



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.:CR182Dec16

In the matter between:

THE COMPETITION COMMISSION OF SOUTH AFRICA

Complainant

and

GEOMETRY GLOBAL (PTY) LTD

First Respondent

VAXIPROX (PTY) LTD

Second Respondent

Panel : Enver Daniels (Presiding Member)
: Medi Mokuena (Tribunal Member)
: Anton Roskam (Tribunal Member)

Heard on : 29 January – 1 February 2018; 28 March 2018; 24 May
2018; 25 June 2018.

Order and Reasons : 03 October 2018
issued on

REASONS FOR DECISION

Per E Daniels, A Roskam concurring

Introduction

- [1] This matter concerns a complaint referral by the Competition Commission ("the Commission") against two firms active in the provision of brand activation

services: Geometry Global (Pty) Ltd ("Geometry") and Vaxiprox (Pty) Ltd ("Vaxiprox").

- [2] The Commission alleged that the respondents contravened sections 4(1)(b)(i) and (iii) of the Competition Act 89 of 1998 ("the Act") by rigging the bidding process for a tender issued by South African Tourism ("SAT") for brand activation services in a section of SAT's annual Indaba conference called "TechZone".
- [3] The Commission sought an order in the following terms:
- 3.1 Declaring that the Respondents have contravened section 4(1)(b)(i) and (iii) of the Act.
 - 3.2 Declaring that the Second Respondent be liable for the payment of an administrative penalty equal to 10% of its annual turnover in terms of section 58(1)(a)(iii) read with section 59(2) of the Act.
 - 3.3 Granting the Applicant further and / or alternative relief.
- [4] The Commission's claim was founded primarily on a thread of emails between SAT, Geometry, and Vaxiprox (which at the time was trading as 'Magnetic Communications'), in which SAT requests a second quotation from Vaxiprox to ensure SAT's ability to process a bid presented by Geometry.
- [5] Both respondents opposed the complaint, arguing broadly that in relation to the tender for the specified work, they had been instructed to form a joint venture by SAT and further that the alleged cover quote giving rise to the bid rigging allegations was provided only after a purchase order had been issued by SAT to the parties.
- [6] During the hearing the Commission called, as witnesses, three representatives from SAT; Ian Utermohlen ("Utermohlen"), Theo Thumbran ("Thumbran") and Raymond Mabuella ("Mabuella"). Geometry, the first respondent, called Fiona Campbell ("Campbell") and Vaxiprox, the second respondent, closed its case without calling any witnesses.

- [7] Having considered the witness testimony and closing arguments, both written and oral, we have decided to dismiss the Commission's complaint in terms of our order below. Our reasons for the decision follow.

Background

Parties

- [8] The first respondent is Geometry, a company duly incorporated in the Republic of South Africa. At the relevant period to this complaint, Campbell was employed by Geometry to service the SAT account. Geometry was previously operating under the name "Brand Activation".
- [9] The second respondent, Vaxiprox, was at the time relevant to the complaint trading as Magnetic Communications and represented by Mr. Brent van Ryswyk ('van Ryswyk') who served as the managing director.
- [10] On the Commission's version, both respondents provide brand activation services through product samplings, in store retail marketing, sponsorships, and experiential events to consumers and are thus competitors in the market for the provision of brand activation services.
- [11] SAT is a public entity of the National Department of Tourism in terms of Schedule 3 Part A of the Public Finance Management Act of 1999, Act 1 of 1999 (the PFMA) with specified responsibilities. Relevant to the matter under consideration is its responsibility to organise and promote the annual Travel Indaba event, hosted at the International Convention Centre in Durban. The purpose of the Indaba event is to showcase a wide variety of Southern Africa's best tourism products. One of the components of the Indaba event was the Techzone Campaign. Techzone was described as an activation showcasing relevant technologies available within South Africa.
- [12] The relevant employees at SAT were:

- 12.1 Utermohlen, who was employed as the Global Manager: Marketing and Advertising;
 - 12.2 Mabuela, who was part of the procurement team working on implementing the 2014 Indaba Event;
 - 12.3 William Price ("Price") who was the global manager for Digital;
 - 12.4 Theo Thumbran ("Thumbran") the head of supply chain management who had replaced Jean Hattingh ("Hattingh"); and
 - 12.5 Roshene Singh ("Singh"), the Chief Marketing Officer of SA Tourism.
- [13] Two other firms are of relevance to the factual complex in this matter. Namely Ireland Davenport (Pty) Ltd ("Ireland Davenport") and Advertising Production Costs Consultants ("APCC"). Ireland Davenport was a marketing and advertising agency employed by SAT over the relevant period as its lead marketing agency. APCC is an advertising cost consulting company employed by SAT over the relevant period of time to examine and approve the costs provided by advertising and marketing firms as being based on market value.

