufacturer of blankets and Mzansi is a reseller of blankets.

[55] Both Aranda and Mzansi submitted bids for the 2015 Tender.[24]

[56] The prices Aranda quoted other bidders such as Vilankosi were much higher in comparison to the quote offered to Mzansi.[25]

[57] The financial terms extended to Mzansi were more favourable than those afforded to the other bidders. By way of example the authorisation letter given to Vilankosi, shows additional, more onerous, credit terms were imposed on it:

> *"1. Irrevocable letter of credit to be obtained by yourselves, and confirmed by one of the prominent banking institutions in South Africa, in order for Aranda Textile Mills (Pty) Ltd to keep to the supply agreement;*
> *2. 50% deposit payable prior commencement of production, and*
> *3. For the full duration of the tender, joint signatory – and joint access arrangement on your banking account, in lieu of tender monies receivable."*[26]

[58] In comparison, Mzansi's authorisation letter of 2 March 2015 said: "*we confirm that we have firm supply arrangements in place*".[27]

[59] A further Aranda letter also dated 2 March 2015[28] recorded the following to Treasury:

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[24] Commission Heads of Argument at paras 15.1-15.2
[25] Commission Heads of Argument at paras 15.3–15.5.
[26] Copy of the Letter from Mr Magni of Aranda Textiles to Mr Vilakazi of Vilankosi Marketing dated 2 March 2015, Record p177.
[27] Record p175.
[28] Aranda Core Bundle p78, Record p145.

'This serves to confirm that Aranda Textile Mills (Pty) Ltd and Mzansi Blanket Supplies (Pty) Ltd have entered into a manufacturing agreement whereby Aranda contract to manufacture woolen blankets for Mzansi Blanket Supplies in accordance with SABS specification 63: 2013, Edition 5.5, Table 1.

Both Aranda and Mzansi Blanket Supplies (Pty) Ltd have familiarized themselves with the description, specifications and bid conditions on Tender RT26-2015T with regards to the ffg (sic.) items…

Regarding financial arrangements, all terms and conditions have been finalized and mutually agreed upon between the two companies.

In terms of our arrangement, Aranda is manufacturing the blankets in full, utilizing mainly local raw materials and input costs, and Mzansi Blanket Supplies (Pty) Ltd is instrumental in administering the tender, including invoicing, deliveries and collection of payments.

It is the intention of this arrangement, to complement and develop one another's skills base, and to achieve amongst other considerations, the BBBEE codes of conduct.

Both parties will gladly entertain officials of the State Tender Board should there be any further queries on this or other issues.'

[60] The above quoted letter references a "manufacturing agreement". Mr Magni[29] and Ms Paruk[30] both confirmed that this letter in fact constituted the manufacturing agreement.

[61] During its investigation the Commission discovered a "business agreement" entered into on 30 November 2012 in furtherance of another tender RT26-2013T wherein "*Aranda assumes the role of manufacturer and Mzansi assumes the role of a B-BBEE distributor*".[31] At clause 3, the Business Agreement contains the substantive provision for Mzansi to issue Aranda with the necessary password and pin number in order for Aranda to access Mzansi's bank account in lieu of its "*agreed share of proceeds i.e. invoice(s) [owed] for the related blanket delivery*".

[29] Mzansi Heads of Argument at para 5.3.13.
[30] Mzansi Heads of Argument at para 6.1.13.
[31] Business Agreement between Aranda Textile Mills (Pty) Ltd and Mzansi Blanket Supplies (Pty) Ltd (Record, pp5562-5564).

The duty of debt collection would be shared between the respondents.[32] The agreement provided that "*should Mzansi succeed in securing the Tender, this business arrangement would form the basis to establish a platform for further cooperation into possible new ventures*";[33] while also providing for the termination of the agreement "*upon delivery of all blankets for the Tender, unless extended through Board resolution*".[34]

[62] The two letters of 2 March 2015 given to Mzansi must be read in conjunction with the Special Conditions of Contract for the 2015 Tender[35] which provide that any bidder sourcing goods from a third party must complete an authorisation declaration, and ensure that all financial and supply arrangements for goods and services have been mutually agreed upon between the bidder and the third party.[36] The Treasury standard form TCBD1 "Authorisation Declaration" was filled in by Ms Paruk;[37] who attached both 2 March 2015 letters to Mzansi's tender response.[38]

[63] In summary, the above facts demonstrate that Aranda extended favourable terms and pricing to Mzansi. The two had a close commercial relationship through an ongoing supply relationship as evidenced by the manufacturing and the business agreements.

Evaluation of Evidence

Pricing evidence

[64] We turn to consider the pricing evidence relied upon by the Commission. An analysis of Mzansi's and Aranda's tender prices ('bid prices') showed the following:

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[32] Business Agreement, clause 5.
[33] Business Agreement, clause 10.
[34] Business Agreement, clause 9.
[35] Copy of the invitation to participate in transversal contract" (Aranda Core Bundle pp86–96; Record pp160–170).
[36] *Id.*
[37] Aranda Core Bundle p366; Record p527.
[38] Aranda Core Bundle pp369–370; Record pp530–531.

a. Table 1: Comparison of bid prices between Mzansi and Aranda

Item No	Description of the product	Aranda Textile (Price)	Mzansi Blanket (Price)	Aranda and Mzansi price difference
RT26-01-001	Woollen blend blanket	R112.00	[redacted]	[redacted]
RT26-01-002	Woollen blend blanket	R112.00	[redacted]	[redacted]
RT26-01-009	Woollen blend blanket	R326.50	[redacted]	[redacted]
RT26-01-010	Woollen blend blanket	R471.65	[redacted]	[redacted]
RT26-02-002	Acrylic blankets	R257.00	[redacted]	[redacted]
RT26-02-003	Acrylic blankets	R196.50	[redacted]	[redacted]

[65] As can be seen in Table 1, Mzansi's bid price of blankets for the 2015 Tender were [redacted]% higher than Aranda's and in the case of RT26-02-003 it was [redacted]%. Type 001 and 002 blankets constituted the largest volume of the tender and therefore the most lucrative for a bidder.

