



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: **CR277Feb18**

In the matter between:

THE COMPETITION COMMISSION OF SOUTH AFRICA Applicant

and

WACO AFRICA (PTY) LTD First Respondent

TEDOC SGB CAPE JV Second Respondent

SUPERFECTA SGB CAPE JV Third Respondent

MTSWENI SGB CAPE JV Fourth Respondent

TEDOC INDUSTRIES (PTY) LTD Fifth Respondent

SUPERFECTA TRADING 159 CC Sixth Respondent

MTSWENI CORROSION CONTROL (PTY) LTD Seventh Respondent

Panel : Ms Y Carrim (Presiding Member)
 : Ms S Goga (Tribunal Panel Member)
 : Dr T Vilakazi (Tribunal Panel Member)

Heard on : 10,13,14,15,17,20,21,22, 23 June 2022 & 24 August 2022

Order Issued on : 30 May 2023

Reasons Issued on : 30 May 2023

REASONS FOR DECISION AND ORDER

Introduction

- [1] On 6 February 2018, the Competition Commission (“the Commission”), following a complaint from Eskom and its own investigation referred a complaint to the Competition Tribunal (“Tribunal”) against WACO Africa (Pty) Ltd (“**WACO**”), Tedoc SGB-Cape JV, Superfecta SGB-Cape JV, Mtsweni SGB-Cape JV, Tedoc Industries (Pty) Ltd (“**Tedoc**”), Superfecta Trading 159 CC (“**Superfecta**”) and Mtsweni Corrosion Control (Pty) Ltd (“**Mtsweni**”).
- [2] The Commission alleges that these firms engaged in price fixing and collusive bidding, in contravention of section 4(1)(b)(i) and (iii) of the Competition Act, No. 89 of 1998 (“the **Act**”) and seeks an administrative penalty against them in accordance with section 58(1)(a)(iii) read with section 59 of the Act.

The parties

- [3] The parties in this complaint are SGB-Cape, a division of WACO International, the three joint ventures into which SGB-Cape entered, and the three companies with which SGB-Cape partnered.
- [4] SGB-Cape is focused on the rental and sale of products and services related to scaffolding, thermal insulation, corrosion protection and asbestos removal.
- [5] Tedoc and Superfecta primarily trade as human resource companies and offer services including placement, recruitment, payroll and HR related administration and management.
- [6] Mtsweni also provides human resource services but additionally provides transport services and has engaged in some construction and scaffolding work (though on a smaller scale than SGB-Cape).¹

¹ TB 0, page 158.

[7] The joint ventures (“JVs”) between SGB-Cape and each of the additional parties (Tedoc SGB-Cape JV, Superfecta SGB-Cape JV, Mtsweni SGB-Cape JV) were established specifically for the purpose of bidding for the tender forming the subject matter of the Commission’s complaint referral. The shareholding and black ownership levels in respect of each JV were as follows:

7.1 **SGB-Cape/Tedoc JV:** SGB-Cape held 51% and Tedoc 49%. This resulted in the JV enjoying 70.9% black ownership and 51.7% black woman ownership;

7.2 **SGB-Cape/Superfecta JV:** SGB-Cape held 55% and Superfecta 45%. This resulted in the JV enjoying 68.7% black ownership and 53.2% black woman ownership; and

7.3 **SGB-Cape/Mtsweni JV:** SGB-Cape held a 60% interest and Mtsweni 40%. This resulted in the JV enjoying 65.8% black ownership and 40% black youth ownership.

Background

[8] On 15 March 2015, Eskom issued an Invitation to Tender, inviting prospective bidders to participate in a tender for the supply, transportation, delivery, installation and dismantling of scaffolding and thermal insulation for its 15 coal fired power stations under tender number CORP3130. The tender, valued at approximately R 240 million, would run for a period of 5 years.

[9] Eskom received bids from 31 bidders. However, in assessing the bids for completeness a concern was raised that four of the bids (those provided by SGB-Cape, Tedoc SGB-Cape JV, Superfecta SGB-Cape JV, and Mtsweni SGB-Cape JV) were signed by the same person and contained similar or the same documents. This was referred to the internal forensic and auditing team

at Eskom who made a finding of collusive bidding and referred the matter to the Competition Commission for investigation in March 2016.

