CONFIDENTIAL VERSION

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CR129Oct16

In the matter between:

COMPETITION COMMISSION Applicant

And

A'AFRICA PEST PREVENTION CC First Respondent

MOSEBETSI MMOHO PROFESSIONAL SERVICES CC Second Respondent

Panel	: M Mazwai (Presiding Member) : M Mokuena (Tribunal Member) : E Daniels (Tribunal Member)
Heard on	: 2, 3 October 2017, 27 February and 13 March 2018
Order Issued on	: 21 September 2018
Reasons Issued on	: 21 September 2018

Reasons for decision

INTRODUCTION

[1] This case involves a price fixing and collusive tendering complaint referred by the Competition Commission ("the Commission") to the Competition Tribunal ("the Tribunal") against A'Africa Pest Prevention CC ("A'Africa") and Mosebetsi Mmoho Professional Services CC ("Mosebetsi"), collectively "the respondents".

[2] The Commission has alleged that the respondents, being firms in a horizontal relationship, have entered into an agreement and/or a concerted practice in

contravention of section 4(1)(b)(i) and (iii) of the Competition Act 89 of 1998, as amended ("the Act").

BACKGROUND

[3] Sometime during 2015, bees invaded the Magistrates' Court in Hertzogville. The Department of Public Works ("the department") as a procurer of goods and services on behalf of state entities, issued a tender for the supply of fumigation services at the Hertzogville Magistrates Office. The tender was issued under tender number BFN/1015/102304, further referred to as "the Hertzogville tender", for which the respondents both submitted bids. Neither of the respondents were awarded the tender as it was ultimately cancelled.

[4] On 21 December 2015, the Commission received a complaint from the department against A'Africa and Mosebetsi regarding the submission of their purportedly competing bids, leading to an investigation by the Commission and ultimately this case before the Tribunal. The department submitted the complaint because it noted that the respondents' pricing schedules contained almost identical pricing for the work - the only difference being the inclusion of VAT in A 'Africa's quote. Further, both of the bids were signed by a Ms Aletta Magrieta Elizabeth Labuschagne ("Ms Labuschange") who is a common member of the respondents.

[5] Following its investigation, the Commission concluded that these pricing schedules were evidence of an unlawful agreement between competitors to fix prices and rig the Hertzogville tender. The Commission, represented by Mr Maenetje, contended that the respondents should be considered competitors in a horizontal relationship because, by submitting bids for the same work, they were effectively bidding against each other and thus competing for the award of the tenders in question.

[6] The respondents, represented by Ms Le Roux, raised two defences; firstly that they were constituent firms within a single economic entity, as contemplated in s 4(5) of the Act; and secondly that they were not in a horizontal relationship.

[7] We now turn to consider the relationship between A'Africa and Mosebetsi.

A'Africa and Mosebetsi's Internal Structure

[8] The respondents are two Close Corporations ("CCs"), both operating in the pest control industry. A'Africa was founded by Ms Labuschagne in 2004. She was the sole member of A'Africa until 2006 when she sold a 49% interest to a Mr Albertus Smith ("Mr Smith"), who is also a member of A'Africa and Mosebetsi.

[9] Mr Modise Maleho ("Mr Maleho") joined A'Africa as a trainee pest controller in 2006.

[10] In 2007, Mosebetsi was founded by Ms Labuschagne as a cleaning business, which operated for three years before going dormant in 2010.

[11] In 2014 Ms Labuschagne approached Mr Maleho, with an offer to join Mosebetsi as a member and business partner, having discussed this with Mr Smith. Ms Labuschagne explained during the hearing that after joining A'Africa in 2006 as a trainee pest controller, Mr Maleho qualified as a pest controller (in 2009) and was in fact a good pest controller from the feedback she was receiving from A 'Africa's customers. She said she feared that Mr Maleho would be snatched up by a competitor. To address this as well as to improve A'Africa's black economic empowerment ("BEE") credentials she made an offer to Mr Maleho.

[12] Mr Maleho would run Mosebetsi as a pest control company under the guidance of Ms Labuschagne and Mr Smith, and grow the business as a BEE entity. The members' interest in Mosebetsi was held 52% by Mr Maleho and 48% by Ms Labuschagne and Mr Smith collectively.

