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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: CR166Dec14

In re points in limine:	Case No.: CR166Dec14/PIL070Jul15
POWER CONSTRUCTION (WEST CAPE) (PTY)	First Applicant
POWER CONSTRUCTION (PTY) LTD	Second Applicant
And	
THE COMPETITION COMISSION	Respondent

In the matter between:

THE COMPETITION COMISSION	Applicant
And	
POWER CONSTRUCTION (WEST CAPE) (PTY)	First Respondent
POWER CONSTRUCTION (PTY) LTD	Second Respondent
HAW AND INGLIS (PTY) LTD	Third Respondent

Panel	: Yasmin Carrim (Presiding Member) : Medi Mokuena (Tribunal Member) : Andreas Wessels (Tribunal Member)
Heard on	: 25 July 2016
Order Issued on	: 25 August 2016
Reasons Issued on	: 25 August 2016

Introduction

1. This is a matter that concerns points *in limine* raised by the Applicants in a complaint referral brought against them by the Competition Commission.

2. On 17 December 2014, the Competition Commission ("Commission") filed a complaint referral with the Competition Tribunal against Power Construction (West Cape) Pty Ltd ("Power WC"), Power Construction (Pty) Ltd[1] ("Power") and Haw and Inglis (Pty) Limited ("H&I"). Haw & Inglis applied for and was granted leniency and thus has little involvement in the matters at hand. Power and Power WC, in their combined answering affidavit, raised points *in limine* to the Commission's referral to which the Commission replied in its replying affidavit.

3. In the complaint referral Power WC stands accused of contravening article 4(1)(b)(iii), alternatively 4(1)(b)(i) and/ or 4(1)(b)(ii) of the Competition Act 89 of 1998 ('the Act') by agreeing to submit a tender to SANRAL with the purpose of keeping alive the tender process for maintenance to a stretch of the N1 from Touws River to Langsberg ('the N1 project') for the ultimate benefit of H&I.

4. The Applicants have admitted the conduct alleged in the complaint referral. Notwithstanding such admission they now seek to have the matter dismissed on the basis of four points *in limine*, heard by the Tribunal on 25 July 2016.

5. The facts of the complaint referral are that in April 2006, SANRAL invited tenders for the N1 project, hosting a compulsory briefing on 20 April 2006. This briefing was attended by a representative of H&I, Mr Kevin Konkol ('Konkol'). After attending the briefing and interacting with suppliers whilst compiling the tender bid Konkol came to conclude that H&I was to be the only tenderer with the required CIPBD status (thus the only viable bidder) submitting a bid and as such, SANRAL would most likely cancel the tender.

[1] Power purchased Power WC as a going concern in 2007.

6. On 3 May 2006, two days before submissions for the tender were due, Konkol contacted Mr. John Beddingham ('Beddingham'), a chief estimator at Power WC, to request that he submit a tender on behalf of Power WC to keep the tender process alive. Konkol added that such a tender should be above R99, 000,000.00 (ninety-nine million rand), which would put it above the price H&I was tendering. Because the deadline was so close, Konkol also provided Beddingham with a bill of quantities document to assist in the compilation of the tender.

7. Two days later, on 5 May 2006, Power WC submitted a tender to SANRAL for R99, 980,000.00 (ninety-nine million, nine hundred and eighty thousand rand). Unbeknownst to both parties, Group Five, another construction firm with the required CIPBD status, later submitted a tender above the price of Power WC. On the 28 July 2006, the tender was awarded to H&I.

8. The first point *in limine* is that there is an absence of a complaint initiation in respect of Power WC's conduct, rendering the referral of Power WC to the Tribunal without legal basis and ultimately displacing the Tribunal's jurisdiction to adjudicate the matter.

9. The second point *in limine* is that, if there was a complaint initiation, it fell outside of the time frames provided for by the Competition Act and as a result the matter has prescribed.

10. The third point *in limine* relates to the liability of Power, as a purchaser of Power WC, for an administrative penalty for conduct committed by Power WC.

11. The fourth point *in limine* deals with the characterisation of the conduct in question with the Applicants submitting that the characterisation of the conduct takes it outside the ambit of prohibition.

First point *in limine*- Referral invalid, no initiation

12. The Applicant's first point *in limine* is that a complaint was never validly initiated against Power WC. The crux of their argument is that because the complaint initiation upon which the Commission relies does not specifically name Power WC as a party to the complaint the referral against Power WC is not valid.