- [10] While this complaint was subsequently withdrawn by Eskom, the Commission continued its investigation and has referred a complaint to the Tribunal that the Respondents, while being firms in a horizontal relationship, entered into an agreement or engaged in a concerted practice to fix prices and tender collusively.
- [11] SGB-Cape has historically had a commercial relationship with Eskom, having provided maintenance, scaffolding and insulation services in respect of various of Eskom's power stations. At the time of issuing CORP3130, SGB-Cape was the incumbent provider of scaffolding and insulation services at four stations, namely, Matla, Kriel, Lethabo and Grootvlei power stations, having been awarded the contract in 2010 (ENK275).²
- [12] Various interactions had taken place between SGB-Cape and Eskom, in terms of which Eskom informed SGB-Cape of its desire for SGB-Cape to improve its empowerment status, indicating that failure to do so will endanger SGB-Cape's prospects of continuing to receive commercial opportunities at Eskom's power stations.³
- [13] SGB-Cape made efforts to improve its empowerment status, with the result that at the time of CORP3130 it had a Level 2 Black Economic Empowerment (BEE) rating, with its Black Ownership status having increased from 16.49% in 2013 to 43.06% in 2015. In addition, its Black Woman Ownership status had increased from 4.53% in 2013 to 14.83% in 2015.⁴
- [14] This notwithstanding, upon the issuing of the Invitation to Tender in respect of CORP3130, along with a set of technical, safety, quality and financial

² Transcript p 342, lines 19-21.

³ TB 00 p 122, TB 01, p 45-46.

⁴ TB 01 p 85, TB 5.1 p W2, W115.

requirements,⁵ reference was made to the requirement for bidders to have 51% black ownership in accordance with section 2(1)(d-f) of the Preferential Procurement Policy Framework Act⁶ (“PPPFA”).⁷ If this was a mandatory requirement, SGB-Cape on its own would not meet the specifications of the tender. Debate ensued within SGB-Cape regarding the wording of the tender documents and whether this reflected a preference or a mandatory requirement.⁸

- [15] Having considered various options and permutations for bidding including bidding alone and through various partnerships as had been entered into for other contracts,⁹ SGB-Cape subsequently chose to bid individually in its own name, and to also submit alternative bids with joint venture partners (“JVPs”).
- [16] On 17 March 2015 SGB-Cape addressed an email to Eskom, acknowledging receipt of the Invitation to Tender and advising that it intended submitting four tenders in response to CORP3130, one in its own name (SGB-Cape) and as Tedoc SGB-Cape JV, Superfecta SGB-Cape JV and Hygitech SGB-Cape JV.¹⁰
- [17] The potential partnerships were subsequently discussed internally and in April 2015, SGB-Cape approached potential JVPs with a proposal. They eventually reached agreement and submitted four separate bids, including one with each of the three JVPs (though the identity of one of the partners had changed from that indicated in their initial letter to Eskom from Hygitech to Mtsweni).
- [18] JV partnerships were constituted for the purpose of the tender. It is noteworthy that at the time of CORP3130, SGB-Cape, Tedoc and Superfecta had a pre-existing relationship as they were partners to an incorporated joint venture,

⁵ TB 04 p 5-9.

⁶ 5 of 2000.

⁷ TB 04 p 11.

⁸ Transcript p 620 lines 5-16, P 626 lines 15-21,p-627 lines 3-9.

⁹ TB 01 p 243 – 246.

¹⁰ TB 01 p 129 – 131.

Octorex, which had provided thermal insulation services at Eskom's Kusile power station.

[19] JV agreements were subsequently drawn up on the basis that each partner would supply inputs to the JV as follows:

19.1 The supply of goods and related services (project management services) by the respective JVs would be subcontracted to SGB-Cape, which would in turn supply goods and services to Eskom.

19.2 The supply of skilled, semi-skilled and unskilled labour (related services) by the joint venture JVs would be subcontracted to the respective JVP, who would supply such related services to Eskom.

[20] On 21 April 2015, each JV and SGB-Cape separately passed resolutions authorising Mr Johan Bernard Falconer ("Mr Falconer"), the Commercial Director of WACO Africa to sign tender documents and/or any other documents which may be required for purposes of submitting a tender.¹¹

[21] During April 2015, SGB-Cape unilaterally prepared and completed bid documents on its behalf and on behalf of the three JVs for submission to Eskom. The bid preparation comprised, *inter alia*, the determination of tender rates, including discounts to be offered to Eskom and the compilation of the mandatory commercial, financial, technical, SHE (safety, health and environment) and quality proposals. Save for the submission of documentation required by SGB-Cape to complete the respective JVs' bids, Tedoc, Mtsweni and Superfecta were neither required by SGB-Cape nor did they volunteer to participate in any aspect of the bid preparation process including pricing of labour components.