History

- [14] Although we have adopted a particular approach to the matter which differs somewhat from the pleaded cases of the Commission, we deem it appropriate to repeat the Commission's pleaded case.
- [15] According to the Commission:
- 15.1 In October 2009, SAT issued a tender for the provision of brand activation services. The tender was issued under tender number 0050/09. The aim of the tender was to preselect two service providers from which SAT would receive bidding cost estimates every time it required brand activation services.
 - 15.2 Both Geometry and Vaxiprox (then Magnetic Communications) submitted their bids for the above tender.

- 15.3 The tender was awarded to the Respondents around March 2010 for the initial period of 3 years with an option of additional 2 years extension. (It must be noted that the Commission took no issue with the process of this tender- but rather with a component arising as a result of the mechanics of the tender provided).
- 15.4 Thumbran's witness statement filed by the Commission, provides a more nuanced description of the October 2009 tender process. He indicates that the tender issued by SAT in 2009 was a tender for the provision of a 360 degree marketing solution and advertising which comprised nine wide ranging activities.
- 15.5 The first part was for a full service, which included the development/ updating of the global communication strategy, as well as execution and activation strategy at the Indaba, and other specified events. Part 7 related to global activation strategy.
- 15.6 Ireland Davenport tendered for and won part 1 of the tender and was thus designated the 'Lead Agency'. Geometry and Vaxiprox were appointed by SAT as agencies to provide 'global activation services' in relation to part 7 of the tender. Part of the services to be rendered by the activation agencies included the annual Indaba event.
- 15.7 Thumbran indicated that the appointment of the two agencies would result in a situation in which the SAT would request cost estimates for all briefed activations and other assignments. Both respondents would then provide the cost estimates and SAT would select the cheapest quote unless extraordinary circumstances applied and the SAT CFO agreed to the higher quote.
- 15.8 Against this background, the Commission alleged that in around May 2014, SAT requested the respondents to submit cost estimates for the provision of brand activation services for the Techzone campaign under

job number 425BE, at the 2014 Tourism Indaba in Durban to be held in the same month.

15.9 In submitting the cost estimates the Respondents quoted the same amount of R763 290.42 for the above Techzone campaign.

15.10 SA Tourism rejected the above cost estimates and requested the Respondents to submit competing bids.

15.11 In reaction to SA Tourism's rejection of the cost estimates, the respondents agreed that Geometry Global would revise its cost estimate. Geometry Global thereafter submitted a revised cost estimate. The revised cost estimate was in the amount of R786 888.42.

15.12 Mr Brent van Ryswyk then forwarded the revised cost estimate to SAT on behalf of Geometry Global. Magnetic Communications did not amend their initial cost estimate of R763 290.42. As such Magnetic Communication's cost estimate was cheaper than that submitted by Geometry Global. The project was awarded to Magnetic Communications.

[16] The Commission alleges that this conduct constituted price fixing and collusive tendering in contravention of section 4(1) (b) (i) and (iii) of the Act.

[17] The respondents' answers to the allegations introduced a number of new facts and put into question many of the conclusions reached by the Commission.

[18] The respondents indicated that:

18.1 With regard to the October 2009 tender, the Commission was correct in asserting that both Geometry and Vaxiprox were required to compete on price for work in relation to any number of events organized by SAT or Ireland Davenport on behalf of SAT.

- 18.2 This was not however the case in relation to work pertaining to the annual Indaba conferences. Geometry indicated that the scope of work on the Indaba was too large for either Geometry or Vaxiprox to successfully plan and implement individually. Because of this, in January 2012, SAT instructed the respondents to collaborate to execute the Indaba's. The instruction was relayed by Singh and resulted in both parties being briefed together by SAT for any work on the annual conference.
- 18.3 On this instruction, the "Indaba Joint Venture" ("Indaba JV") was formed by the respondents. The Indaba JV was not a creature formalised by a joint venture agreement, but the relationship was undertaken with the knowledge and approval of SAT. For two Indaba's (2012 and 2013) the respondents worked together on all aspects of the Indaba with the knowledge and approval of SAT.
- 18.4 Turning then to the 2014 Indaba, one of the components falling to the Indaba JV to organise was the Techzone. The respondents, acting together, submitted a budget which was finalised on 19 March 2014 by Price of SAT. It contained two components. The first one for "*New Technology (for the Techzone)*" ("New Technology") and amounted to R2,340,876.00. The second was an amount of R3,159,124.00 for the "*Techzone/ Amphitheatre*". The budget item relating to the New Technology forms the basis of the Commission's complaint.
- 18.5 On 25 April 2014, SAT communicated to the respondents that only half of the budgeted amount for the New Technology was available. SAT advised the respondents as to how this amount was to be utilised.