Background

13. On 1 September 2009, the Competition Commissioner, Mr Shan Ramburuth, initiated a complaint ('the September initiation') against nineteen named construction firms and 'other firms' in the construction industry for alleged breaches of s4(1)(b) of the act.[2] Attached to the September initiation was an initiation statement, detailing that the initiation was prompted by the Corporate Leniency Policy applications of two multi-disciplinary construction firms which revealed evidence to suggest that price fixing, allocation of customers/projects/tenders and collusive tendering had become industry norms in the construction industry. In the initiation statement, the Commissioner states:

> *"I believe that collusive practices, potentially in contravention of section 4(1)(b) of the Competition Act 89 of 1998, as amended ('the Act'), are prevalent in the construction industry and may also involve construction firms that are not directly implicated in the CLP applications.*
>
> *In order to uncover this conduct, I initiate a complaint in terms of section 49B(1) of the Act in relation to collusive practices in the construction industry as regards price fixing, market allocation and collusive tendering in possible contravention of section 4(1)(b) of the Act against the following firms..."(our emphasis)*

14. The Commissioner goes on to name the nineteen construction firms in respect of which the initiation applies and, most importantly to the matter at hand, makes mention of:

[2] Annexure MN2 to the Applicant's reply.

"Other firms, including joint ventures, in the construction industry"[3]

15. Following this initiation the Commission's investigation unsurprisingly appears to have endured for a long period of time. On 1 February 2011, the Commission issued an 'Invitation to Firms in the Construction Industry to Engage in Settlement of Contraventions of the Competition Act' ('the February invitation')[4] in which it invited firms which had committed infringements to provide particulars of such contravention and apply to engage in settlements for such conduct, circumventing the need for arduous legal procedures.

16. In response to such an invitation, on 31 March 2011, Power, which had purchased Power WC as a going concern in 2007, submitted details pertaining to five of its projects in which prohibited practices took place.[5] This information was prefaced with a letter from the CEO, Mr Graham Power in which he went to great lengths to describe the willingness of Power to work with authorities in 'cleaning up the construction industry'. At this juncture we do make the observation that Mr Power in his submission of 31 March 2011 sought to escape liability by expressing the view that the conduct had ceased and that he was merely providing the information for the record. However nothing turns on this for purposes of determining the point *in limine*.

17. On 15 April 2011, four days after the Commission had received Power's submission, Power submitted further details to the Commission pertaining to Power WC's involvement in the N1 Project tender. Mr G Callum, in a letter attached to the submission explained that Power was uncertain as to whether it should have submitted this information with its previous submission owing to the fact that 'Power WC had received no benefit from the submission of the tender'.[6]

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[3] September Initiation (note 2 above) pg2-3.
[4] Annexure MN1 to the Applicant's reply ('The February invitation').
[5] Such submissions were received by the Commission on 11 April 2011. Annexure MN2 to the Applicant's founding affidavit.
[6] Annexure MN3 to the Applicant's Founding Affidavit.

18. On 23 November 2011, the Commission sent a letter to Power in which it invited the firm to settle the project in accordance with its February invitation, going on to state:

> "*Should your client not wish to settle, the Commission will initiate proceedings against your firm at the Competition Tribunal for this project*"[7]

19. After no response was received from Power the Commission referred the matter to the Tribunal by means of the prescribed CT(1) form on 17 December 2014.

20. The Commission, it its founding affidavit in the complaint referral, relied upon the September initiation as the genesis of its proceedings against Power, citing the ability of the Commissioner to initiate investigations under s49B(1) of the Act.

21. The Applicants argue that the September initiation amounts to an industry wide one which is not competent and that relying upon such an initiation as the basis for a referral amounts to using an initiation 'against some as a springboard off of which to investigate all and sundry'- a course of action, they argue, expressly banished by the SCA in *Woodlands*.[8] The Applicants claim that implicit in a s49B initiation is the requirement of party specificity. They argue that the Commission is only able to initiate investigations into 'prohibited conduct', which in terms of the act may only be committed by 'identified' firms. In order to be valid an initiation must refer to *all the parties* it seeks to investigate. Given that the initiation relied upon by the Commission did not specify Power WC the Commission was precluded from referring the complaint against Power WC.

Initiation & Referral

22. The initiation of a complaint by the Commissioner is regulated by s49B(1) of the Act which states:

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[7] Annexure GP3 to the First and Second Respondent's answering affidavit.
[8] 'Woodlands Dairy (Pty) Ltd v Competition Commission 2010 (6) SA SCA ('Woodlands') para 36.