[22] While each of the JVPs were aware that SGB-Cape could potentially enter into similar agreements with other companies based on email correspondence,¹²

¹¹ TB 5.1 p W13, TB 5.2 p T13, TB 5.3 p S12, TB 5.4 p M12.

¹² TB 01 p 251, TB 01 p 253, TB01 p 255, TB 01 p 257.

they, at the time of bid submission, were not aware whether this had in fact transpired, and if so, the identities of the other partner companies and what terms of agreement were reached with these partners.

The tender

- [23] It is important to note that CORP3130's Invitation to Tender had various requirements. To qualify for evaluation and/or award of the contract, bidders were required to complete and submit mandatory SHE, commercial, financial, technical, and quality proposals. Documentary requirements included a SHE policy, SHE plan and assessment, an approval certificate as an Asbestos Contractor, quality requirements such as ISO 9001:2008 quality management accreditation and technical requirements including evidence of specialized experience.¹³
- [24] Tedoc, Superfecta and Mtsweni were not in possession of these documents and did not meet the tender requirements. While it was argued that Mtsweni could nevertheless have submitted a tender with a different partner who met the tender requirements¹⁴, it is common cause that Tedoc and Superfecta were unable to tender for this opportunity on their own.¹⁵ While SGB-Cape met the technical requirements, it did not meet the requirement of 51% black ownership (to the extent that it was mandatory).
- [25] On 28 April 2015, four bids were submitted to Eskom, in the names of SGB-Cape, Tedoc SGB-Cape JV, Superfecta SGB-Cape JV and Mtsweni SGB-Cape JV. The four bids contained various similarities including Mr Falconer being a common signatory and SGB-Cape being a common participant in respect of each bid. In addition, the bids contained identical commercial, technical, financial, SHE and quality documents.¹⁶

¹³ TB 04 p 5 – 9.

¹⁴ Transcript p 1101 lines 11-21, p 1102 lines 1-2.

¹⁵ Transcript p 981 lines 4-7.

¹⁶ TB 05.

[26] Furthermore, all four bids offered Eskom a joint volume discount on all tendered rates, measured against the number of power stations awarded to SGB-Cape and/or the joint ventures as follows:

26.1 1.5% discount if awarded the existing four power stations, awarded under a previous tender ENK275 (namely, Matla, Kriel, Lethabo and Grootvlei);

26.2 3% discount if awarded a fifth power station, being either Hendrina, Kendal or Duvha;

26.3 5% discount if awarded a fifth and sixth power station, being any 2 stations between Hendrina, Kendal or Duvha; and

26.4 7% discount if awarded all seven of the above-mentioned power stations.

26.5 The bid document stated that the discount was applicable *“...to any of the offers which have been made to Eskom which involve SGB-Cape, whether this is on their own, or in a joint venture with a partner...”*¹⁷

[27] The four bids differed in respect of tendered rates as the Tedoc SGB-Cape JV and Superfecta SGB-Cape JV's rates were consistently about [1%>] above SGB-Cape rates in respect of each line item and the Mtsweni SGB-Cape JV's tendered rates were consistently [<10%] more than SGB-Cape's rates.

[28] Eskom has various stages in evaluation of bids. First, the prequalification documents are checked for completeness. Next, a functional assessment is done on the basis of documentation submitted and a factory assessment with 50% awarded for technical attributes, 30% for safety (on an all or nothing basis) and 20% for quality (on an all or nothing basis). The bidder requires a minimum of 80% for the functional assessment to proceed. Other stages in evaluation include evaluation for local production of content (Step 2), a financial analysis (Step 3) and then a price and preference analysis. There is a further objective criteria related to ownership with bid documents stating that Eskom would

¹⁷ TB 05, p W120-121, T245-246, S166-167, M 166-167.

contract with suppliers that have 51% black ownership in accordance with section 2(1)(d-f) of the PPPFA.¹⁸

[29] As far as the award of the tender is concerned there are two aspects that are important to note.