- 18.6 On the same day Vaxiprox submitted a cost estimate to SAT for an amount of R763, 290.42.¹ SAT thereafter issued a purchase order that same day. On 30 April 2014, Vaxiprox issued a tax invoice for the stipulated amount to SAT. According to the respondents, Vaxiprox was, at all material times and with the full knowledge of SAT, representing the supposed Indaba JV.
- 18.7 In early May the respondents were advised by SAT that because the quoted amount for the New Technology was over R500, 000.00 more than one cost estimate was required on record. SAT thus requested another cost estimate from the respondents and Geometry submitted a cost estimate of R763, 290.42- the same amount as that quoted by Vaxiprox.
- 18.8 Upon receipt of the Geometry cost estimate, Mabuela (of SAT) emailed Price to indicate that it was unsatisfactory that the estimates were the same amount. Mabuela requested that a revised 'competitive' Geometry quote be submitted. Price requested an additional cost estimate appearing to be competitive from Campbell of Geometry. Campbell provided the quote, adding a further catering component which increased the quoted amount to R786, 888.42.
- 18.9 Campbell goes to some length to indicate that the revised quotation was inconsequential and issued purely in order to satisfy the internal requirements of SAT. It is also averred that the revised cost estimate was submitted in the full knowledge and sanction of SAT.
- [19] From these facts, the respondents launched two defences. The first was that they were at all material times participants in a joint venture and thus could not be classified as competitors for the purposes of s4(1)(b). The second was that

¹ Magnetic stated that the cost estimate had to be, and was so approved, by the Advertising Production Costs Consultants ("APCC") to ensure that the costs were reasonable and within industry norms.

their conduct was not of the kind that restricted competition. Whilst our decision was predicated on the second defence, we turn to briefly address the first.

Analysis

Joint venture

- [20] The respondents' claimed that they were, at all material times in relation to the Indaba conference, operating as a joint venture. In support of this claim the respondents directed us to email correspondence and the minutes of meetings regarding the Indaba conference in which representatives of both parties were copied and listed as working as one entity under the knowledge of SAT. Further, Geometry indicated that the reason their initial cost estimate was the same as Vaxiprox's was because they used the same supplier as members of the joint ventures. The Respondent's indicated that the genesis of their joint venture was a meeting in 2012 in which Singh instructed the two to work together.
- [21] This narrative was not seriously challenged by the Commission which regrettably failed to call Singh and Price, both of whom worked for SAT at all relevant times and whose evidence regarding the alleged joint venture would have assisted the Tribunal.
- [22] To those claiming to operate as a joint venture, we would caution that whispered agreements at side meetings are poor substitutes for formalised memorandums of understanding or joint venture agreements.
- [23] Regardless, we did not have to make a finding on whether the respondents were in a joint venture because of our approach to the respondent's second defence, to which we now turn.

Did the conduct amount to per se prohibited conduct

[24] The Commission alleged that the respondents contravened sections 4(1) (b) (i) and (iii) of the Act, which read as follows:

4. *Restrictive horizontal practices prohibited*

(1) *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 –*

b) it involves any of the following restrictive horizontal practices:

(i) directly or indirectly fixing a purchase or selling price or any other trading condition;...

(iii) Collusive tendering.

[25] It is settled that s4(1)(b) of the Act delimits conduct which is deemed *per se* prohibited; conduct deemed so inimical to competition that no pro-competitive justification for such conduct may be considered by this Tribunal.²

[26] In the absence of an opportunity to justify *per se* prohibited conduct, it is necessary for the Tribunal to closely scrutinise the actions of a respondent firm/s and satisfy itself that that such conduct amounts to *per se* prohibited conduct.

[27] To this end, we assessed the timeline of events in this matter. The key date and event being 25 April 2014 and SAT's preparation of its purchase order.

[28] On 25 April according to all parties, Vaxiprox submitted a cost estimate of R763 290.42 for new technology to SAT. On the same day, SAT accepted the cost estimate and prepared a purchase order for that amount.