"The Commissioner may initiate a complaint against an alleged prohibited practice"

23. In the recent decision of Competition Commission v Yara[9] the SCA has expressly clarified the requirements of s49B(1) namely that:

> "... *the legislature draws a clear distinction between a complaint initiated by the Commission (in terms of s 49B(1)) and a complaint submitted by a private person (in terms of s 49B(2)(b)). While the latter has to be in the 'prescribed form', no formalities are prescribed for the former. Taken literally 'initiating a complaint' appears to be an awkward concept. The Commission does not really 'initiate' or start a complaint. What it does is to start a process by directing an investigation, which process may lead to the referral of that complaint to the Tribunal. And it can clearly do so on the basis of information submitted by an informant, like Mrs Malherbe in the Glaxo case; or because of what it gathers from media reports; or because of what it discovers during the course of an investigation into a different complaint and/or against a different respondent. Since no formalities are required, s 49B(1) seems to demand no more than a decision by the Commission to open a case. That decision can be informal. It can also be tacit."*[10] (our emphasis)

24. While no formalities are required, it appears most importantly, that the decision to initiate such a complaint or investigation must be based upon the reasonable suspicion of the presence of a prohibited practice.[11] The validity of such an initiation would thus be determined by whether the initiation was the manifestation of a reasonable suspicion derived from information available to the Commissioner/ their duly authorized representative at the time.

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[9] Competition Commission v Yara (South Africa) (Pty) Ltd and others 2013 (6) SA 404 (SCA) ('Yara') at p415-417.
[10] *ibid* para 21.
[11] Woodlands (note 8 above) para 13.

25. The CAC has provided guidance on the level of details required in respect of a valid complaint. In *Glaxo Wellcome (Pty) Ltd v National Association of Pharmaceutical Wholesalers*[12] the court held that-

> "*There must be a rational or recognisable link between the conduct referred to in a complaint and the prohibitions in the Act, otherwise it will not be possible to say what the complaint is about and what should be investigated.*"[13]

26. While party specificity is a logical requirement – after all an investigation into prohibited conduct cannot be initiated in the air but must relate to the conduct of identified firms – the CAC has recognized that in certain instances particularly those involving the secretive nature of cartel activity, the Commission cannot be expected to know at initiation stage all the identities of all the market participants that would fall within the ambit of its investigation. It might know some of the market participants but as provided for by the CAC in *Loungefoam (Pty) Ltd v Competition Commission and others*[14] it can still initiate a complaint in broad terms even if it lacked information directly implicating a particular firm –

> "*This gives a broad scope to the Commissioner in formulating the terms of a complaint initiation. In a cartel case, where new participants may be discovered as an investigation progresses, the Commissioner may be justified in couching a complaint initiation in fairly broad terms covering a number of market participants, on the basis of circumstantial evidence to be construed in the light of the pattern that cartel activity takes, even if the Commissioner lacks information directly implicating a particular firm...*"[15]

27. An assessment of the jurisprudence at this stage provides us with the following guidance for the initiation of a complaint by the Commission under s49B(1): no formalities are necessarily required in such an initiation and s49B(1) requires no more than a decision by the Commission (represented by the Commissioner or his

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[12] 15/CAC/Feb02 (21 October 2002) ('Glaxo').
[13] *ibid* para 16.
[14] [2011] 1 CPLR 19 (CAC) ('Loungefoam').
[15] Loungefoam (supra) para 53.

duly authorized representative) to open a case.[16] The decision can be informal, it can also be tacit. The basis for an initiation by the Commissioner must be a reasonable suspicion of a prohibited practice taking place.[17] Section 49B(1) gives the Commission broad scope in formulating the terms of an initiation, even if in cartel cases the Commissioner lacks information implicating a particular firm.

28. Turning now to the facts of this case we have established, and this is not contested by the Applicants, that the September initiation met the requirements of *Yara*. Their complaint is that Power was not contemplated in that initiation and for this they rely on the passage in *Woodlands* to the effect that "a suspicion against some cannot be used as a springboard to investigate all and sundry".[18]

29. The facts of this case however differ to those in *Woodlands*. In this case the Commission had received information from its investigation of certain leniency applications, themselves being market participants in more than one layer of the construction sector, that "*collusive tendering by submitting uncompetitive bids*" was prevalent in the construction industry to such an extent as to be considered a norm. That the practice was wide spread is confirmed by the Commissioner in his statement "*and may also involve construction firms that are not directly implicated in the CLP applications*".

