competitiontribunal
south africa

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CR212Feb15

In the matter between:

THE COMPETITION COMMISSION	**APPLICANT**
and	
DELATOY INVESTMENTS (PTY) LTD	**1ST RESPONDENT**
DELATOY GROUP HOLDINGS (PTY) LTD	**2ND RESPONDENT**
ATPD PROPERTIES (PTY) LTD	**3RD RESPONDENT**
DREAM WORLD 344 (PTY) LTD	**4TH RESPONDENT**
DREAM WORLD 345 (PTY) LTD	**5TH RESPONDENT**
PATRICK DONOVAN DELAMERE NO	**6TH RESPONDENT**
FRANCOIS KOCH NO	**7TH RESPONDENT**
TONYA ELIZABETH DELAMERE NO	**8TH RESPONDENT**
ANDREW DAVID TOY NO	**9TH RESPONDENT**
PATRICK JAMES ROWAN TOY NO	**10TH RESPONDENT**

HILTON SOMAH GORDON NO **11TH RESPONDENT**

CYCAD PIPELINES (PTY) LTD **12TH RESPONDENT**

PHAMBILI PIPELINES (PTY) LTD **13TH RESPONDENT**

Panel	:	Medi Mokuena (Presiding Member) Anton Roskam (Tribunal Member) Prof. Imraan Valodia (Tribunal Member)
Heard on	:	16 and 18 November 2015
Closing Argument	:	30 November 2015
Order issued on	:	14 April 2016
Reasons issued on	:	14 April 2016

Decision and Order

INTRODUCTION

[1] The two main issues before the Tribunal are whether the first to eleventh respondents constitute a firm for the purposes of the Competition Act 89 of 1998 ("the Act") and whether the complaint has prescribed in terms of Section 67(1) of the Act.

THE COMPLAINT

[2] The complaint concerns collusive tendering. The Commission discovered the collusive conduct during its Fast Track Process in the construction sector. The Commission alleged that the respondents were involved in cartel conduct in the market for the construction of steel pipelines. The contravention was in relation to the Thabazimbi Project, which Boynton Investments (Pty) Limited ("Boynton")

and Barrick Platinum South Africa (Pty) Limited ("Barrick") had issued a tender for.

[3] The Thabazimbi Project was the construction of a pipeline of approximately 31 kilometers ("km") in length from Padda Junction to Tuschenkomst, for the Pilanesberg platinum mine at Northam. The Commission concluded that on or about February 2008, the first, twelfth and thirteenth respondents entered into a collusive tendering agreement in contravention of Section 4(1)(b)(iii) of the Act in relation to the Thabazimbi Project.

[4] The collusion involved an agreement in terms of which the first, twelfth and thirteenth respondents agreed to inflate their tenders by about R2 million rand and that the company awarded the tender would pay the others a loser's fee ("the Loser's Fee Agreement"). The twelfth respondent ("Cycad") won the tender and paid the others their loser's fees from the amount by which the tender price was inflated. However, when it came to paying the first respondent ("Delatoy Investments"), Cycad was directed by Delatoy Investments to pay the third respondent ("ATPD"). ATPD issued Cycad with a fictitious invoice for the hire of "equipment" in respect of the fee paid.

[5] Delatoy Investments admits that it contravened Section 4(i)(b)(iii) of the Act. However, at this stage it has no assets.

ISSUES TO BE DECIDED

[6] The Commission and the respondents attended a pre-hearing on 28 October 2015. At the conclusion of the pre-hearing the Tribunal directed that the second to eleventh respondents' points relating to group liability and prescription should be determined first.

[7] The second to eleventh respondents dispute that they, together with the first respondent, which for convenience we refer to as the Delatoy Group, constitute a firm for purposes of the Act.

[8] The Delatoy Group contends that the Commission's complaint has prescribed in terms of Section 67(1) of the Act, and should, therefore, not be heard by this Tribunal.

[9] Therefore, the issues to be determined are whether:

(i) the Delatoy Group constitutes a firm for purposes of the Act; and

(ii) the complaint has prescribed in terms of Section 67(1) of the Act.

THE PARTIES

[10] The Applicant is the Commission, a regulatory body established in terms of Section 19(1) of the Act as a juristic person with its offices at Block C, Mulayo Building, 77 Meintjies Street, Sunnyside, Pretoria.

[11] The first respondent is Delatoy Investments (Pty) Ltd ("Delatoy Investments"), a private company duly incorporated in terms of the company laws of the Republic of South Africa ("RSA"). Delatoy Group Holdings (Pty) Ltd ("Delatoy Holdings") holds 100% of the shares in Delatoy Investments.

[12] The second respondent is Delatoy Holdings, a company duly incorporated in terms of the company laws of RSA. The shares in Delatoy Holdings are jointly held by Dream World Investments 344 (Pty) Ltd ("Dream World 344") and Dream World 345 Pty Ltd ("Dream World 345").

[13] The third respondent is ATPD Properties (Pty) Ltd ("ATPD"), a company duly incorporated in terms of the company laws of RSA. The shares in ATPD are jointly held 50% by Dream World 344 and Dream World 345.