[29] The purchase order contained three sections which Thumbran describes as follows:

"The top part deals with what we referred to as a requisition. So, we first do a requisition. That's normally done by the business owner, the project sponsor.

² Competition Commission vs Eye Way Trading (Pty) Ltd; Seardel Group Trading (Pty) Ltd t/a Berg River Textiles CR073Aug16/CR074Aug16.

After that it goes to our finance department, which is the second part of the purchase order number to confirm that there is indeed budget for this project. Then the third section is the approved supplier, which is where supply chain basically comes in. Only then, after the signature is done under the approved supplier, it becomes an official purchase order.”³

- [30] The top section of the requisition order was filled in on 25 April 2014.⁴ The document is signed by Utermohlen on behalf of Hatting for SAT on 24/25 April 2014 and Utermohlen testified that he had filled in that section of the purchase order on 25 April 2014.⁵
- [31] In response to this purchase order, a tax invoice was constructed by Vaxiprox and dated 30 April 2014. Because the tax invoice references the purchase order number, we were able to conclude that the tax invoice followed the purchase order but whether this document was in fact constructed on 30 April 2014 may be placed in doubt. However nothing turns on this.
- [32] We pause our analysis of the timeline to assess the import of preparing the requisition component of a purchase order. Assuming that the respondents were competitors and that the process surrounding this tender was fully open to the competition dynamics associated therein, we found that the point at which competition ceased would be the point at which SAT accepted a cost estimate from either party. This acceptance would be best represented by the relevant member of SAT preparing the requisition component of a purchase order. At that point in time the relevant member of SAT must have accepted a cost estimate and filled in the requisition order for the accepted amount.
- [33] Returning then to our analysis of the timeline; Geometry submitted that in early May 2014, SAT requested that the Indaba JV provide another cost estimate

³ Transcripts 30 January 2018, page 135 lines 1-12.

⁴ See *purchase order* at page 44 of The Record.

⁵ Transcripts 30 January 2018, page 258 lines 4-8.

appearing to be competitive because the cost for the new technology was over R500 000.00.⁶

[34] An email thread in the record reflects that on 4 May 2014 van Ryswyk (of Vaxiprox) emailed Price and Mabuela (of SAT), forwarding a cost sheet sent from an employee at Geometry. Van Ryswyk wrote:

*"Hi William [Price] we urgently need this PO here is a comparative quote from geometry as requested, please could I ask that you push this as it has been due for some time now."*⁷

[35] We understood the email above to be a response to SAT's request.

[36] The draft cost estimate attached was dated 25 March 2014. Campbell (of Geometry) indicates in her testimony that this must have been a mistake, and that the document must have been a draft quote constructed for another quotation on 25 March 2014 and then edited later for the purposes required by SAT.⁸

[37] Mabuela, an employee in SAT's procurement division was copied into van Ryswyk's email of 4 May 2014. Later that day the email was forwarded to him with a cover mail from his colleague at SAT, Price, which stated:

"Raymond, Brent [van Ryswyk] needs to get this PO urgently please-we've been promising this to him since last week. Please assist and get the PO to Brent for the TechZone costs and INDABA"⁹ [our emphasis].

We took the emphasised phrase to corroborate the conclusion that SAT had accepted Vaxiprox's cost estimate the week earlier on 25 April.

[38] Mabuela responds on 5 May 2014 at 17:21 writing that he had:

⁶ Paragraph 28 of the First Respondent's Answering Affidavit, page 59 of the Record.

⁷ Email dated 4 May 2014 from Van Ryswyk, page 46 of the Record.

⁸ Transcripts 24 April 2014, page 62, lines 11-21.

⁹ Email dated 5 May 2014 from Price, page 46 of the Record.

"requested Geometry quote on Friday to compare quotes and I just got it to you now bc CE [cost estimate] amounts are equal. They need to revised Geometry CE. (sic)"¹⁰ [our emphasis].