[13] With regard to Mosebetsi's operational requirements: all equipment, consumables, vehicles and office facilities used were those of A'Africa. Mosebetsi would make use of A 'Africa's equipment and premises with the costs becoming loans payable to A'Africa by Mosebetsi. Mosebetsi's day-to-day business was conducted by Mr Maleho.

[14] Meetings were held on a monthly basis among all three members of Mosebetsi, but there were no formal agendas or minutes of the meetings. Decisions were made on a consensual basis. The purpose of the meetings was to provide

guidance and strategic direction to Mr Maleho whose main function was growing the business to customers who valued BEE status in their service providers.

[15] However, the business of Mosebetsi struggled to take off and as such Mr Maleho increasingly started performing work for A'Africa as a pest controller until October 2015 when he resigned from Mosebetsi and A'Africa to work for a competitor, called 'Rentokil'.

[16] Mr Maleho remained a registered member of Mosebetsi subsequent to his departure and was still a 52% member of Mosebetsi at the time of the hearing. When the Hertzogville tender was submitted in November 2015, Mr Maleho was included as a member of Mosebetsi in the tender documents filled out for Mosebetsi.

The issues to be decided

[17] The Tribunal is required to decide (i) whether the respondents were competitors of each other for the Hertzogville tender; (ii) or whether they were constituent firms within a single economic entity as contemplated in section 4(5) and therefore could not be competitors of each other. These seem to be two sides of the same coin – whether one starts at the back-end with the defence raised by the respondents or the front-end with whether the respondents competed makes no material difference. It is not in dispute that the respondents are in the same line of business.

[18] At the hearing, the Commission called one witness Mr Petrus Whielers ("Mr Whielers"), Director of Supply Chain Management in the department, while the respondents called two witnesses, Ms Labuschagne and Mr Maleho.

[19] In these reasons we also explain our decision to allow certain documents in the strike-out application brought by the respondents at the beginning of the hearing.

Strike-out application

[20] At the commencement of the hearing, the respondents applied to strike-out paragraph 13 of the Commission's witness statement as well as the documents

that underlie this paragraph[1]. Mr Whielers stated in his witness statement that he was requested by the Commission to find out how the respondents had previously submitted quotes for tenders to the department. He stated further that, having reviewed the department's records, he found that the respondents had in fact quoted as independent firms to the department in the past. He provided supporting documents to the Commission for discovery. [2]

[21] The respondents argued that this paragraph and the related spreadsheets were irrelevant to the issue at hand since they did not relate to the tender in question, but past tenders. They submitted that these documents would not shed further light on the internal workings of the respondents and thus whether they could be considered to be operating as a single economic entity in the Hertzogville tender. The respondents further argued that to admit this evidence would amount to a 'backdoor amendment' of the Commission's referral and would subject them to significant prejudice.[3]

[22] The Commission clarified in its papers and in oral argument before us that it was not seeking to expand its complaint, but rather that the documents were relevant and were required only for purposes of interrogating the single economic entity defence raised by the respondents in their answering affidavit. That being the case, we need not consider the concern regarding the expansion of the complaint any further since this is not what is happening.

[23] On relevance, we decided that the documents were relevant to the question of whether the respondents acted independently of each other (or not). This is because the question of autonomy and independence is central to the single economic entity defence pleaded by the respondents in their own papers. It is relevant, in considering whether firms are independent of each other or not, to consider their historical conduct in the market.

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[1] Transcript, page 1.
[2] Record, page 952.
[3] Transcript, page 2.

[24] We also considered at that stage of the proceedings that it would be premature to strike out documents before hearing evidence.

[25] Further, the argument that the admission of such evidence to the record would lead to unjust prejudice since they were discovered outside the discovery timetable cannot succeed as the respondents were afforded an opportunity to consult with any other relevant witnesses implicated in paragraph 13 and file further witness statements if need be, but they declined to do so.[4]

[26] We accordingly dismissed the strike out-application and allowed the documents as part of the record.

OUR ANALYSIS

Are the respondents constituents of a single economic entity?