[14] The fourth respondent is Dream World 344, a company duly incorporated under the company laws of RSA. The PDD Family Trust ("PDD Trust") holds 100% shares in Dream World 344.

[15] The fifth respondent is Dream World 345, a company duly incorporated under the company laws of RSA. The Andrew Toy Family Trust ("the Toy Trust") has 100% shareholding in Dreamworld 345.

[16] The sixth respondent is Patrick Delamere ("Mr Delamere"), in his capacity as a trustee of the PDD Trust. Mr Delamere is one of the Directors of Delatoy Investments and Delatoy Holdings. Mr Delamere is also the sole Director of Dream World 344.

[17] The seventh respondent is Mr Francois Koch ("Mr Koch"), in his capacity as a trustee of the Family Trust. Mr Koch is also the accountant of the various entities that form part of the Delatoy Group.

[18] The eighth respondent is Ms Tonya Elizabeth Delamere ("Ms Delamere"), in her capacity as a trustee of the PDD Trust.

[19] The ninth respondent is Mr Andrew David Toy ("Mr Toy), in his capacity as a trustee of the Andrew Toy Family Trust ("Toy Trust"). Mr Toy is also one of the Directors of Delatoy Investments and Delatoy Holdings. Mr Toy is also the sole Director of Dream World 345.

[20] The tenth respondent is Mr Patrick James Rowan Toy ("Mr Rowan Troy"), in his capacity as a trustee of the Toy Trust.

[21] The eleventh respondent is Mr Hilton Somah Gordon ("Mr Gordon"), in his capacity as a trustee of the Toy Trust.

[22] The twelfth respondent is Cycad Pipelines (Pty) Ltd ("Cycad"), a company duly incorporated in terms of the company laws of RSA. The Commission seeks no relief against Cycad and Cycad is cited purely for the interest it had in this proceeding, on account of a settlement agreement with the Commission on 14 July 2014. The consent agreement was made an order of the Tribunal on 19 August 2014.

[23] The thirteenth respondent is Phambili Pipelines (Pty) Ltd ("Phambili"), a company duly incorporated in terms of the company laws of RSA. Phambili was, until 2010 a wholly-owned subsidiary of Valente Brothers (Pty) Ltd ("Valente")

which was acquired by Basil Read Holdings ("Basil Read") in 2010. Phambili is now a subsidiary of Basil Read. Again the Commission seeks no relief against Phambili.

IS THE DELATOY GROUP A FIRM?

[24] To address this question, it is important to sketch a background on the shareholding and structural changes in the Delatoy Group between 2008 and 2014, and how it conducted business.

[25] In 2008 the Inyathi Trust[1] and the Patrick Delamere Family Trust ("Delamere Trust") each held 50% of the shares in Shearwater Group Holdings (Pty) Ltd, presently known as Delatoy Holdings. Delatoy Holdings held 100% of the shares in Shearwater Construction (Pty) Ltd ("Shearwater Construction"), presently known as Delatoy Investments. At that time, Delatoy Holdings also held 100% of the shares in Shearwater Plant, as well as, 32% of the shares in Shegowane Construction (Pty) Ltd ("Shegowane"). K Govender held the remaining 68% of the shares in Shegowane.

[26] The Inyathi Trust and the Patrick Delamere Family Trust were succeeded and / or replaced by the Toy Trust and PDD Trust respectively. In addition to this, according to the new structure the Toy Trust, held 100 % of the shares in Dream World 345 and 50% of the shares in ATPD. At the same time the PDD Trust held 100% shares in Dream World Investments 344 and 50% of the shares in ATPD. It is submitted by the Delatoy Group in its papers that in 2008, Dream World 344, Dream World 345, ATPD, the Toy Trust and the PDD Trust had no ties in terms of shareholding to Delatoy Holdings, Delatoy Investments, Shearwater Plant, as well as, Shegowane.[2]

[27] In 2008, Esor purchased all the shares in Shearwater Plant in terms of a written agreement dated 26 September 2008. The Delatoy Group submitted in their answering papers, that Delatoy Investments sold its entire shareholding in

[1] The Inyathi Trust and Delamere Trust were not cited as a respondent in these proceedings as they were dissolved in 2014.
[2] See pages 32 of the Delatoy Group's answering affidavit.

Shearwater Construction to Shearwater Plant, which was then sold to Esor. It is important to note that the Shearwater Construction was sold to Shearwater Plant on 25 September – the day before Shearwater Plant was sold to Esor. The company no longer conducted the erstwhile business of Delatoy Investments.[3] During 2012, the shareholdings of the Delatoy Group changed. An additional layer was brought into play in that the Trusts no longer had any direct shareholding in Delatoy Holdings but Dream World 344 and Dream World 345, in which The Toy Trust retained its 100% shareholding in Dream World 345, and the PDD Trust retained its 100% shareholding in Dream World 344.