[39] Price responds a matter of minutes later, writing:

"No idea why you need a new CE and New APCC approval Ray cause we're changing the scope and staying within the PO amount already sent- endless paperwork is killing is (sic) and may cause non delivery due to delays. I recommend that Brent uses what he has and we recon later"¹¹ [our emphasis]

[40] Mabuela responds to both Price and Van Ryswyk the next morning, 6 May 2014, reminding Price that *"anything above 500k needs two competitive quotes from Geometry Global and Magnetic events [Vaxiprox] to select the cheapest one. In this case all quotes have the same amount"*. The email then addresses van Ryswyk indicating *"Brent myself and Ian we previously explain these to you. Please to fasten approval submit another competitive quote from Geometry Global"¹² [our emphasis].*

[41] Price (of SAT) responds half an hour later:

"Thanks Ray. My head is spinning with all the stuff happening at once. I have asked Fiona to submit her CE. As soon as we get it, we can go with the PO. Hopefully we get this fast."¹³ [our emphasis].

[42] In response to this request, an email with a revised Geometry cost estimate is sent from Geometry to Van Ryswyk of Vaxiprox who forwards the mail on to Price and Mabuela with the cover message *"Grom (sic) Tebogo at GG [Geometry], please issue PO sir, we still need to issue invoice today still."*¹⁴

¹⁰ Email chain dated 5 May 2014, page 45 of the Record.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

¹⁴ Email chain dated 6 May 2014 from van Ryswyk page 642 of the record.

- [43] Campbell indicates that the revised quotation was constructed by adding an additional R20 700.00 to the amount for the catering costs, thereby increasing the estimate total amount to R786 888.42.¹⁵
- [44] From the above, two factual conclusions became abundantly clear. The first was that the cost estimates provided by Geometry were done soon after Vaxiprox's initial cost estimate had been accepted.
- [45] Vaxiprox had submitted the initial cost estimate of R763 290, 42 to SAT and that cost estimate was accepted by the representatives of SAT. This acceptance is recorded as 25 April 2014 on the requisition portion of the purchase order signed by Utermohlen.
- [46] The acceptance on this date is corroborated by Price's mail of 4 May 2014 where he indicates to Mabuela that SAT has been promising Van Ryswyk an official PO "*since last week*".
- [47] What further corroborates the date of acceptance is that, according to Campbell's testimony which we found to be satisfactory, the work in respect of which the cost estimate had been issued would take at least one and half to two weeks and would need to have been completed before the 2014 Indaba started on 10 May 2014.¹⁶ It is axiomatic that that Vaxiprox would not have begun the work and completed such in time if they were not assured that they had, in fact, won the tender.
- [48] Geometry's first quotation only reached SAT on 4 May 2014, after work would have already begun.
- [49] We viewed this factual conclusion as destructive to the Commission's case. If it is assumed that both Geometry and Vaxiprox were competing for the additional tender in relation to New Technology, the competitive process

¹⁵ Transcript 24 April 2018, page 50, lines 4-8.

¹⁶ Transcript 24 April 2018, page 177, lines 5-8.

between the two would have concluded on 25 April 2014. This meant that Geometry's submission of a quotation on 4 May could not amount to the manifestation of an agreement seeking to subvert the competitive process of the tender.

- [50] It is impossible to define conduct committed after the completion of the competitive process as anti-competitive. For one, after SAT accepted Vaxiprox's cost estimate, Vaxiprox and Geometry could not be considered competitors for the New Technology tender. Secondly a post-hoc cover quotation would not have afforded Vaxiprox the ability to manipulate prices in the way a cover quotation submitted prior to the award of a tender would.
- [51] Section 4 is designed to promote competition and prohibits conduct which stifles competition. It does not apply to and cannot be applied retrospectively to events which have already occurred.¹⁷ Put differently, once an institution like SAT has issued a tender and the work required in terms of that tender has already been performed then, unless an agreement to fix the price and to tender collusively had been reached between the parties prior to the tender having been awarded, section 4 does not apply. Even if we were to find that an agreement to fix a price and to tender collusively had been reached, the fact of the matter is that that agreement was reached *ex post facto* (after the event) and at the request of SAT itself. The clear language of this section suggests that the legislature did not intend that section 4 should apply retrospectively to a tender which had already been awarded in accordance with a tender procedure (albeit flawed as in this case) and where the work envisaged in the tender award had already been completed.¹⁸

¹⁷In *S and Another v Acting Regional Magistrate, Boksburg and Another 2012 (1) BLCR 5 (CC)* at para 16 the Constitutional Court stated:

"However, in our common law there is a presumption against retrospectivity. It is presumed that a statute does not operate retrospectively, unless a contrary intention is indicated, either expressly or by clear implication. This presumption is consistent with the fair trial provisions of the Constitution, and was approved by this Court in Veldman".