[66] The Commission alleges that because Mzansi's bid price was [redacted]% higher than Aranda's for the most lucrative products in the tender, this amounted to price fixing.

[67] While the comparison of the prices in the 2015 Tender indeed shows that the Mzansi bid price was [redacted]% higher than Aranda's, there was no direct evidence put up by the Commission that Aranda was involved in deciding or influencing Mzansi's *bid* price.

[68] Unlike in *Berg River* where email correspondence between the two bidders confirmed that Berg River, the supplier, had influenced the pricing of Eye Way in its bid,[39] no direct evidence of Aranda influencing Mzansi's pricing was present in this case. Thus, it was not possible to draw an inference only from the pricing data that the respondents had engaged in coordination in the form of bid rigging.

[39] Berg River (above note 21) at para 50.

[69] However, when the pricing evidence in the 2015 Tender is considered in the context of all the other evidence, it takes on a different light.

Significant price differences

[70] Recall that the evidence thus far is that Mzansi received preferential pricing and terms from Aranda.

[71] The first significant aspect of the other evidence is the pricing difference between other prospective bidders and Mzansi.

[72] Interested bidders such as Vilankosi were given a price that was significantly higher than Mzansi's, as shown in Table 2 below. This means that their input price for the blankets (cost price) would be significantly higher than Mzansi's especially in relation to Types 001 and 002.

a. Table 2: Comparison of cost prices between Mzansi and Vilankosi

Item Num	Mzansi	Vilankosi	Vilankosi compared to Mzansi
1	R 115,00	R 179,48	56%
2	R 115,00	R 179,48	56%
3	R 326,50	R 332,45	2%
4	R 471,65	R 488,70	4%
5	R 257,00	R 277,33	8%
6	R 196,50	R 198,66	1%

[73] As can be observed from Table 2, the pricing difference of 56% between Mzansi and Vilankosi for Types 001 and 002 which constituted by volume the bulk of the tender and thus represented the largest turnover for a bidder is staggeringly high.

[74] In a tender situation even a small percentage difference could affect a bidder's ultimate scoring. In the case of Mr Vilakazi of Vilankosi the price difference between his and Mzansi's cost price was so large in respect of Types 001 and 002 that this would have put him at a significant disadvantage in the tender, even if we assume his mark-up was the same as Mzansi's.

[75] Of interest, is that Mzansi's cost price of R115.00 for Types 001 and 002 was very close to Aranda's bid price of R112.00.

[76] Mr Magni put up a justification for giving Mzansi preferential pricing and terms. We deal with this later but for now the pricing evidence shows that Aranda, who knew what the cost price was for each of the other bidders, placed Mzansi in a more – and significantly so when compared to Vilankosi – advantageous position *vis-à-vis* any other bidder, except itself.

The Checklist

[77] In addition to the evidence of significant price differences for bidders other than Mzansi set out above, other pieces of evidence were of significance.

[78] The first of these consisted of a series of emails from Ms Paruk to Ms Bell.

[79] In the email of 18 February 2015 Ms Paruk had asked Ms Bell to provide her with a "checklist" of documents for the 2015 Tender. This was followed by a series of emails between Ms Bell and Ms Paruk for requests for original documents.

[80] Ms Bell who was also responsible for putting together Aranda's own bids for tenders, testified that she was the contact person for all prospective bidders who required information and documentation from Aranda for purposes of completing their bid documents. Ms Bell would field requests from them and supply them with the necessary information such as the letter of authorisation, a certificate testifying for moth protection, SABS specifications and the like. The record showed several exchanges between her and Mr Vilakazi on precisely these matters. She testified that after discussing pricing with Mr Magni she would then forward this to the prospective bidder. Pricing was always given to her by Mr Magni and she would send this along in an email with requests for information.

[81] The situation with Mzansi was different. While Ms Bell dealt with all the administrative issues, pricing for Mzansi was always decided by Mr Magni directly with Mzansi. In her view this might have been because of the long-standing relationship between them but she was not involved in those discussions. She

thought it was likely that this was discussed between them on the telephone, a fact confirmed by Magni.[40]

[82] As to the request for a checklist, Ms Bell did not find anything untoward in this because bidders were always asking for documents and all of them required the originals. Sometimes they would come to the premises and ask Aranda to print these out for them. No explanation was extracted either in chief or cross why Mzansi would receive original documents in the evening and not during normal office hours.

[83] Ms Bell's explanation about the test report, given in the context of an email sent by Dr Faizel Mansoor, Ms Paruk's husband, (an issue that we come to later) was that there was some confusion on Mzansi's part as to whether the test reports were required for each colour of the same type of blanket or not.

[84] Ms Paruk, when asked to explain why she would be asking Aranda, a competitor, for a checklist, stated that Mzansi had, in the previous year, been excluded from consideration because of a failure to submit a test report.[41] Aranda was responsible for attending to and giving over the test report. Because Aranda only provided documents on request, she was anxious to avoid a similar incident from occurring. At the time of the 2015 Tender, there was no checklist of these requirements accessible on Treasury's website, so she asked Aranda for one.