[28] The Commission's investigation into the alleged involvement of Shearwater Construction in anti-competitive conduct revealed that Shearwater Construction, Cycad and Phambili had tendered for the Thabazimbi Project in 2008. The three companies – Shearwater Construction, Cycad and Phambili – agreed to inflate their bid prices by R2 million, and for the winner to pay a loser's fee to each of the two companies that would lose the bid. Cycad won the tender, and Shearwater Construction and Phambili lost the bid. The agreed loser's fee was paid to Shearwater Construction through ATPD, in an amount of R1 143 420. The agreed loser's fee was paid pursuant to an unlawful collusive agreement concluded on / or about 28 February 2008, between Shearwater Construction, Cycad and Phambili. ATPD rendered fictitious invoices to Cycad[4], which Cycad duly paid. These invoices were allegedly for "equipment", which it is common cause that, was never supplied to Cycad. The Commission's investigation suggested that Shearwater Construction was sold to Esor. Esor corrected this view, and explained that in fact it bought Shearwater Plant, and not Shearwater Construction (which was sold to Shear Water Plant). It would appear that a lot of structural changes had taken place pertaining to the various firms that make up the Delatoy Group.

[29] The Commission decided to refer to the Tribunal, an allegation of collusive conduct against the "Delatoy Group". The Commission believed that the various structural changes to the Delatoy Group were made to cover up the tracks of

[3] See page 32 of the answering affidavit of the Delatoy Group.
[4] See p182 of the transcript, where Mr Rossouw admitted that his clients committed fraud by creating fictitious invoices, he however said that fraud does not mean there is contravention of Section4(1)(b)(iii)

firms that were involved in the alleged conduct.[5] It also came to light that there were other players behind Shearwater Construction that were involved in the orchestration of the anti-competitive conduct.

THE HEARING

[30] During the hearing, the Commission called the following witnesses:

(i) Mr Mokgale Mohlala ("Mohlala"), the lead investigator in the matter;

(ii) Mr Mehluli Nxumalo ("Nxumalo"), the investigator who took over from Mr Mohlala; and

(iii) Mr Alfred Henry Smith (Smith"), who was the CEO of Cycad at the time of the alleged conduct.

[31] The Delatoy Group had scheduled Mr Delamere to appear as a witness on its behalf, but elected not to call Mr Delamere to give evidence during the hearing. The Delatoy Group relied on the affidavit deposed to and filed on its behalf by Mr Delamere. The value placed on evidence that is untested by cross-examination is of little worth and less persuasive than the evidence of a cross-examined witness.

[32] The Commission submitted that for purposes of the Act, the Delatoy Group was a "firm". Its argument was twofold. Its first argument was that Cycad, Phambili and Shearwater Construction (Delatoy Investments) were in a horizontal relationship and consequently, competitors. Furthermore, as competitors, they concluded a collusive agreement pursuant to which, a loser's fee was paid to the Delatoy Group in contravention of Section 4(1)(b)(iii) of the Act. Lastly, that accordingly the Delatoy Group should pay the administrative penalty, which the Tribunal may impose in respect of the collusive agreement. The reason for the submission is that the evidence shows that the Delatoy Group is a single economic entity. This would be on the basis that the companies in the Delatoy Group were mere instruments in the hands of Messrs Delamere and Toy, who ultimately controlled the Delatoy Group and directed its

[5] See the structure submitted by the first to eleventh respondents' legal team marked Exhibit F and by the Commission's Exhibit A

corporate affairs for the benefit of the two family trusts, namely the PDD Trust and Toy Trust.

[33] The second argument was that even if the Delatoy Group (or some of its constituents) were not a "firm" for purposes of the Competition Act, the Tribunal would still be entitled to impose a penalty upon it, because of the strategy embarked upon by the Delatoy Group, to assist Delatoy Investments to avoid liability to look beyond corporate personality and attribute the conduct of Delatoy Investments to the Delatoy Group.

[34] The Commission requested the Tribunal to find the Delatoy Group liable for an administrative penalty if, we find that it is a "firm" and that it contravened section 4(1)(b)(iii) of the Act. It would be premature to pronounce on the liability of the Delatoy Group, because that is not the issue we are seized with in this proceeding. Our obligation is limited to determining whether or not the Delatoy Group is a "firm", and if in fact, prescription has set in on the complaint the Commission referred to the Tribunal (which has already been answered in the first part of these reasons).

THE DELATOY GROUP'S CASE

[35] The Delatoy Group did not refute the Commission's submission that Delatoy Investments (then known as Shearwater Construction), Cycad and Phambili were, in fact and in law, engaged in collusive tendering, which culminated in the conclusion of a Loser's Fee Agreement in respect of the Thabazimbi Project. The Delatoy Group merely contended that it is and was not a "firm".

[36] In the Delatoy Group's submission, it was argued that whether or not the "Delatoy Group" was involved in bid rigging, can be disposed of by means of a proper interpretation of the word "firm" as defined in the Act. It was the Delatoy Group's submission that *if a "firm" is a single business entity and if it does not include the concept of a group of companies, it should be the end of the enquiry.*

[37] The Delatoy Group also suggested that we deal with the interpretation of the word "only" in terms of Section 59(1) of the Act. Section 59(1) is irrelevant to the questions we are seized with. As already pointed out, we cannot venture into the realm of finding who is responsible for paying a fine, when that question is not even before us.