¹⁸In *S and Another v Acting Regional Magistrate, Boksburg and Another 2012 (1) BLCR 5 (CC)* at para 22, the Court stated:

"In New Clicks, this Court approved the rule laid down in Venter v R, that a court may depart from the clear language of a statute where it—

[52] Geometry's quote and revised quote did not have any impact on the competitive process, but rather allowed a tender, which appears to have been irregularly awarded, to be paid out. Properly interpreted, Geometry's quotation at the request of SAT is a mechanism adopted by SAT to remedy the deficiency in its tender process. This may make SAT, Vaxiprox and Geometry co-conspirators to a fraud, but it cannot amount to conduct inimical to competition.

[53] Mr Subel, for Geometry, submits in his heads of argument that:

*"The time at which the allegedly collusive conduct occurred, was after the decision to award the work had been taken... If one accepts that section 4(1)(b) seeks to prevent practices which are designed to and have as their object or effect the prevention, lessening, restriction and distortion of competition in South Africa, there can be no doubt that the conduct of the parties did not have any pejorative results."*¹⁹

[54] We agree fully with this statement.

[55] The second factual conclusion reached was that the request for both the initial quote from Geometry and the revised higher quote came from SAT itself.

[56] van Ryswyk's email to Price of SAT containing the first of the Geometry bids corroborates Geometry's submission that its initial quote was provided at the request of SAT. The email exchange between Mabuella and Price indicates that SAT were aware that the bids were the same and that SAT thereafter requested a revised bid from Geometry, through Vaxiprox. Price also requests a revised bid directly from Geometry.

"would lead to absurdity so glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations as the Court is justified in taking into account".

In this case, given that the clear language does not lead to absurdity, there was no reason for the High Court to depart from the plain meaning of section 69. Accordingly, section 69 is incapable of disclosing a contrary purpose. The presumption against retrospectivity must therefore prevail.

¹⁹ First Respondents' Heads of Argument, paragraph 78.

- [57] In seeking another quote, it appears that the representatives of SAT understood they were merely paying lip service to procurement requirements and that the quotes were in no way meant to be considered competitive. Thumbran and Mabuela conceded this fact.²⁰
- [58] We considered this factual conclusion destructive to the Commission's case for two reasons. The first is that because Geometry's cost estimate and the revised higher estimate were provided at the request of the SAT we could not conclude, as we could in a conventional cover bid situation, that the cost estimates were the manifestation of an agreement between Geometry and Vaxiprox. In our view, the role of Magnetic was simply to convey the message to Geometry and relay Geometry's bid back to SAT.
- [59] This act on the part of Vaxiprox, which required payment for the work which it had already done, can hardly be described as Vaxiprox having reached an agreement with Geometry consistent with the language of section 4(1) of the Act.
- [60] The second reason this factual conclusion was destructive to the Commission's case was that it indicated that SAT never considered the tender in question a competitive one.
- [61] It is trite that an essential feature of a conventional tender process is the expectation on the part of the client that it will receive, as a response to its request, a number of independently articulated bids formulated by contractors independent of each other.²¹ The tender process is thus designed to induce competition in a very structured way by facilitating independent conduct of potential service providers.²² It follows then that conduct should amount to collusive tendering when it amounts to an agreement or communication

²⁰ Mabuela: Transcript 28 March 2018, page 96 lines 13-17; Thumbran: Transcript 30 January 2018, page 140, line 19 to page 141, line 7.

²¹ See paragraph 208 of UK decision *Apex Asphalt and Paving Co limited v OFT [2005] CAT 4*.

²² *CC v Eye Way Trading (supra)*, paragraphs 50-54.

between competitors that undermines the expectations of the client for independently articulated bids.²³

- [62] In the present matter, we found that, on the evidence provided, SAT and its agents never formed the expectation of a competitive tender process and never considered the submission of Geometry's bid as a component of such. Seemingly, the purpose of Geometry's bids were to create the impression of a competitive process to third parties. This then differentiates the facts in this case from conventional collusive tendering actions where there is an agreement to create the impression of a competitive process *to the client*.

Conclusion

- [63] The Commission had the burden to prove, on balance of probabilities, that the actions of the respondents amounted to conduct prohibited by s4(1)(b) of the Act. On the basis of these facts and our analysis above, we find that the Commission has failed to discharge its onus.

- [64] We found that the conduct of SAT, Geometry and Vaxiprox, in this particular factual complex could not have amounted to that prohibited by the Act. And the case stands to be dismissed.