[85] It was not clear from Ms Paruk's evidence whether only Mzansi was disqualified from the previous tender or other bidders as well. Ms Bell however confirmed that Aranda had also submitted a bid in that tender and was successful.[42] This means that the respondents had also competed in that previous tender.

[86] A lot of focus was placed on Annexure C and the pricing schedule attached in this email by the Commission. Ms Bell explained that Annexure C related to local content aspects of the blankets. She explained that the departments mainly want locally manufactured items and they wanted to see if any portion of the blanket

[40] Transcript p593.
[41] Transcript pp733-735.
[42] Transcript pp435-436.

had to be imported. As to the pricing schedule this was not put up and the Commission did not pursue this to any meaningful extent with Ms Bell.

[87] It was common cause that Aranda had to submit a report about tests run on the blankets for moth proofing by SABS. This document would have to be given to all prospective bidders, not only to Ms Paruk.

[88] Ms Van Niekerk did not find any of the requested documents, including the request for a checklist, to be *"strange for a supplier to request from its manufacturer".*[43] When asked, in cross-examination, what had been "*wrong"* with Ms Paruk requesting the documents, Ms Van Niekerk said that she presumed there was nothing wrong, and she could not explain why something bad had to be inferred from this request.[44]

[89] Mr Vilakazi gave evidence confirming Ms Van Niekerk's evidence that there really was nothing untoward about the email requesting the list of documents. He testified to having relied on Aranda's "*experience"* to know what documents to send him.[45] So although he did not ask them for a checklist, he expected them to comply with a notional checklist of required documents when they responded to him. Mr Vilakazi also made plain that, if Aranda had not supplied him with a document that he needed, he would have similarly asked them.[46] The only reason he did not ask, was because Aranda gave him everything that he required for the tender.[47]

[90] Mr Vilakazi did however point to the fact that these documents were nothing more than that required for the tender and the list of requirements which could easily be drawn up by looking at the tender specifications.

[91] Ms Van Niekerk explained further that a submitted bid could be later supplemented with the test report from Aranda (or other relevant supplier) at a

[43] Transcript p40.
[44] Aranda's Heads of Argument at para 40.6 p24 and Transcript p93.
[45] Transcript p253.
[46] Transcript p253.
[47] Transcript p254.

later date if Aranda or the relevant supplier had not as yet supplied it as long as this was brought this to her attention.[48]

[92] From Ms Paruk's evidence, it was not clear at what point in time Aranda's failure to provide such a report affected her bid. If Aranda had not provided her with the test report at the time when she submitted her bid, then she clearly had not done her own audit or homework of the tender requirements herself. If, however Aranda failed to provide her with a test report and was required to do so *after* the tender documents had already been submitted, no explanation was provided by her why Mzansi could not have submitted that later by arrangement with Ms Van Niekerk.

[93] Ms Paruk's justification for the request for the checklist is improbable when viewed in the context of her own evidence.

[94] She testified that she was an experienced businesswoman and made her own decisions about her business. She did not need Aranda to tell her how to run her business, for example her pricing for the tenders. She also proclaimed, as did Mr Magni, that Mzansi was experienced in managing tenders and that unlike other bidders she would put effort into ensuring that orders were in fact placed by the intended recipient government department of the blankets under the 2015 Tender in a timely manner. She also put effort into following up on customers.[49]

[95] Given her self-proclaimed experience in the field and in the business of tendering frequently for the supply of these blankets, it is surprising to say the least that she did not know what the list of documents would entail or for that matter draw up a checklist herself.

[96] Ms Paruk as an experienced businesswoman could have easily done her own audit of the tender requirements, as did Mr Vilakazi, and did not have to rely on Ms Bell, an employee of a competitor to do this for her.

[97] In closing argument, the respondents placed much reliance on what appeared to be these 'concessions' on the part of Mr Vilakazi and Ms Van Niekerk regarding

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[49] Transcript p770 and 779.

the checklist. In our view this does not take the matter any further. Both Mr Vilakazi and Ms Van Niekerk, are lay persons and not competition law experts. In any event they were essentially concerned about the preferential pricing and dealing that Mzansi enjoyed, terms that were not offered to all prospective bidders.

[98] Ms Van Niekerk however did make the point that notwithstanding their vertical relationship, competitors were under a duty to act independently in preparing their bids and were required to complete the SBD9 form by Treasury attesting to this independence. Mzansi had not declared the assistance it had obtained from Aranda in the preparation of its bid.[50]

'Let's Get it Done'

[99] Another piece of evidence which has significance involved an email from Dr Faizel Mansoor to Ms Bell on 7 March 2015.[51]

[100] As background to this, Ms Paruk is the daughter-in-law of Africhoice's founder, Mr Farooq Mansoor. She had 'taken over' the family business and traded as Mzansi in her own name. Her husband Dr Mansoor, the son of Africhoice's founder, was closely involved in helping her with the business.

[101] The email thread shows that Ms Paruk had informed Dr Mansoor that the test report received was only for a blue blanket, and not a grey one. Dr Mansoor then wrote to Ms Bell, reminding her that the failure to submit test reports led to Mzansi's disqualification in the previous year. The contents of the email are reproduced here:

> *"Hi C, as you are aware, this was the reason Mzansi was disqualified last year; that is failure to submit test reports. Kindly check if you have included this test report in your documents and if so, please send us a copy of the type 5 grey a.s.a.p. If you have not, then we both will be disqualified. So, let's get this done*

[50] Ms Van Niekerk Witness Statement at para 15.
[51] Aranda Core Bundle p758; Record p5410 and Commission Heads of Argument at para 21 p13.