30. This information led the Commissioner to initiate a complaint not in the industry as a whole but against a relevant prohibited practice of *collusive tendering* which involved some 19 companies that were named. It also initiated an investigation into "other firms" whose identity was as yet unknown but who came to be suspected of participating in the same conduct namely collusive tendering based on the information provided by the leniency applicants. From its inclusion of "Other firms" in the initiation statement the Commission had clearly contemplated, on the basis of the information it had obtained, that its investigation will likely include other firms whose further particulars were yet to be established.

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[16] Yara (note 9 above) para 21.
[17] Yara (note 9 above) para 26.
[18] Woodlands (note 8 above) para 53.

31. This was clearly not some fishing expedition, in which the Commission sought to investigate anti-competitive behavior in the construction industry at large. The initiation statement was not broad in scope but contained sufficient detail for the reader thereof to conclude that it was an initiation into a specified prohibited conduct, namely collusive tendering and the Commissioner expressly contemplated, based on the information he had been given, that while there were some 19 firms that had already been identified, others might be added to the complaint after further investigation.

32. On the basis of the SCA and CAC jurisprudence discussed above, the Commission was entitled to initiate the complaint against collusive tendering as provided for in the September initiation and to extend its investigation to Power WC under the rubric of 'other firms'. The referral against Power WC is therefore valid.

33. However lest there be any doubt about whether the Commission was entitled to include Power WC in its September initiation, the SCA has expressly contemplated that the Commission in the course of its investigation is entitled to amend its complaint by the addition of further particulars as and when it obtains more information.

34. Indeed the very paragraph in *Woodlands* upon which the Applicants have relied for support of their argument, when read in its entirety, contemplates that the Commission may amend its complaint when it obtains information about others:

> *"A suspicion against some cannot be used as a springboard to investigate all and sundry. This does not mean that the commission may not, during the course of a properly initiated investigation, obtain information about others or about other transgressions. If it does, it is fully entitled to use the information so obtained for amending the complaint or the initiation of another complaint and fuller investigation."*[19]

[19] Woodlands (note 8 above) para 36.

35. The events that followed the September initiation are now a matter of public record. The Commission, after initiating its investigation into the 19 companies and others discovered that collusive tendering was indeed pervasive in the construction industry and that the utilization of conventional methods of enforcement would require endless resources and likely render the process interminable. In order to address this conundrum the Commission embarked on a unique and innovative methodology of the fast track process (the February invitation) whereby it issued an invitation to all companies involved in the construction industry to come forward and admit their contraventions.[20] For this they would receive the benefit of an early settlement discount. Included in the February invitation were guidelines to prospective respondents as to how their contraventions would be treated by the Commission for purposes of imposing administrative penalties.

36. The fast track process did not stand outside of the Commission's investigation commenced in September 2009 but formed a critical component thereof. It was at once both an investigative tool which enabled the Commission to gather further information and a public notice that the Commission was willing to engage in settlement talks with respondents. Through this methodology the Commission was able on the one hand gather more information efficiently and expeditiously and on the other promote competition through a settlement process analogous to that of a tax amnesty. Further particulars of "other firms" involved in collusive tendering in contravention of section 4(1)(b) were obtained through the course of the Commission's investigation which also included this very fast track process. The fast track process yielded information of some 300 contraventions of the Act at all levels of the construction industry and resulted in some 15 settlements in the first round, in respect of which the Tribunal imposed administrative penalties of R1.46 billion.

37. Power responded to the February invitation by sending details of its contraventions to the Commission on 31 March 2011 and 15 April 2011. If, as provided in *Yara*, the initiation of a complaint does not require any formalities, it follows that an

[20] Invitation to Firms in the Construction Industry to Engage in Settlement of Contraventions of the Competition Act' ('the February invitation') Annexure MN1 to the Applicant's reply.

amendment of a complaint by the addition of further particulars could not require any more formalities than the initiation itself. On this approach it can be concluded that the September initiation was amended by the particulars obtained through the fast track process.

38. The requirements for a valid initiation are discussed above. Once validly initiated the Commission is entitled to add further particulars to a complaint as and when such particulars are revealed in the course of the investigation provided for in *Woodlands* The Commission was thus entitled to amend its September initiation by the adding of further particulars obtained through the fast track process.