[27] Section 4(5) of the Act stipulates as follows;

> *(5) "The provisions of subsection (1) do not apply to an agreement between, or concerted practice engaged in by, –*
>
> > *(a) a company, its wholly owned subsidiary as contemplated in section 1(5) of the Companies Act, 1973, a wholly owned subsidiary of that subsidiary, or any combination of them; or*
> >
> > *(b) the constituent firms within a single economic entity similar in structure to those referred to in paragraph (a)".*

[28] The term 'single economic entity' is not defined in the Act. However, the Act provides guidance in that it stipulates that the exemption, under section 4(5)(b) applies to constituent firms of a 'single economic entity' that are 'similar' in structure to a parent and a wholly owned subsidiary. This would mean that the use of the word 'similar' takes on the understanding that the subordinate firm does not

[4] Transcript, page 73.

necessarily have to be wholly owned by the parent firm, but still seems to suggest that the structure of such firms would have a similar setup.

[29] It is common cause that structurally, A'Africa and Mosebetsi are not in a wholly owned subsidiary-parent relationship as contemplated in section 4(5)(a).[5] What we know is that the members of A'Africa, Ms Labuschagne and Mr Smith were also members of Mosebetsi. The question then is whether their common membership in both CCs qualifies them as firms within a single economic entity similar in structure to that of a parent-subsidiary as contemplated in section 4(5)(b).

[30] Here, while considering the common membership of the respondents, it's important to note that section 4(2) becomes relevant because it deals with common shareholding and directorships. Section 4(2) provides that: "*An agreement to engage in a restrictive horizontal practice referred to in subsection 4(1)(b) is presumed to exist between two or more firms if – (a) any one of those firms owns a significant interest in the other, or they have at least one director or substantial shareholder in common; and (b) any combination of those firms engages in a restrictive horizontal practice.*"

[31] Section 4(2) clearly contains an aversion to competitors holding interests in each other.

[32] The Commission argued for a restrictive interpretation[6] of section 4(5)(b) read with section 4(2) in light of the purposes of the Act and in line with the *Life Healthcare* ("*Life*") decision.[7] In *Life*, which was a merger between two hospital groups the Tribunal had to determine whether the merger would have any impact on pricing in the market. To determine this, the Tribunal had to assess the pre-merger control that the acquiring firm had in the target firm, in comparison to the post-merger control.

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[5] Mr Maenetje submitted that section 29 (1) of the Close Corporation Act 69 of 1984 prohibits a Close Corporation from holding an interest in another Close Corporation therefore such a structure would be illegal anyway.
[6] Transcript, pages 448-449.
[7] *Life Healthcare Group (Pty) Ltd & Joint Medical Holdings Ltd ("JMH"); case number; 74/LM/Sep11.*

[33] The merging parties submitted that by virtue of Life's minority shareholding (which had received Competition Board approval pre-1999) in JMH – the target firm, it was entitled to negotiate tariffs with medical funders on behalf of JMH, and since it was already doing so pre-merger, the merger would not have any effect on tariffs.

[34] The Tribunal rejected this argument and clearly interpreted the Act as one in which horizontal interests in competitors are generally discouraged.

[35] The Tribunal reasoned that: *"If the Legislature had intended a partial controller or joint controller of a company to be immune from liability for colluding with it by operation of law as a consequence of partial or joint control, then it is hard to see why this provision was inserted in the Act. Quite clearly the Legislature had no such intention. JMH and Life are therefore not, pre-merger, where on the facts the holding firm does not even enjoy de jure control of the subordinate firm, and holds less than 50% of its shares, constituent firms within the same economic entity."*[8]

[36] The Tribunal held further that: *"The only time when a firm can be certain of immunity from the consequences of a section 4(1) prosecution is where it and the subsidiary form part of a wholly owned subsidiary-parent relationship or the type of single economic entity contemplated in section 4(5)(b). Where the relationship between the controlling and controlled firms falls short of this, such collusion will not be exempt from the consequences of sections 4(1) and 4(2)."*[9]

[37] Following this restrictive approach, a relationship that is "similar in structure" to entities in the wholly owned subsidiary – parent relationship is not necessarily one of full ownership, but it cannot be far removed from such. To interpret section 4 (5) (b) in such a manner that allows immunity for firms by virtue of partial or joint control in one another would contradict the intention of the legislature and the purposes of the Act.

[38] The respondents submitted that while not strictly in a parent-wholly owned subsidiary relationship, they qualify as firms within a single economic entity since

[8] Ibid at paragraph 55.
[9] *Ibid* at paragraph 56.

they "*had a complete unity of interest*"; their actions were "*guided or determined not by separate consciousnesses but by one*"; and their conduct was "*[like that of] a multiple team of horses drawing a vehicle under the control of a single driver*" – to use the language of the famous US case of *Copperweld*[10] that established the doctrine of single economic entity.