Thanks, F". [52]

[102] Dr Mansoor was not called to testify. However, Ms Bell testified that this email stemmed from a misunderstanding on the part of Mzansi (mentioned above) in relation to the previous tender.

[103] Eventually Ms Bell explained that this 'misunderstanding' was that Mzansi was under the impression that it needed a test report for both colours of blankets. In her view this was not a requirement, their test report was based on specifications of the product, the implication being that the test report would suffice for both the blue and grey blankets.

[104] Ms Bell was asked what she thought of his request. She testified that she was irritated by his tone and felt insulted by his insinuation that she did not know her own job. She did not do as he requested.[53] She in fact had responded to this email. However, her response was not placed before us and it was uncertain whether this had in fact been discovered.

[105] However, Ms Bell could not explain how it came to be that Dr Mansoor from Mzansi, a competitor of Aranda, was sufficiently confident that he could direct an employee of a competitor as if he was the manager, to check their documents. This was clearly no ordinary exchange between parties in a vertical relationship, even one of a long standing.

[106] Starting from the way he addresses her "*Hi C*" to the "*let's get it done*" suggests that he was more than just a long-standing business associate who occasionally obtained supply from Aranda.

[107] But more significantly, irrespective of the confusion surrounding the test report, what the email <u>does</u> confirm is that by 7 March 2015 (the date of the email), Mzansi, a competitor of Aranda, knew that Aranda was going to submit a bid for the tender. Why else would Dr Mansoor ask Ms Bell to "*check in <u>your</u> documents*

[52] Aranda Core Bundle p758; Record p5410.
[53] Transcript pp467 and 468.

if you have included the test report and send us a copy"? He was not asking her simply for a copy of the test report but also that she checks she has included it in *Aranda's* documents.

[108] That Dr Mansoor was aware of Aranda preparing its own bid for the tender is further suggested by the sentence that follows "*If you have not we will both be disqualified*". If Aranda was only being required to provide the test report for other bidders or for Mzansi, they could not "*both*" be disqualified.

[109] Thus, the only reasonable inference to draw from this email is that Dr Mansoor, and therefore Mzansi, knew by 7 March 2015, the very date on which Aranda's bid document was signed, that Aranda was submitting a bid.

[110] A second notable aspect of these emails from Mzansi to Ms Bell is that they were all copied to Mr Magni. Emails from other bidders were not copied to Mr Magni, but both Ms Paruk and Dr Mansoor copied their emails to him. When Mr Magni was asked why this was so, he could not provide an explanation and went as far as saying "*honestly I can't give you any firm answer on that*".[54]

[111] Thus, in preparation for the 2015 Tender, Mzansi was liaising directly with Mr Magni, the director of a competitor, at the highest level of Aranda, and not merely with an administrative clerk who routinely fielded queries from prospective bidders. A director who curiously, given the alleged special personal relationship with Mzansi, could not explain why all correspondence was copied to him. And at a time when they both were aware that they would be submitting bids.

[112] An alternative interpretation of what Dr Mansoor meant in his email was suggested in closing argument, namely that the "both" could refer to a joint Mzansi/Aranda bid and that if Mzansi was disqualified they would both lose out.

[113] This alternative interpretation however is not supported by the evidence. Ms Bell herself testified during her evidence in chief that she felt insulted by Mansoor's

[54] Transcript p705.

insinuation that she did not know her job by telling her to "*check in your documents*".

[114] Under cross examination Ms Bell confirms her understanding of the request:

> *MS BELL: Because neither of us have included the test report, the correct rest report or none of us would win the tender. That specific document is part of the supporting documentation that must be submitted.*
> *MR MOTSHUDI: Yes, and why do you think he has to remind you that we will both be disqualified?*
> *MS BELL: To make sure that we include the test report*.[55]

[115] What also renders this alternative interpretation improbable is that in the previous tender, both Aranda and Mzansi had put in bids. Aranda won that tender, Mzansi was disqualified. The word "both" read in context of the sentence "*check if you have included this test report in your documents....else we will both be disqualified*" suggests that they both were planning to put in bids for the 2015 Tender as they had done in the previous one.

Aranda's explanation for the preferential pricing to Mzansi

[116] Mr Magni accepted that Aranda quoted Mzansi a preferential price. He also accepted that the credit requirements placed on other would-be bidders were more onerous than the conditions imposed upon Mzansi.[56] He also didn't dispute the fact that he wanted to grant Mzansi these special terms or advantages. However as much as he admitted to this, so he denied dictating to Mzansi at what prices they should bid.

[117] In his witness statement he said:

> "*If I am asked about my preference about who was to be the successful bidder, my immediate reaction would be that I wanted Aranda to win for itself. In the absence of that, I suppose my preference was for Mzansi to win the tender,*

[56] Aranda Heads of Argument at para 45.6 pp42-43.

because I considered that the risk of non-payment or incomplete payment was the least in respect of that firm. My pricing decisions (ie the prices offered to Mzansi as opposed to other prospective bidders) reflects this preference. But my own preference certainly did not result in me discussing with Mzansi the prices at which they would quote or agreeing with them in any way on the manner in which they would respond to the tender. I did not tell Mzansi the price at which Aranda quoted in response to the Tender. I also did not communicate with Mzansi the prices that had been quoted to other prospective bidders, and there was no way for Mzansi to know what price level it would have to offer to be more competitive in its pricing than any of the other bidders (including Aranda)."[57]

[118] In his testimony he maintained throughout that he was entitled to have a preferred business partner but that he did not dictate to Mzansi its pricing in the bids it submitted. And that he determined to give Mzansi prices in his own discretion, as a unilateral decision, not with their agreement.