39. The approach of the SCA in *Yara* and *Woodlands* discussed above is, with respect, correct. Section 49B(1) cannot be interpreted to require the Commission to know the identities of all the parties involved in prohibited conduct at the *commencement* of its investigation.[21] Such a requirement would render the investigative powers of the Commission redundant and defeat the objectives of the Act – why should the legislature require the Commission to embark on an investigation if it is expected to know from the commencement of its investigation the identities of the prospective respondents.

40. In *Yara*, the SCA has clearly stated that:

> *"To demand that the referral corresponds with the contents of the complaint simply makes no sense if the complaint, as initiated, consists of nothing more than an informal decision to investigate."*[22]

41. In light of the above, we find that September initiation was based on a reasonable suspicion that collusive tendering was pervasive in the construction industry. The Commission's view that "other firms" were involved in this anti-competitive conduct in contravention of s4(1)(b)(iii) was clearly a reasonable suspicion formed on the basis of the information it had received at the time and was subsequently confirmed by the outcome of its fast track process. The fact that Power WC was not

[21] *See* Loungefoam (note 14 above) para 53.
[22] Yara (note 9 above) para 28.

specifically mentioned in the September statement does not render the referral against it invalid simply because the Commission is entitled to add further particulars to its complaint such as the identities of firms involved in cartel conduct that is the subject of the Commission's investigation, as and when its investigation unfolds.

42. Accordingly we find that the referral against Power WC is jurisdictionally valid and the point *in limine* falls to be dismissed.

43. In light of such a conclusion, we do not deem it necessary to rule on the alternative submissions of the parties pertaining to tacit initiation. However for purposes of completion we set out here the essential argument put up by the Commission which is that the Commission when it received the information provided to it by Power on 15 April 2011, it had tacitly initiated an investigation into Power WC. On the basis of this argument, at the very latest the initiation into Power's conduct would have commenced on 15 of April 2011.

Second Point *in limine*: Prescription.

44. The Applicant's second challenge was that the Commission had initiated a complaint in respect of the prohibited conduct more than 3 years after such conduct had ceased and thus the matter had prescribed under s67(1).

45. The Applicants argue that the collusive tendering in respect the N1 project in which Power WC had given a cover price of R99,98 million was a once-off occasion and the conduct had ceased on 5 May 2006, the date on which the tenders were submitted. The Commission had initiated the complaint on 1 September 2009, which was more than 3 years after the conduct had ceased and the matter had thus prescribed.

46. The CAC has held in *Paramount Mills (Pty) Limited vs The Competition Commission* that:

"the prohibited conduct does not end or cease with the conclusion of the agreement fixing the selling price. It continues to exist and its effect continues to be felt when the future prices, agreed upon pursuant thereto, are implemented"[23]

47. The Tribunal has previously held that a practice for the purposes of s67(1) ceases when its *effects* have ceased.[24] That final prices in certain cases would be the direct result of a collusive bid and inextricably bound up in them.[25] However the effects of a prohibited conduct are a matter for evidence in each case:

"Even if the initial agreement precedes the cut-off date, if the subsequent acts of execution have effects that succeed it, the practice has not 'ceased' but is continuing after the cut-off date and therefore is not barred in terms of section 67(1). Whether there are effects, and what constitutes 'effects', is a matter for evidence in each case."[26]

48. The admitted facts of this case are that Power WC submitted a tender for R99,98 million for the purposes of keeping a tender alive for H&I, the result of which was that H&I was awarded the tender at the price of R99 million. Notwithstanding the fact that a third bidder had entered the process, the collusive agreement between Power WC and H&I remained intact. The tender awarded to H&I was for a period of three years with the last payment in respect thereof made on 17 February 2009. The receipt of that amount of payment was inextricably sufficiently linked to the original conspiracy and was thus an effect of such for the purposes of s67(1).

49. It may be that there were other ongoing effects of the award of the tender to H&I which might have come about as a consequence of sub-contracting or otherwise but in the absence of evidence relating thereto we are unable to arrive at an assessment thereof.

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[23] (112/CAC/Sep11) para 44.
[24] Competition Commission vs Ekusasa Mining (Pty) Limited (65/CR/Sep09) para 146.
[25] *ibid* para 138.
[26] *ibid* para 150.

50. On the basis of the evidence before us we find that the effects of Power WC's actions continued at least until 17 February 2009, when H&I received the final payment. Accordingly the conduct had not ceased 3 years prior to the 1 September 2009 initiation thus the matter has not prescribed under s67(1) and the point *in limine* fails. Whether or not the effects continued thereafter is a matter to be determined by the adducing of further evidence.