[39] Ms Le Roux submitted that since Ms Labuschagne and Mr Smith were directing the strategy of Mosebetsi (even though Mr Maleho held a 52% interest), they controlled Mosebetsi as contemplated in sections 12(2)(f) and 12(2)(g) of the Act and therefore Mosebetsi and A'Africa (where Ms Labuschagne and Mr Smith held 51% and 49% respectively), constituted a single economic entity.

[40] However, as discussed in paragraphs [35] and [36] above, the threshold for determining whether two firms' relationship is similar in structure to a parent and wholly owned subsidiary is not satisfactorily met when there exists a common membership capable of exerting only partial or joint control over one of the two firms. Ms Labuschagne and Mr Smith did not have *de jure* control of Mosebetsi as together they hold only 48% of the members interest.

[41] Further, the evidence before us shows that the majority of strategic decisions regarding Mosebetsi were made jointly with Mr Maleho.[11] Mosebetsi did enjoy a degree of autonomy in determining its course of action in the market, even bidding for tenders without instruction from Mr Smith or Ms Labuschagne.[12] The fact that the respondents shared premises, equipment and consumables is not sufficient to constitute a complete unity of interest, especially considering that A'Africa recorded these expenses as loan accounts payable to A'Africa by Mosebetsi.[13]

[42] The fact that Ms Labuschagne and Mr Smith may have had negative control over Mosebetsi for section 12(2) purposes does not mean that they are exempt from the application of section 4(1)(b).

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[10] *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).
[11] Transcript, pages 369-370.
[12] Transcript, page 366.
[13] Transcript, pages 373-374.

[43] The departure of Mr Maleho as a *de facto joint* controller did not significantly change the structure of the relationship between the respondents. He remained a 52% *de jure* member in the second respondent, allowing Mosebetsi to retain its status as a majority BEE entity and the public procurement advantages that come with it. Lastly, any control exercised by Ms Labuschagne and Mr Smith, was done solely as members of Mosebetsi, and not in the capacity of A' Africa. To thus conclude that Mosebetsi and A'Africa are part of a single economic entity would be incorrect.

[44] Even assuming the respondents formed parts of a single economic entity after Mr Maleho left, their submission of two bids for the same tender would fall within the scope of section 4(1)(b).[14] It cannot be that the legislature intended section 4(5) to be a defence to a firm that puts in two bids against itself. This is because there is a suppression of competition when two bids are submitted purportedly in competition with one another when the bidders are in fact one entity since this undermines the competitive bidding process, the very purpose of calling for tenders.

[45] The respondents' contention that the price was the same in both bids does not affect the anti-competitive character of the bids.

[46] On the facts of this case, Mr Whielers testified that the evaluation criteria for bids under R30 000.00 was purely on price. On this basis, A'Africa could have submitted a bid in its name alone. It decided however to also submit a bid in Mosebetsi's name for the same price, according to Ms Labuschagne in order to recover the debt in Mosebetsi.

[47] However, Ms Labuschagne could not explain why if recovering the debt in Mosebetsi was her concern, she did not submit a bid in Mosebetsi's name only. Although BEE credentials were not a requirement for bids under R30 000.00[15], Mr Whielers' testimony was that bidders usually submit their BEE credentials even for

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[14] See *Competition Commission v Eye Way Trading and Seardel Group; case number; CR073Aug16-CR074Aug16.*

[15] Evidence of Mr Whielers, Transcript page 129.

bids under R30 000.00.[16] In instances where BEE applies, the weighting between price and BEE is 80/20 respectively.[17]

[48] As a matter of fact, the Mosebetsi bid was chosen as the winning bid, although as mentioned the department decided not to go ahead with this tender because of the collusion concerns around it. The only inference to be drawn is that the Mosebetsi bid was submitted together with the A'Africa bid (even though the price was the same in both) for the potential advantage carried by Mosebetsi in BEE scoring.

[49] Ms Labuschagne could also not explain why she did not submit a joint bid for A'Africa and Mosebetsi if it was all the same to her.