[119] There are three elements to this evidence that we consider in turn. First there is the issue of a historic relationship. Then there is issue of Mzansi's special skills in managing tenders and finally the issue of risk.

Historic relationship

[120] As to the special relationship, Mr Magni testified to his longstanding personal relationship with members of the Mansoor family, commencing from the time, when the business was trading as Africhoice under Mr Mansoor, Dr Mansoor's father. According to Mr Magni, Aranda lost out to Africhoice in a tender many years ago around 2005. He found out that Africhoice had imported blankets from India and contacted them to set up a relationship in which Aranda would become their supplier. Eventually the business became Mzansi, which was run by Dr Mansoor's wife, Ms Paruk. The relationship with Aranda continued and he was happy to extend the same favourable terms to Mzansi as he did to Africhoice because of the family link.[58] In his view there was a lower business risk to Aranda

[57] Magni Witness Statement at para 46.
[58] Transcript pp572 -574.

if the administration of the tender were in the hands of Mzansi rather than any of the other bidders with whom he had no business experience.

[121] It bears mentioning that the historic arrangement was struck between Aranda and Africhoice at the time when Africhoice was a competitor that had just won a tender away from Aranda.

Special skills

[122] Both Ms Paruk and Mr Magni testified that other bidders did not put in the kind of effort that Mzansi did in extracting orders and doing follow ups with State departments. Mr Vilakazi however disputed that Mzansi would be doing anything different to any other bidder like himself. [59]

[123] The evidence of both Ms Paruk and Mr Magni revolved around Mzansi's special skills in comparison to other unknown bidders. The import of this evidence, in summary, was that many successful bidders did not realise that once a bid has been won, they still needed to put in the effort to ensure government departments place the orders for fulfilment of the tender.

[124] However, as testified by both Ms Bell and Mr Magni himself, Mzansi did not enjoy any special skills in managing tenders when compared to Aranda itself. They both confirmed that Aranda was more than capable of managing tenders and ensuring that orders were fulfilled.

Risk

[125] Mr Magni asserted that there was a business rationale to justify the preferential treatment given to Mzansi. One of the major risks identified by Mr Magni was that as a supplier they were always at risk of non-payment by the tender administrator (winner of the tender). A second risk was that the tender would not be properly administered and could be cancelled on the basis of breach or non-performance. This presented not only financial but also reputational risks to Aranda. This is why

[59] This was disputed by Mr Vilakazi who testified that this was not a complicated business (Transcript pp199-200).

they required such onerous terms for bidders they had no previous business relationship with.[60]

[126] However, this explanation becomes somewhat circular when considered in the context of the requirements Aranda placed on bidders other than Mzansi.

[127] Recall that all other prospective bidders were required to provide the following:

1. *Irrevocable letter of credit to be obtained by yourselves, and confirmed by one of the prominent banking institutions in South Africa, in order for Aranda Textile Mills (Pty) Ltd to keep to the supply agreement;*
2. *50% deposit payable prior commencement of production, and*
3. *For the full duration of the tender, joint signatory – and joint access arrangement on your banking account, in lieu of tender monies receivable."*[61]

[128] Thus Aranda had put in place several risk mitigating factors by requiring financial guarantees from prospective bidders in the form of an irrevocable letter of credit, a deposit of 50% prior to production and access to the bidders' bank account to ensure that it Aranda could have direct access to the payments received by the bidder from State departments.

[129] However, the evidence given by Mr Magni, the CEO of Aranda, for the justification of the financial requirements for the other bidders was somewhat vague and confusing that it begged the question whether he in fact understood it. During his evidence on the financial terms imposed on Vilankosi for example, Mr Magni could not explain why – when a direct question was put to him – he would want a 50% deposit and an ILOC (guarantee) *in advance* of that bidder winning the tender.[62]

[130] As to the preferential pricing extended to Mzansi, a fair amount of evidence was given by Mr Hunter[63] and Mr Magni on how pricing was determined in Aranda,

[60] Aranda Heads of Argument at para 45.6 pp42-43.
[61] Copy of the Letter from Mr Magni of Aranda Textiles to Mr Vilakazi of Vilankosi Marketing dated 2 March 2015, Record p177
[62] Transcript pp714-715.
[63] Hunter's Witness Statement at paras 7-9.

from a manufacturing perspective. Mr Magni's explanation about how he arrived at a price for Mzansi suggested a very informal back of the envelope kind of calculation. One factor in this pricing was seemingly the application of a rebate to orders by "*big clients*".[64]

[131] Assuming for argument's sake that we accept Mr Magni's justification that he extended these favourable terms to Mzansi because of this historical special relationship, because Mzansi was better at managing tenders in comparison to other bidders (other than Aranda) or for managing risk; what he could not explain, and which remains at the core of the complaint of the Commission and Treasury, is why Aranda would still submit a bid in competition with Mzansi, its preferred partner.

[132] And perhaps this is the heart of the matter.