OUR ANALYSIS

[38] We are in agreement with both parties to this dispute that, in determining whether or not the Delatoy Group is a firm, the definition of the word "firm" in the Act is the starting point. The Act does not define a "firm" but tells us what a "firm" includes i.e. "*firm includes a person, partnership or a trust*".

[39] It is clear from what the word "firm" includes that it is not restricted to or limited to liability companies, but is inclusive of natural persons, trusts and partnerships. The Delatoy Group as referred to, by the Commission in its referral, consists of natural persons, trusts and companies.

[40] We accept and understand that the word "firm" can mean different things in different contexts. It could mean an economic entity, or a group where the component parts of it are related to each other in such a way that they constitute a single economic entity. The second route is what the Commission referred to as the "attribution doctrine", better known as the "doctrine of the piercing of the corporate veil". The Commission submitted that whichever route is taken, both will arrive at a similar conclusion that persons, companies and Trusts entities that constitute, or comprise the Delatoy Group, is a firm, and are jointly and severally liable for any administrative penalty the Tribunal may impose on the Delatoy Group. These two routes will be explored further below.

[41] The Commission submitted that when trying to establish whether the Delatoy Group as it stands is a "firm", one must not look at the company law perspective of separate legal personality. The Commission submits that the relevant concept for purposes of an economic statute such as the Act, is the economically functional relationships between entities.

[42] The Commission further submitted that, in this present matter, one needs to look at the behaviour of the two main Directors (Messrs Delamere and Toy, who were common joint directors in Delatoy Investments, Delatoy Holdings and ATPD, as well as individually investment companies of the Trusts i.e. Dream World 344 and Dream World 345) of Delatoy Investments at that time, and evaluate their fiduciary duties to Delatoy Investments and the wider Delatoy Group. They deliberately decided to not collect the loser's fee for Delatoy Investments directly in pursuit of performance under the "Losers' Fee Agreement within the Delatoy Investments company vehicle. Instead, they used another company, ATPD, within the Delatoy Group, which they jointly controlled, and in which, they were the two directors to collect the proceeds of the loser's fee.

[43] Neither in the affidavit deposed to by Mr Delamere, nor during the hearing was an explanation proffered by the first to the eleventh respondents with regard to the following:

a) Why was the loser's fee not paid directly to Delatoy Investments?

b) Why was the loser's fee paid to ATPD?

c) Why did ATPD issue five false invoices for hiring out equipment to Cycad, when none was in fact hired by Cycad?

d) Why was there a need to disguise the payment?

e) Why was Delatoy Investments' assets subsequently stripped, and why was it left with R1000.00?

f) Why were the proceeds of the loser's fee then subsequently transferred, in the form of dividends, to the two family trusts controlled by Messrs Delamere and Toy?

[44] The conduct of Messrs Delamere and Toy speaks volumes (they suggest that the Delatoy group is one single economic entity). Revenue due to Delatoy Investments is directed to ATPD. Messrs Delamere and Toy are the only directors of Delatoy Investments and Delatoy Holdings, and both of them

manage these companies. Mr Smith's unrefuted evidence is that, Delamere called him and, reminded him of the loser's fee payable. Subsequently ATPD sent the invoices for payment to Cycad, which, were paid. Mr Smith did not query the invoices, because he knew what they represented, thus, Cycad paid without any protestation, or raising any questions.

[45] It is appropriate and important to remind ourselves of the link between ATPD and Delatoy Investments. These companies are all in the same stable, and could be viewed as the 'Delatoy Group'. ATPD shares were 50%/50% held by the PDD Family Trust and Andrew Toy Family Trust, which family trusts are for Messrs Delamere and Toy respectively. In 2011, the structure of the Delatoy Group changed again, which, resulted in Dream World 345 and Dream World 344 directly holding equal shares in ATPD.

[46] We accept the evidence led by the Commission that dividends paid to the Delatoy Holdings and the two trusts between 2008 and 2011, was borne out by the Annual Financial Statements of the various companies:

a) In 2008 Delatoy Investments paid R9, 000, 000.00 dividends to Delatoy Holdings;

b) In 2009, before it was sold, Delatoy Investments paid R27, 472, 140.00 dividend to Delatoy Holdings, which in turn paid the dividends to the two trusts;

c) In 2010 Delatoy Investments paid R29, 912, 826.00 to Delatoy Holdings which was retained and not paid to its shareholders;

d) In 2011 Delatoy Investments paid a dividend to Delatoy Holdings in the amount of R30, 656, 275.00.