Costs

- [65] Both respondents requested an order of costs against the Commission.
- [66] The Tribunal is however bound by the Constitutional Court's ruling in the *Pioneer* case, which maintains that

²³ Ezrachi A, EU Competition Law 4th Ed. page 135.

*"The correct interpretation is therefore that the Tribunal has no powers to award costs against the Commission under the Act"*²⁴

However, we take this opportunity to record some of our observations in this matter.

- [67] It would appear that Ms Roshene Singh who apparently instructed the parties to work together left the employ of the SAT in 2012. We could find no basis on which the respondents could simply have assumed that the instruction given to them by Ms Singh to work together could apply to future Indabas, especially in this instance, the 2014 Indaba. The manner in which SAT dealt with the procurement processes in respect of the 2014 Indaba suggests that there may have been governance lapses which may have been exploited by the respondents. The respondents had done work for SAT for many years and should have been aware that the tender procedures were not being complied with fully or at all.
- [68] These matters should perhaps be fully investigated by SA Tourism itself or any other appropriate body.

²⁴Competition Commission of South Africa v Pioneer Hi-Bred International Inc and Others 2014 (3) BCLR 251 (CC) (18 December 2013) Para 40.

ORDER

- [1] The matter is dismissed.
- [2] No order is made as to costs.



Mr Enver Daniels
Mr Anton Roskam concurring.

3 October 2018

Date

Tribunal case manager : Alistair Dey van Heerden and Jonathan Thomson

For the Commission : Adv Mothibe *assisted by* Mr D Mogaswa of Mogaswa Inc.

For the first respondent : Adv A Subel SC *assisted by* Adv C Bester *instructed by* Tabacks Attorneys

For the second respondent : Adv C Rip *instructed by* Faber Goértz Ellis Austen Inc.

MINORITY REASONS

Per M Mokuena

- [1] I concur with my learned panel members that the Commission failed to discharge its *burden to prove that the respondents contravened section 4(1)(b) of the Act and that case stands to be dismissed*. In addition that each party pay its own costs.
- [2] Indeed after the cost estimate of Vaxiprox was accepted by SAT and its subsequent request for a second quotation which Geometry provided, the question of price fixing and or collusive tendering did not arise. Secondly, having compelled Geometry to provide a higher quotation than the accepted cost estimate, that does not fall foul of the Act. Thirdly, post tender conduct does not constitute collusion.
- [3] However, it would be remiss not to make remarks that follow in these paragraphs. The respondents succeeded for their pitch in response to SAT's Activation tender and were appointed competing sub-contractors individually.²⁵ This is clearly set out in the letter of appointment dated 24 March 2010. The opening paragraph of both letters to Geometry and Vaxiprox reads "*South African Tourism wishes to thank you for your organisation's recent pitch for this tender following your short-listing. The quality of pitches received was generally extremely high which made the final selection of the preferred bidder very difficult.*" In the letter of appointment the respondents were informed that they were expected to sign a 42 months non-exclusive agreement with Ireland Davenport.²⁶ These letters did not refer to the joint venture between these

²⁵ Letters to the respondents dated 24 March 2010 "*The agreement will specifically provide that only Magnetic Event Management and Brand Activation will be asked to provide cost estimates for all briefed activations and other assignments that SA Tourism may deem fit and SAT Tourism will select the cheapest quote unless extraordinary circumstances apply and SAT's CFO agrees to a higher quote as per its Supply Chain policy.*"

²⁶ Paragraph 2 and 3 of the appointment letters pages 328 and 330 of Bundle 2.

respondents.²⁷ It is apparent from the contents of the letters that they competed for the SAT tender. This is also confirmed by Ms Campbell in her testimony that Magnetic had submitted a tender independent of Brand Activation.²⁸

- [4] Magnetic's decision to tender independently displeased Geometry. In her own words Ms Campbell said

*"It was the actual tendering in the document. So we were not happy that they had gone off on their own and had tendered by themselves. We had believed that we were going to go in as a team. When that had not happened, then they had gone in separately, we literally said to them they were no longer welcome to come and work on any business within Ogilvy and we had put a block to any work being put through the Ogilvy campus, which was quite a big thing, because Ogilvy being such a big operation, it meant that that put a slump on their workflow, because we at that stage had a lot of work that they were getting from us, not just on SAT."*²⁹

This suggest that for as long as Magnetic continued to rely on Ogilvy for work, and not tender independently, it was welcome. If it steps out on its own, Geometry would deal with it. This is suggestive of anti-competition and contravention of section 4(1)(b). However the saving grace in this case is that, the quotation was submitted after Vaxiprox's cost estimate had been accepted and approved by SAT.