'If not me then Mzansi'

[133] Mr Magni's explanation for why Aranda would submit a bid in the same tender as its preferred business partner was that his preference was for Aranda to win the tender but if not then Mzansi. In Mr Magni's own words "*I would rather want Aranda to win the tender, but if we don't then I prefer Mzansi*".[65]

[134] When we assess the pricing evidence in the context of incentives, for Mzansi there was every incentive for it to win the bid away from the other bidders except Aranda.

[135] How could Aranda ensure that Mzansi would win the bid in a tender where Aranda would be the supplier to most if not all the bidders, as opposed to another bidder unless Mzansi obtained a significant advantage over the other bidders?

[136] The first way in which this could be achieved is by Aranda giving Mzansi a far better cost price (and trading terms) than to the other bidders. Had Aranda given

[64] Transcript p698.
[65] Magni Witness Statement at para 46 p13.

it the same price as it did to other bidders, Mzansi would not have a cost advantage above any other bidders.

[137] But this advantage alone would not be able to secure the bid for Mzansi unless Aranda played some role in determining the level of Mzansi's bid prices (not necessarily the actual) in comparison to other bidders. Indeed both Aranda and Mzansi would have to have an understanding or an agreement that any advantage gained by Mzansi through a lower cost price could easily be eroded if Mzansi was free to put any margin it wanted on that very low cost price. For example if left to price independently, without the input of Aranda (who had knowledge of all the prices given to other bidders) Mzansi could theoretically add a margin of 50-100% and thereby undermine the advantage of the lower cost price it received from Aranda. In other words, what would be the purpose of giving Mzansi a lower cost advantage over other bidders, if Mzansi could simply erode that by putting a higher margin on it?

[138] Hence if Mzansi was allowed to set its bid price at a level that would erode any advantage it gained from a favourable cost price, the desired outcome for both Mr Magni and Mzansi - *if not Aranda then Mzansi* - could not be achieved.

[139] This is why Mzansi would necessarily have to be an acquiescent, if not an active partner in the arrangement with Aranda, as opposed to a passive recipient of an advantage unilaterally extended to it by a benefactor in the form of Mr Magni.

[140] For this outcome to be achievable, Mzansi would necessarily have to know the level of pricing given to bidders other than itself and Aranda would need to ensure that Mzansi did not erode its cost advantage by putting on extremely high margins. Were it not so, Mzansi would not have been able to secure the 2015 Tender.

[141] But what would be the incentive for Aranda to compete against Mzansi, that it had a special relationship with and that it had confirmed as its preferential partner? Aranda after all stood to benefit whether it won the bid in its own name or whether Mzansi won it because it would be supplying all the blankets in any event.

[142] Why would Aranda submit a bid in competition with Mzansi if it wanted Mzansi, its special partner, to benefit from the preferential pricing extended to it and it itself stood to benefit from the volumes that would be delivered by Mzansi's alleged greater skills in tender management?

[143] During argument, counsel for Aranda, Ms Englebrecht, asked the prescient question. '*What is the theory of harm here? Some kind of strange "cover pricing*"?

[144] We say it was precisely that. A strategy to ensure that only Aranda (evaluated on the basis of pricing) stood to win the tender or Mzansi (evaluated on the basis of pricing and B-BBEE points) won the tender and **not** any other bidder, such as Vilankosi.

[145] In competition law, when assessing competitive dynamics between competitors, we would be equally concerned about nominal prices and the price differentials between them. Recall that the price given to Mzansi by Aranda in respect of the 2015 Tender placed Mzansi in a significantly more advantageous position than any other bidder, except Aranda. The differences in these prices were so staggering as to render bidders other than Aranda and Mzansi out of the running.

CONCLUSION

[146] When we stand back from the evidence and consider it in its totality, the only reasonable inference that can be drawn[66] in relation to the 2015 Tender is that the respondents co-ordinated their bids in contravention of section 4(1)(b).

[147] First the conclusion that the respondents co-ordinated their bids is supported by:

a. Dr Mansoor's email which demonstrates that Mzansi was aware that Aranda was going to tender.

[66] *Competition Commission v Stuttafords and 11 Others* (CAC case number: 15862/2019) (22 October 2020) at paras 26-30.

b. The email of Dr Mansoor to Ms Bell which was copied to Mr Magni also confirms that at that time Aranda knew that Mzansi was going to submit bids for the 2015 Tender.

c. Ms Bell rendered assistance to Mzansi which no other bidder enjoyed. Assistance to Mzansi was given in the form of the check list.

d. Mr Magni was copied on all correspondence to and from Mzansi, including Dr Mansoor's email.

[148] At this point in time the respondents clearly knew that they were in a horizontal relationship for the 2015 Tender and thus had a duty to act independently, a duty that arises not only from the Act[67] but also from requirements by the Treasury.

[149] Further the cover pricing of a special type strategy designed to exclude any other bidder from the race is confirmed by:

a. The staggeringly lower price given to Mzansi by Aranda that would ensure that Mzansi had a significant advantage over any other bidder, other than Aranda;

b. The low margin put on by Mzansi to ensure that it did not erode its cost advantages; and

c. Aranda putting in its own bid at a lowest price, thereby knocking all competitors out on that parameter of competition.

[67] *See Berg River* (above note 21) at para 54:
"*Note that we distinguish between Berg River, as a supplier, knowing Eye Way's cost price for the latter's tender management services; and Berg River knowing Eye Way's tender price. The former may be lawful as Berg River would be acting as supplier, but the latter is unlawful because Berg River was acting as competitor. Once both firms entered bids they became competitors and therefore had a duty to bid independently. This was not done. Instead the bids were rigged as a result of the firms fixing the output prices for the tenders. The respondent have therefore collided with each other to unlawfully fix the prices submitted in their tender documents, in contravention of section 4(1)(b)(iii).*

[150] Thus, we find that the evidence when considered in its totality supports the conclusion that Aranda and Mzansi, as competitors for the 2015 Tender co-ordinated their bids with each other.