51. The alternative argument put up by the Commission in relation to the tacit initiation for the N1 project places the initiation date on or about 15 April 2011.[27] Even it were to accept for purposes of argument that the initiation date was 15 April 2011 then the effects of the collusive arrangement, manifesting in the last payment of 17 February 2009, had not ceased three years prior to that and the matter would not be prescribed under 67(1).

Third point *in limine*: Liability for Administrative Penalties

52. Power, the second respondent in the matter, acquired Power WC as a going concern in 2007. It argues that the Tribunal does not have the power to hold it liable for the actions of Power WC, a separate business entity. The Commission argues for the importation of the concept of economic successor liability, to ensure that the penalty for such a contravention is meted out does in fact have teeth.

53. We are not satisfied that the information in the papers before us is sufficient to make a full and proper determination on this matter. We know not the circumstances surrounding the relationship between Power WC and Power at the time of the purchase, or other circumstances, which could materially influence our decision in this regard.

[27] Commission's replying affidavit para 32.

54. This matter is thus one to be addressed in the main hearing, with the benefit of witness(es) testimony and the presentation of further evidence. The third point *in limine* is thus dismissed.

Fourth point *in limine*: Characterisation.

55. Haphazardly advanced in both written and oral submissions by the Applicants was their fourth point *in limine*, namely that the conduct Power admitted, could not be characterised as prohibited conduct under the Act.[28]

56. Underlying this submission is the argument that because the bid submitted was illusory in that Power WC had no intention of winning the bid, it did not impact the price H&I tendered and thus the theory of harm which s4(1)(b)(i) read with 4(1)(b)(iii) seeks to prohibit was never realised.

57. Collusive tendering is *per se* prohibited by s4(1)(b)(iii) of the Act and may be defined as "any agreement between competitors pursuant to which contract offers are to be submitted to or withheld from a third party."[29] Sutherland submits, which we agree with, that collusive tendering destroys the basis of competitive bidding and is harmful to the public because it distorts markets for public procurement.[30]

58. In the present matter H&I requested that Power WC submit a tender above a certain price and Power WC obliged. This conduct is colloquially known as "cover pricing". Power WC's price was not arrived at through the normal process of tendering because in a normal competitive environment, a bidder should not be asked to tender above a certain amount and/or price by its competitor.

59. Notwithstanding the argument of the Applicants' counsel, Mr Graham Power in his submissions on behalf of the Power Construction group to the Commission, clearly

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[28] The Commission laboured under the misimpression that the applicants no longer persisted with this point but at the hearing Mr Brassey clarified that the point was still alive.

[29] Sutherland, P & Kemp, K 'Competition Law of South Africa' service issue 16 October 2013 pg 5-75 *relying on* United States v Reicher 983 F 2d 168 (10th Cir 1992) 170.

[30] Sutherland & Kemp (2013) pg 5-77.

considered such conduct to be the subject of competition concern. In paragraph 2 of his letter dated 31 March 2011 he states:

> *"2.1 It has been our experience that the construction industry is certainly not a 'clean' industry and that anti-competitive behaviour does occur. Anti-competitive behaviour takes many forms and we have come across the following in our years in the industry:*
>
> > *2.1.1 Bid rigging….*
> > *2.1.2. Collusive tendering (mostly in the form of the provision of a cover price/cover bid by one firm in agreement with another)"*

60. Mr Graham Power, in his own words, is not a person who has no appreciation of anti-competitive conduct. Instead he is a proud and committed member of a movement styled as "Unashamedly Ethical" who has committed his group of companies to ethical conduct and has challenged the broader business community to "clean up its act".[31]

61. Nevertheless it seems to us that the Applicants point of characterisation turns on the intent of Power when accepting to submit such a bid. In our view this can only be determined through the proper examination of a witness and their testimony. The fourth point *in limine* is thus dismissed.

Order

62. The following orders are thus made:
    1. The first, second, third and fourth points *in limine* are dismissed
    2. No order is made regarding costs.

Yasmin Carrim — **25 August 2016** **Date**

Andreas Wessels and Medi Mokuena concurring

[31] See Power letter dated 31 March 2011

Tribunal Researcher:	Alistair Dey-Van Heerden
For the Applicant:	T Motau SC *Instructed by*: The Competition Commission of South Africa
For the 1st and 2nd Respondents:	MSM Brassey SC (with him G Engelbrecht) *Instructed by*: Van Huysteens Attorneys