[47] The financial activities were not limited to dividends only, but also to *soft, uncommercial loans between members of the group* which were made: ATPD owed Shearwater Plant R961, 311.00 and R4, 000, 000.00 to PDD Family Trust and Andrew Toy Family Trust respectively in the financial year end February 2007;

a) ATPD owed Shearwater Plant Hire R1, 032, 347.00 and Delatoy Investment R7, 984, 695.00 in the financial year end February 2008;

b) Shearwater Plant Hire owed Delatoy Investments R4, 016, 531.00 and ATPD owed R2, 695, 430.00 in the financial year end February 2007;

c) Shearwater Plant Hire owed Delatoy Investments R3, 223, 430.00 and R7, 984, 695 in the financial year end February 2008;

d) ATPD owed Delatoy Investments R29, 912, 826.00 in the financial year end February 2009;

e) Shearwater Plant Hire, ATPD, ATPD Investments and Shegowane Constructions owed Delatoy Investments R3, 987, 361.00 in the financial year end February 2006;

f) Shearwater Plant, ATPD, ATPD Investments and Shegowane Construction owed an unsecured loan for an indefinite period with no fixed repayment terms to Delatoy Investments in an amount of R6, 722, 065.00 for the financial year end February 2007;

g) Shearwater Plant, ATPD, ATPD Investments and Shearwater Construction owed an unsecured loan for an indefinite period with no fixed repayment terms to Delatoy Investments of R11, 969, 568.00 in the financial year end February 2008;

h) ATPD owed an unsecured loan for an indefinite period to Delatoy Holdings of R67, 935, 758.00 in the financial year end February 2009; and

i) ATPD advanced an unsecured loan for an indefinite period with no fixed repayment terms to Delatoy Holdings of R6, 770, 475.00 in the financial year end February 2010.

[48] Cumulatively, the evidence in paras 43-49 suggests that the Delatoy Group acted as a single economic entity, consequently constitutes a "firm" under or for the purposes of the Act. Consequently the conduct of the Delatoy Investments

(Shear Water Construction) is imputable to Delatoy Holdings, the Trusts and the natural persons referred to in this matter. We align ourselves the Judgment of The Court (Third Chamber) in *AKZO Nobel Nv and 4 others v The Commission of the European Community*[6]. The Court in AKZO after considering all the facts, including the separate legal personality of the wholly owned subsidiary (the subsidiary) to the parent company, the fact that the subsidiary was not conducting itself independently from the parent company in the markets, the possible influence of, and / or use, of its power by the parent company, regard being had *in particular to the economic, organisational and legal links between those two legal entities* and the presumption that the parent company exercise decisive control over the subsidiary, came to the conclusion that the infringement of the competition law can be imputable jointly and severally to the parent company and others in the group which constitute a unit. *"It must be observed in that connection that, as it is clear from paragraph 56 of this judgment, Community competition law is based on the principle of the personal responsibility of the economic entity which has committed an infringement...."*[7] The Delatoy Group's conduct fits that of an economic entity.

[49] The common thread in the control of the Delatoy Group is the two directors (Delamere and Toy) in Delatoy Holdings, Delatoy Investments, ATPD and their respective positions in Dream World Investments 344 and Dream World Investments 345 and their trusteeship in their respective family trusts. These directors were aware of the collusive tendering and its unlawfulness. They did everything within their power to conceal it, together with the loser's fee payments resulting therefrom, restructuring the Delatoy Group more than once, including selling Delatoy Investments assets to Shearwater Plant then to Esor, paying out large dividends and stripping Delatoy Investments of its assets. We therefore agree with the submission of the Commission that the Delatoy Group *"...achieved multiple aims; illegal collusive agreements, its concealment, fraud, and sale of the business of Delatoy Investments together with Shearwater Plant. All the benefits of the ultimate owners of the Delatoy Group, Mr Toy and Mr Delamere. But this involved abusing the corporate personality of the entities in*

[6] 10 September 2009
[7] See paragraph 77 of the AKZO decision.

the Delatoy Group. The source of all this abuse was the collusive agreement, and the desire to escape liability." [8]

[50] The kind of conduct engaged in by the Delatoy Group, the Commission submitted is clear evidence that, there is greater co-operation amongst Delatoy Group (which extends to acting fraudulently),[9] which is suggestive that these entities are indeed a "firm" in terms of the Act.[10] They act as a single economic activity. Delatoy Investments and ATPD were instruments in the hands of the two directors. Effectively, they are a single economic unit.

[51] The submission by the Delatoy Group that we should not make much of the group's conduct falls. We do not accept the submission of the Delatoy Group that, it cannot be dealt with as one economic entity, for its conduct for all intent and purposes was that of a single economic entity.

[52] The Delatoy Group's submission is bad in fact and law. We thus, cannot agree with the Delatoy Group on its submissions, because the relationship we are more concerned about, is not in relation only to the activities of the entities within the Delatoy Group, but rather the relationship of how they conduct themselves within the Group. By this, we are referring to the evidence before us which shows us that, there are common directors and common shareholding in all the entities in the Delatoy Group.[11] Moreover, the conduct of the directors, Delamere and Toy, demonstrate that the various entities in the Group were used as part of a wider strategy for example, ATPD was used to receive the loser's fee, and then to conceal this, although it did not participate in collusion. In the case in *casu*, the facts buttress the argument that the directors did not govern the companies in the Delatoy Group distinctively. In fact, the directors conflated the exercise of their fiduciary duties within the Delatoy Group.