[151] They co-operated with each other to ensure that if Aranda was unsuccessful Mzansi would win the tender.

[152] The explanation provided by Mr Magni that he unilaterally extended preferential pricing and terms to Mzansi as a friendly gesture is improbable in light of the fact that Aranda and Mzansi co-ordinated their bids for the 205 Tender. This was a strategy designed to ensure who would win the bid (either Aranda or Mzansi or both) and who should **not** win the bid. For this strategy to succeed both Aranda and Mzansi would need to know each other's bid prices, as well as the cost prices of the other bidders.

[153] This indeed was the outcome of that 2015 Tender until the complaint by Mr Vilakazi was laid.

[154] Collusive bidding or bid rigging takes many forms as has been shown both in South Africa and other jurisdictions. For example, in the early case involving of bid rigging *Competition Commission v RSC Ekusasa Mining (Pty) Ltd and Others ("RSC")* (mining roof bolts) the respondents successfully defeated a tender put out by Anglo by colluding on prices with each other.[68] In the *Southern Pipeline Contractors v Competition Commission ("SPC")*, firms colluded on product type, pricing and customer allocation (tenders were allocated amongst them) and in subcontracting.[69] In the many bid rigging cases involving the construction industry, bid rigging took different forms, involving customer allocation, cover pricing and in some instances refraining from putting in bids.[70] More recent cases involving public (government) tenders cover pricing has become a frequent

[68] *Competition Commission v RSC Ekusasa Mining (Pty) Ltd and Others* [2012] ZACT 82.
[69] *Southern Pipeline Contractors v Competition Commission (105/CAC/Dec10, 106/CAC/Dec10)* [2011] ZACAC 6.
[70] *Competition Commission v Giuricich Coastal Projects and Another* [2013] ZACT 77.

collusive mechanism in the context of public tenders. *Berg River*[71] is one such case.

[155] Collusive bidding or bid rigging can also occur when the tendering businesses "*conspire to raise prices or lower the quality of goods or services for purchasers";* undermining the competitive bidding process which *"can achieve lower prices or better quality and innovation only when companies genuinely compete (i.e., set their terms and conditions honestly and independently)".* Such conspiracies "*take resources from purchasers and taxpayers, diminish public confidence in the competitive process, and undermine the benefits of a competitive marketplace*."[72] Bid-rigging can take many forms, but the frequent form is when competitors agree in advance to orchestrate which firm will win the bid. But competitors can also agree which firms won't win the bid.

[156] In bid rigging, competitors are often asked to provide higher 'cover' prices to ensure which firm will win the bid and - by implication - which will not. This is especially so in instances where there is customer allocation or *quid pro quo* arrangements between them.[73]

[157] The Australian competition commission lists types of bid-rigging as including:

a. cover bidding - where competitors choose a winner and everyone but the winner deliberately bids above an agreed amount to establish the illusion that the winner's quote is competitive
b. bid suppression - where a business agrees not to tender to ensure that the pre-agreed participant will win the contract
c. bid withdrawal - where a business withdraws its winning bid so that an agreed competitor will be successful instead
d. bid rotation - where competitors agree to take turns at winning business, while monitoring their market shares to ensure they all have a predetermined slice of the pie

[71] *Berg River* above note 21.
[72] OECD in the Guidelines for fighting bid rigging in public procurement p1.
[73] Nedschroef Johannesburg (Pty) Ltd (Nedschroef) / Teamcor Ltd and Others (95/IR/Oct05) [2006] ZACT 7 at paras 47-48.

e. non-conforming bids - where businesses deliberately include terms and conditions that they know will not be acceptable to the client.[74]

[158] The FTC speaks of a type of bid-rigging "*involve subcontracting part of the main contract to the losing bidders, or forming a joint venture to submit a single bid*."[75] The Seychelles enforcement agency says about the subcontracting type of bid-rigging: "*[s]ubcontracting is when bidders submit bids that are not realistic such as bids that are too expensive, bidders not meeting requirements etc... and a bigger enterprise wins the bid and then sub-contracts that particular contract with the non-winning bidder*."[76]

[159] All of this serves to demonstrate that in answer to Ms Engelbrecht's question, the theory of harm has to do with the manipulation of the competitive process, which is deemed to result in egregious consumer harm as the *per se* prohibitions of the Act contemplate in section 4(1)(b)(i)-(iii) and for which no justification or defence is available to respondents engaging in this conduct.[77]

[160] We highlight here that in competition law the prohibition against price fixing as contemplated in section 4(1)(b)(i) is not limited to respondents fixing actual or nominal prices. It can include circumstances where respondents have agreed to a certain level of discount or a certain range of price increases or even the timing of such price increases. Often an agreement on the range of prices or a range of a mark-up level (as opposed to an actual price) in the context of tenders, could be part and parcel of collusive tendering.