[50] This is the suppression of competition that cannot be characterised as contemplated in the Supreme Court of Appeal decision in *Ansac*[18] as Ms Le Roux tried to argue. By characterising conduct one considers whether conduct that is seemingly *per se* prohibited under section 4(1)(b) might have any features such as efficiencies or pro-competitive gains that justify the conduct. It does not mean – on our reading of the relevant case law, that every section 4(1)(b) complaint must be characterised since this would erase the clearly stipulated *per se* prohibition in the Act.[19]

[51] By its nature, bid-rigging is the antithesis of competition. It does not allow for characterisation; and even if the arrangement between the respondents were to be characterised, it is difficult to see how their conduct was efficiency-enhancing or pro-competitive in any way that would have benefitted the department as the customer. The respondents have themselves not claimed any such efficiencies or pro-competitive gains. To the contrary the department was led to believe it had two competing bids. Ms Labuschagne's actions were aimed at increasing her chances of winning, as she testified, she didn't mind which entity won.[20] This is hardly the efficiency-enhancing or pro-competitive conduct contemplated by characterisation.

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[16] Transcript, page 129.
[17] Transcript, page 134.
[18] American Natural Soda Ash Corporation and another v Competition Commission and Others 2005 6 SA 158 (SCA).
[19] Competition Commission and Wasteman Holdings and Enviroserv Waste CR210Feb17, para 72.
[20] Transcript, pages 214-217.

Submission of tender documents

[52] Other issues casting doubt on the respondents' defence include the fact that they sealed and submitted bids separately despite allegedly being a single economic entity. The respondents explained that they submitted separately because firms that failed to submit for tenders were removed from the department's list of service providers.[21] This reason is unconvincing as evidence was given in the hearing which showed there were instances in which one or both of the respondents did not submit a bid, but were still invited to bid for later tenders.[22]

[53] Further, in those separate bids the respondents did not disclose that they were related companies.[23] The explanation for this non-disclosure is improbable taking into account the experience Ms Labuschagne had in filling out these documents.[24] Instead, the non-disclosure was done to allow the respondents to continue to gain an advantage over other competitors.

CONCLUSION

[54] We conclude that A'Africa and Mosebetsi were not constituents of a single economic entity as envisaged in section 4(5)(b) but instead two competitors, albeit with common membership, submitting separate bids for the Hertzogville tender. This is because structurally the respondents are not in a wholly owned subsidiary-parent relationship as contemplated in section 4(5)(a).

[55] Their common membership does not bring them within the ambit of a single economic entity as contemplated in section 4(5)(b). This is because, on a proper interpretation of section 4(5) read with section 4(2), Ms Labuschagne and Mr

[21] Transcript, page 350.
[22] This was stated by Mr Maleho in the hearing, however due to recording problems it was not included in the official transcripts. In lieu of rehearing the evidence, the Tribunal directed the parties to compare their notes of the hearing and agree on the evidence traversed; only if they could not reach an agreement would the witness be recalled and the evidence reheard. The Respondents provided their written notes dated 6 March 2018, the contents of which were confirmed by the Commission in an email to the Tribunal dated 9 March 2018.
[23] Transcript, pages 357-358.
[24] Transcript, page 195.

Smith's partial membership in Mosebetsi and joint control over Mosebetsi are not sufficient to provide immunity from liability under section 4(1).

[56] Assuming the respondents became a single economic entity after Mr Maleho left – as they allege, the respondents have not provided a plausible explanation for submitting two bids if they were indeed a single economic entity.

[57] Of note is the deceptive nature in which the tenders were completed that led the department to consider the conduct of the respondents as that of competing firms. The respondents cannot be allowed to benefit from their own dishonest actions and the illusion of competing for the work.

[58] At the request of the parties, a hearing on remedies will be convened at a later stage as the present hearing was concerned only with the merits of the case. The parties must approach the Tribunal's registrar in due course for dates for the hearing of remedies.

ORDER

1. A'Africa has contravened section 4(1)(b)(i) and (iii) of the Act.
2. Mosebetsi has contravened section 4(1)(b)(i) and (iii) of the Act.
3. There is no order as to costs.

Ms Mondo Mazwai

21 September 2018
DATE

Mr Enver Daniels and Mrs Medi Mokuena concurring

Tribunal Researchers:	Caroline Sserufusa and Jonathan Thomson
For the Respondents:	Adv. Le Roux instructed by Truter Jones Inc
For the Commission:	Adv. Maenetje SC instructed by Ndzabandzaba Attorneys