[53] Other jurisdictions have decided the question of single economic activities. In this instance we will look at the European Community's ("EC") approach on the economic activity of an entity. In order to understand what a "firm" is for

---

[8] See paragraph 80 page 37 of the Commission's Heads of Argument.
[9] See page 183 of the transcript of the hearing.
[10] See page 130 of the transcript of the hearing.
[11] See the organogram submitted by the Delatoy Group Exhibit "F1:

purposes of the Competition Act, our law recognizes that one must focus on the economic activity of the entity concerned. The EU Article 101 (old article 81) of the EC Treaty is the equivalent of section 4 of our Competition Act. It prohibits "undertakings" – equivalent to "firms" in our Competition Act – from engaging in anti-competitive conduct, which includes collusive tendering of the sort that took place in this case. An "undertaking" has been understood in the EC Treaty to include limited liability companies, partnerships, sole traders, or self-employed professionals.

[54] The EU jurisdiction when faced with similar circumstances has chosen not to be fixated with the structure of a collection of entities, but to rather concentrate on how the entities are put to work in a fashion, which does not observe separation of persons. It would then not make sense to consider such entities as being separate when it comes to determining liability under the Competition Act. This is clearly evident in the *Tokai Carbon*[12] case where the court of first instance held:

> *"Article 81(1) EC is aimed at economic entities made up of a combination of personal and physical elements which can contribute to the commission of an infringement of the kind referred to in that provision".*[13]

[55] The EU also held that in order to determine whether an entity is an "undertaking" one has to look at the functional approach of such entity. This was clearly stipulated in the Bundesverband[14] *case* where the Court of Justice held:

> *"the Court's general approach to whether a given entity is an undertaking within the meaning of the Community, competition rules can be described as functional, in that it focuses on the type of activity performed rather than on the characteristics of the actors which perform it, the social objectives associated with it, or the regulatory or*

[12] Tokai Carbon Co Ltd v Commission of the European Communities (T-71/03) (CFI) [2005] 5 C.M.L.R. 13.
[13] Ibid
[14] *AOK Bundesverband and Others v Ichthyol-Gesellschaft Cordes, Hermani & Co and Others* [2004] 4 C.M.L.R. 2

funding arrangements to which it is subject in a particular Member state".

[56] We agree with the EU's analogy. This analogy is applicable to the current matter before us. The Commission's second route was that, if we do not find that the Delatoy Group is a firm in terms of the Competition Act, we could apply the doctrine of the "attribution doctrine" or "the piercing of the corporate veil"[15] doctrine as it is known in Company Law. This doctrine simply stipulates that the conduct of one entity is attributable to the other entities, where there is an abuse of corporate form, or where other entities are implicated in the infringements that have taken place.

[57] The Delatoy Group, on the other hand, submitted that to apply this doctrine would be an error on our part, as this doctrine is normally applied to instances wherein, there is fraud, or manifest justice would be denied. In the present, the Delatoy Group submitted that Shearwater Construction did participate in a horizontal restrictive practice. This is not a case where Shearwater Construction was misused as a device, or a façade, and also not a case where it was merely an instrument of some other entity. Shearwater Construction is, in fact, itself the company, which committed the restrictive practice.[16]

[58] We do not agree with the Delatoy Group's submission as the evidence before us shows otherwise. ATPD was used as an instrument to receive the payments for the Loser's Fee on behalf of Delatoy Investments.[17] Delatoy Investments declared dividends to Delatoy Holdings, which in turn were forwarded to Dream World 344 and Dream World 345 in equal amounts (dividends). The dividends paid to the Dream World 344 and Dream World 345 were declared to the two family trusts in which, Delamere and Toy are trustees and beneficiaries as well as the only directors of the affected companies. There is a nexus amongst the Delatoy Investments, Delatoy Holdings, Dream World 344, Dream World 345,

---

[15] Piercing the corporate veil is an expression rather indiscriminately used to describe a number of different things, properly speaking it means disregarding the separate personality of the company. See *Prest v Prest* [2013] 2 A .C. 415.

[16] See page 15 of the Delatoy Group's Heads of Argument.

[17] Mr Rossouw in response to the Chairperson's question admitted that the conduct to divert payment to ATPD was deceptive.

ATPD, Patrick Delamere NO, Tonya Delamere NO, Andrew Toy NO, Patrick Toy NO, Francois Koch NO and Hilton Gordon NO.

[59] The dividends declared culminated in payments to beneficiaries in these trusts. The trusts were a final destination for the money distributed, consequently Messrs Delamere and Toy, who were trustees and beneficiaries benefited.