[161] As we indicated earlier, when the favourable pricing and terms given to Mzansi are viewed in the context of the other evidence of their interactions for the 2015 Tender, the only reasonable inference that can be drawn is that Aranda and

[74] Australian Competition & Consumer Commission website https://www.accc.gov.au/business/anti-competitive-behaviour/cartels/bid-rigging#types-of-bid-rigging
[75] Federal Trade Commission website https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/bid-rigging
[76] Republic of Seychelles National Tender Board website https://www.ntb.sc/news/item/30-the-basics-of-bid-rigging
[77] As confirmed in *American Soda Ash Corporation and Another v Competition Commission of South Africa and Others* [2002] ZACAC 5 at para 37.

Mzansi had engaged in collusive bidding. They adopted a pricing strategy through which they could hedge their bets and ensure that only either or both won the tender, and not the other bidders. For this strategy to be successful, which it was in the 2015 Tender, both Aranda and Mzansi would need to be active participants in coordinating their bids.

[162] We thus conclude that they have contravened section 4(1)(b)(i) and(iii) of the Act.

Aranda's objection

[163] We turn now to consider the objection lodged by Aranda's counsel during closing argument that the Commission had changed its case.

[164] The Commission in its Heads of Argument and in closing submissions argued that Aranda and Mzansi had a single overall agreement to collude on tenders and did so in the 2015 Tender. However, in oral submissions it still maintained its position on the price fixing and collusive bidding case.

[165] In its pleadings the Commission limited the respondents' conduct to the 2015 Tender only and did not allege a case that there was an overall agreement between them in respect of all prior tenders.

[166] The Commission's witness statements were limited to the 2015 Tender.

[167] The respondents understood from inception, from the pleadings read together with the Commission's witness statements, the case against them and were given an opportunity to present their own evidence and to cross-examine the Commission's witnesses.

[168] This does not mean that in the course of the hearing, additional evidence might not have come to light which might suggest that there was an overall collusive agreement between the respondents.

[169] For example, during the evidence given by Mr Vilakazi it came to light that Treasury had noticed the strange patterns between Aranda and Mzansi over the years when dealing with transversal contracts, including the 2015 Tender.[78]

[170] During the hearing the Commission referred to two documents, which had not been referred to either in its pleadings or witness statements. These constituted the manufacturing agreement and the business agreement between Aranda and Mzansi. The second document seemingly came into the possession of the Commission in the course of discovery.

[171] Mr Magni himself testified that his longstanding relationship with Mzansi had its genesis with his arrangement with Africhoice, a competitor of Aranda during 2004/5.

[172] Thus the belated argument of a single overall agreement made by the Commission, albeit not pleaded, is not based on any new evidence introduced by the Commission but on evidence that came to light in the course of the proceedings and the respondents own documents or evidence, to which they could not object.

[173] In any event, even if the Commission may have argued a single overall agreement or conspiracy somewhat belatedly, its case could not go beyond the 2015 Tender. In other words no evidence was put up by the Commission such as a pattern of behaviour of the two respondents across a number of tenders to support the inference that they were in a collusive arrangement in respect of all tenders from 2004 to the 2015 Tender.

[174] Our conclusions are limited to only the respondents' conduct in relationship to the 2015 Tender.

[175] In light of this it was unclear what the objection actually related to.

[78] Transcript pp267-268.

REMEDY

[176] We now turn to consider the issue of remedy.

[177] The Commission has asked that we impose an administrative penalty on Aranda in the amount of R10 793 475.92 based on its 2018/2019 financials. It has asked that we impose an administrative penalty on Mzansi in the amount of R551 007.98 based on its 2018/2019 financials.

[178] As far as an administrative penalty is concerned, while the Tribunal has often relied on its six-step approach for determining an appropriate penalty, it has also emphasised that it retains a discretion in this regard.

[179] In assessing the factors set out in section 59(3), we note that the Commission's case was limited to the conduct of the respondents in respect of the one tender, namely the 2015 Tender. Neither of the respondents have been found to have contravened the Act previously. The tender was awarded to Mzansi and implemented.

[180] Aranda has a long and proud history of manufacturing and also demonstrated that it was committed to promoting local production. However, it elected to engage in unfair pricing methods towards potential bidders thus defeating one of the objectives of the tender namely the promotion of small, black owned businesses. As Ms Van Niekerk said[79] why did Aranda not give all potential bidders the same price so that they could all stand a chance? In the circumstances we find that a penalty of R5 000 000 (five million Rand) would be appropriate.

[181] Mzansi is a relatively small firm. We find that an appropriate penalty in these circumstances would be R500 000 (five hundred thousand Rand).

[182] Accordingly, we make the order as set out below.

[79] Transcript pp59-63.

ORDER

We make the following order:

1. The respondents have contravened section 4(1)(b)(i) and (iii) of the Act.

2. Aranda Textiles must pay an administrative penalty of R5 000 000 (five million Rand) within 30 days of date hereof.

3. Mzansi must pay an administrative penalty of R500 000 (five hundred thousand Rand) within 30 days of date hereof.

Signed by:Yasmin Tayob Carrim
Signed at:2021-01-16 10:27:35 +02:00
Reason:I approve this document

Yasmin Tayob Carrim

4 December 2020

Ms Yasmin Carrim **Date**

Dr Thando Vilakazi and Mr Enver Daniels concurring.

Tribunal Case Managers:	Busisiwe Masina and Mpumelelo Tshabalala
For the Commission:	Ms Thandi Nkabinde and Mr Ofentse Motshudi
For the First Respondent:	Adv Greta Engelbrecht instructed by Mr Gerald Nochumsohn and Ms Tshidi Tseki of Nochumsohn and Teper Attorneys
For the Second Respondent	Adv Ismail Sardiwalla instructed by Mr Hardin Mayet of Hardin Mayet Incorporated