- [5] From Ms Campbell's own testimony Brand Activation was unhappy that Magnetic had tendered independently for the activation SAT tender.³⁰ Magnetic's action resulted in a *fractured* work relationship between the respondents.³¹ The fact that Magnetic had competed with Brand Activation in

²⁷ In her affidavit on page 3 paragraph 8 she said "Geometry and Magnetic Events were required to quote on each brand activation job by each submitting cost estimates to SA Tourism. SA Tourism will the select the most competitive between the two cost estimates and approve the sub-contract to either Geometry or Magnetic Events."

²⁸ Page 17 of the transcribed record of 24 April 2018.

²⁹ Ibid page 17 – 18.

³⁰ Ibid page 17.

³¹ Ibid page 18 line 13.

the *whole tender, for the entire tender* made Brand Activation unhappy.³² It is apparent that the respondents were not in any joint venture for purposes of the SAT tender thus, Magnetic tendered on its own. Ms Campbell did not submit evidence that there was a joint venture between the two respondents except that there was an expectation that they would bid together.³³

[6] It is evident from her testimony that the fractured work relationship was the cause of Ms Singh in a meeting, telling them to co-operate and work together.³⁴ The magnitude of Indaba did not make room for the two companies which were the only *like for like business* in the whole project to not work together.³⁵ Ms Singh's request that they collaborate, co-operate with each and work together was not intended for the respondents to jointly tender as sub-contractors, but concern for the success of Indaba.

[7] At the time of the Indaba 2014, the agreement between Ireland Davenport and SAT had been terminated and Ms Singh was no longer working for SAT. So, it is improbable that Ms Singh's instructions to the respondents to work together extended beyond her term of employment at SAT. It is also clear and unequivocal that the Ireland Davenport and SAT Agreement was already terminated at the time of the Indaba 2014. It follows that the contract of the respondents also came to an end if one takes into account clause 2.4 of Partner Agency Appointment Agreements (the Partners Agreement).³⁶ Therefore the issue of partnership which Ms Campbell alluded to in her testimony had ended.

³² Ibid.

³³ Ibid page 17 line 19.

³⁴ Ibid page 19 – 20 "*So we then had this meeting with Roshne, she asked us to please work together in a meeting afterwards she was aware that we were at each other's throat and that we were really not happy, ... So there was no kind of clandestine type meeting, it was just like she was well aware of the fact that we were kind of a little scratchy with each other and she just wanted the best in Indaba she could possibly have.*"; See page 21 line 15 -18; page 16 line 7 – 11; page 22 line 9 – 12 and 15 – 16.

³⁵ Ibid page 22 line 2 - 6 Ms Campbell's testimony; on page 23 line 20 in her response to Mr Subel's request for her to explain why they worked together as competitors, she said "*Sir as I tried to explain the scale of this event.*"; Page 24, she emphasised that the Indaba "*Is a major, major event that happens over 3 days and that is robust, it is very, very big and no single company, small company could do that at all. You have to have communication and there has to be a lead.*"

³⁶ Partner Agency Appointment Agreement between Ireland Davenport and Brand Activation as well as Ireland Davenport and Vaxiprox.

The effect of its termination was that the respondents' appointment as the sub-contractors also came to an end.³⁷

- [8] Emphasis was placed on the SAT was aware of the working relationship between the respondents. However this does not change the reality that, they are in fact and in law competitors. Their explanation that the Indaba is too big for them as small firms to work independently and or alone is reasonable, thus the two were appointed sub-contractors and were requested to work together. Outside the peculiar circumstances in the present case, where a quote was submitted after SAT had already accepted the cost estimate of Vaxiprox, their actions would have contravened section 4 of the Act.
- [9] The suggestion that SAT never intended the tender to be a competitive bid, is incorrect. That cannot be the case and flies in the face of the contents of the appointment letters given to Brand Activation and Vaxiprox dated 24 March 2010. However, it is correct that the subsequent request for a second more expensive quotation, was not a tender, but a mechanism to comply with the internal requirements, which stems from the Public Finance Management Act of 1999 read with the Treasury Regulations.
- [10] In conclusion neither SAT nor the respondents conducted themselves in an exemplary manner. They did not make the work of the Commission easy by not availing information that was in their exclusive knowledge. Unfortunately the Commission chose to pursue the matter irrespective of evidentiary challenges it was facing.

³⁷ Clause 2.4 of the Partner Agency Appointment Agreement.