[60] The Commission argued that another route would be, to pierce the corporate veil. It is well known in South African law that the piercing of the corporate veil normally comes into effect when there is suspicion of shams, schemes, stratagems and abusive conduct. Although most legal systems acknowledge legal personality, there are limits to this, hence the piercing of the corporate veil.[18] In the *Cape Pacific*[19] case, the court clearly held the following: "*But where fraud, dishonesty or other improper conduct (and I confine myself to such situations) are found to be present, other considerations will come into play. The need to preserve the separate corporate identity would in such circumstances have to be balanced against policy considerations which arise in favour of piercing the corporate veil".*

[61] The EU holds a similar position, and illustrates it very well in the *Wallersteiner*[20] case where the court had to deal with companies controlled by one Dr Wallersteiner, decided to pierce the corporate veil and held the following: "*Even so, I am quite clear that they were just the puppets of Dr. Wallersteiner. He controlled their every movement. Each danced to his bidding. He pulled the strings. No one else got within reach of them. Transformed into legal language, they were his agents to do as he commanded. He was the principal behind them. I am of the opinion that the court should pull aside the corporate veil and treat these concerns as being his creatures".*

[62] For purposes of this matter, it would therefore be most appropriate to pierce the corporate veil in order to properly answer the question of liability. It would

---

[18] Supra at footnote 17, para 17.
[19] *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and others* 1995 (4) SA 790 (A) at 802-803.
[20] *Wallersteiner v Moir* (No.1) [1974] 1 W.L.R. 991 at page 1013G.

also be most appropriate to point out that regardless of which route we are to take, the Delatoy Group would still be held jointly and severally liable, based on the evidence before us, but, we cannot do so because of the issues before us. We leave that conclusion to another panel to deal with.

[63] Having said what we said in the paragraphs above, we do not think it's necessary in this case, to pierce the corporate veil. The Commission has led sufficient evidence which remain unrefuted. It also proved that the stratagem of the Delatoy Group, was to deceive, and its conduct confirms that it worked as single economic unit. Therefore, the Delatoy Group is indeed a "firm" in terms of the Act.

IS THE REFERRAL TIME BARRED?

[64] Section 67(1) of the Act provides that *"A complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased".* The Delatoy Group submitted that in the view of the fact that the Commission initiated the investigation three years after the conduct had ceased to exist, the complaint had prescribed.

[65] The basis of their submission was that the collusive conduct in question was a once-off event, which ceased on 28 February 2008, alternatively some time during 2008. It disputed the allegation of the Commission that the complaint in this case was initiated on 1 September 2009. It contended that the complaint was initiated on 17 October 2012, alternatively on 30 January 2014. The significance of 17 October 2012 is that this was the first time that the Delatoy Group was informed by the Commission, that it was being investigated for collusive tendering. The 30 January 2014 date is significant, because after a hiatus, the Commission revived the investigation (which had already been initiated).

[66] Whether or not the Delatoy Group was first informed of the investigation on 17 October 2012, is irrelevant to determine when the investigation was initiated. Also, the hiatus between 17 October 2012 and 30 January 2014 (when the complaint had already been initiated) is

of no relevance at all. The important question to answer is, when was the investigation initiated? It is not when it was revived.

[67] The Commission submitted that the "fast track" process was the catalyst to information that shed light on the first respondent's role, in collusive tendering for the Thabazimbi Project. The fact that the first respondent was not referred to specifically by name until the 14 April 2011 and that the Commission contacted the Delatoy Group on 17 October 2012, does not support its submission that, the investigation was initiated more than three years after the collusive tendering had ended. Contacting the suspected firm does not mean that the investigation is being initiated. The investigation had been long initiated, as explained by the Commission in the case before us.

[68] Mr Mohlala in his evidence before the Tribunal explained how the investigation was conducted, and why the investigation took the form that it did.. His evidence was not refuted even though endeavors were made by the first to eleventh respondents' Counsel to do so. We accept the Commission's version of what transpired during the investigations that started in 2009. We also accept that no formality is required to initiate an investigation.

[69] This approach finds support in the SCA decision in *Competition Commission v Yara*.[21] At paragraph 21 The court said "A vital consideration in evaluating the cogency of the SCA's equation of the two complaint forms, is that with regard to formalities, 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 Mr Malherbe in the Glaxo case; or because of what it gathers from media reports; or because of what it discovers during the

[21] Competition Commission v Yara (South Africa) (Pty) Ltd and others 2013 (6) SA 404 (SCA) at p415-417.

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 be tacit. In argument counsel for Omnia informed us that, in practice, the initiation usually takes the form of a memorandum. I have no doubt that for the sake of good order and certainty that would be so. But it is not a requirement."

[70] Further in *Yara* at p416 para 24 the Court said: "But as I see it, the CAC's motivation conflates the requirements of initiating a complaint and referral and misses the whole purpose of initiating a complaint. In fact, it is in direct conflict with the judgment of this court in Simelane and Others NNO v Seven-Eleven Corporation SA (Pty) Ltd 2003 (3) SA 64 (SCA) ([2003] 1 ALL SA 82) para 17, which in turn relies on statements in the decision of the Tribunal in *Norvatis SA (Pty) Ltd v Competition Commission* CT 22/CR/B June01 paras 35-61. What this statement of *Norvatis* make plain is that the purpose of initiating a complaint is to trigger an investigation which might eventually lead to a referral. It is merely the preliminary step of a process that does not affect the respondent's rights. Conversely stated, the purpose of initiating a complaint, and the investigation that follows upon it, is not to offer the suspect firm an opportunity to put its case. The commission is not even required to give notice of the complaint and of its investigation to the suspect. Least of all is that, the Commission is required to engage with the suspect on the question whether its suspicions are justified. The principles of administrative justice are observed in the referral and the hearing before the tribunal. This is when the suspect firm becomes entitled to put its side of the case."

[71] The Delatoy Group elected not to call any witness although Mr Delamere was scheduled to testify during the proceedings. It relied heavily on the date the Delatoy Group's Shearwater Construction (Pty) Limited was contacted, in its attempts to demonstrate that the investigation, was initiated outside the three years prescription period in terms of Section 67(1) of the Act. The Commission's witness, Mr Mohlala, testified that he was the principal investigator who personally led the team

that was investigating collusion in the construction industry (which included the dispute before this Tribunal). In his testimony Mr Mohlala testified as follows: "*What happened is that at the time we received information from industry players in the construction industry which indicated that collusive practices in the construction industry were prevalent. We then interviewed the individuals from these construction companies so the individuals confirmed to us that collusion and bid-rigging in the construction industry was an industry norm. They provided us with names of firms that they were aware of but they could not remember all the firms that were involved in collusion*".[22]

[72] He further said that "*But they did indicate that given the fact that it's an industry norm there are other firms that are involved in collusion which they cannot remember at that particular point in time. So what we did as a team when we drafted the initiation was to make provision that given that there are other firms that we don't know their names at that stage that are also likely to be involved in collusion, we should draft the initiation in such a way that we do not exclude them from the investigation in the construction sector.*"[23]

[73] The Commission also made an alternative submission that, even if the investigators learnt about the identity of the suspected firm on 14 April 2011 that does not change the issue of when the investigation was initiated. The reality of the situation is that Cycad and Phambili, which colluded with Shearwater Construction in the Thabazimbi Pipeline Project, disclosed the names of the companies involved in the contravention of the Act. According to the unrefuted evidence of the Commission, its investigation led to family trusts (which subsequent to the collusion were deregistered and new trusts registered), ATPD, Shearwater Construction, Shearwater Plant Hire, which was subsequently, restructured by Messrs Delamere and Toy. According to the Commission's undisputed evidence, the Delatoy Group management was not forthcoming with information. Esor Limited ("Esor") informed the Commission that it did not purchase Shearwater Construction but Shearwater Plant Hire.

[22] See page 107 of the transcript of the hearing.
[23] Ibid

[74] It was furthermore testified that Delamere was uncooperative. In fact, Delamere denied the existence of collusion or bid rigging. The process of having to establish who is who after the restructuring that took place, the investigation took much longer than anticipated because of the conduct of Messrs Delamere and Toy.

[75] Mr Rossouw, counsel for the first to the eleventh respondents, submitted that the collusion was a once off incident in 2008 by Shearwater Construction, and that the investigation of its conduct commenced three years after the conduct had ended. Prescription set in, thus, the Delatoy Group does not have a case to answer. The Commission's contention was that collusive tendering is not dependent on whether or not the conduct was committed once. The provision of section 4(1)(b)(iii) is clear and unequivocal. It provides that: *"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;(iii) collusive tendering.*

[76] Of importance is, did the collusion take place, was the investigation initiated within three years after the impugned conduct ended? If the answer is yes, it is immaterial that the collusion happened once or twice or repeatedly for that matter.

[77] The Delatoy Group failed to prove that the investigations were commenced contrary to the requirement of Section 67(1), consequently the complaint should be dismissed. We are satisfied that the investigation was commenced before three years after the conduct ended. Consequently, the complaint has not prescribed and the Tribunal has jurisdiction to hear the complaint referred to it by the Commission.

CONCLUSION

[78] Having read the papers filed of record, heard the parties and considered the matter; we are convinced that the Delatoy Group is indeed a "firm" for purposes

of the Act. The two main Directors, namely Mr Delamere and Mr Toy are the main puppet masters, who pull the strings in all the entities that make up the Delatoy Group. They used the various entities as dummies to orchestrate their objects, and are now attempting to hide behind the corporate veil in order to avoid responsibility be it be personal or otherwise, for the administrative penalty.

[79] It is our finding that the Delatoy Group is a firm for purposes of the Act and that the complaint has not prescribed.

[80] The investigation was not initiated three years after the collusive conduct had ended, therefore the complaint referral has not prescribed in terms of Section 67(1) of the Act.

ORDER

1. The complaint has not prescribed;

2. It is hereby declared that the Delatoy Group constitutes a "firm" for purposes of the Competition Act; and

3. Each party to pay its costs of this application.

MA Mokuena 14 April 2016

MRS MEDI MOKUENA **Date**

Mr Anton Roskam and Prof. Imraan Valodia concurring.

Tribunal Researcher:	Caroline Sserufusa
For the Applicant:	DN Unterhalter SC and L Sisilana instructed by the State Attorney
For the 1st -11th Respondents:	PF Rossouw SC and JL Kaplan instructed by MJ Hood & Associates
For the 12th Respondent:	Sarah Manley of Webber Wentzel Attorneys
For the 13th Respondent:	Ingrid Rogers of Fasken Martineau