29.1 Firstly, the bid documents note that the allocation of power stations remained the prerogative of Eskom. This notwithstanding, bidders were required to indicate the number of power stations they believed they had the resources and capacity to service, based on typical volumes;¹⁹

29.2 Secondly, Eskom reserved the right to award a tender to a supplier who may not be the highest scoring or highest ranked supplier, for the purposes of maximizing recognition of black ownership, black management control, skills development and/or preferential procurement in line with section 2(1)(f) of the PPPFA.²⁰

The Commission's Case

[30] On 22 March 2016, the Commission received a complaint against SGB-Cape on allegations of collusion in respect of CORP3130.²¹ On 8 March 2017, the Commissioner initiated a complaint to include Tedoc, Superfecta and Mtsweni in allegations of collusion in respect of CORP3130.²²

[31] During its investigation, the Commission received information and documentation from Eskom and interrogated Mr Falconer²³, Helen Peters ("**Ms Peters**") of Superfecta²⁴, Doctor Jiyane ("**Mr Jiyane**") of Tedoc²⁵ and Sibusiso Mtsweni ("**Mr Mtsweni**") of Mtsweni.²⁶

¹⁸ TB 04 p 11.

¹⁹ TB 04 p 12 – 13.

²⁰ TB 04 p 18.

²¹ TB 00 p 22.

²² TB 02 p 112-115.

²³ TB 02 p 39-43.

²⁴ TB 02 p 44-70.

²⁵ TB 02 p 71-94.

²⁶ TB 02 p 95-102.

- [32] On 6 February 2018, the Commission referred its complaint to the Tribunal for adjudication, seeking a declaration that the Respondents have contravened section 4(1)(b)(i) and (iii) of the Act as well as the imposition of an administrative penalty.²⁷
- [33] In terms of the complaint, the Commission alleged that SGB-Cape concluded bilateral agreements with the JVPs, with a view to using them to tender collusively. It alleged that in terms of the bids, all of which were signed by Mr Falconer, SGB-Cape consistently quoted prices for itself which were lower than those of the JVs and that SGB-Cape used the JVs' bids to better its chances of winning the tender. Finally, the Commission relied on the presumption of collusion in section 4(2) of the Act²⁸ on the basis that SGB-Cape and the JVs have a common shareholder who submitted bids on behalf of and in competition with the JVs.
- [34] On 6 March 2018, the Respondents filed an exception against the Commission's referral on the basis that it failed to set out a lawfully initiated or valid complaint, failed to meet the requirements of Tribunal Rule 15 and/or was vague and embarrassing.²⁹ On 8 August 2018, the Tribunal ordered the Commission to file a supplementary affidavit in which it provides specified particulars to the Respondents.³⁰
- [35] On 23 August 2018, the Commission filed its supplementary affidavit,³¹ in terms of which it clarified that SGB-Cape and the JVs colluded when Mr Falconer

²⁷ TB 00 p 1-31.

²⁸ *"An agreement to engage in a restrictive horizontal practice referred to in subsection (1)(b) is presumed to exist between two or more firms if-*
(a) anyone 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 that restrictive horizontal practice."

²⁹ Case no.: CR277Feb18/EXC300Mar18.

³⁰ The Respondents were of the view that the Commission's supplementary affidavit did not comply with the Tribunal's order and brought a second exception application against the Commission, under case number: CR277Feb18/EXC180Sep18, which was later dismissed by the Tribunal on 31 July 2019.

³¹ TB 00 p 32-40.

prepared and finalised tender documents on their respective behalf. Further, that its presumption of collusion is limited to SGB-Cape and the JVs and does not include the JVPs in their individual capacities. This notwithstanding, that the JVPs are jointly and severally liable for the conduct of the JVs. The Commission seemingly abandoned its reliance on section 4(2) as no reference was made to it in the hearing or in its Heads of Argument.

[36] As indicated, the Commission's case has evolved from its pleadings and now focusses on two main allegations, namely:

36.1 the agreement between SGB-Cape and the JVs (and not JVPs) as firms that could have independently competed with each other but did not do so, as a result of their decision to mandate Mr Falconer to prepare the bids on their behalf (the first impugned agreement). In other words, the Commission alleges that the collusive conduct between the JVs arose when the JVs mandated Mr Falconer to prepare the bids on their behalf. Further, that the collusion stems from Mr Falconer being aware of all the bids and prices for these bids; and

36.2 the agreement between SGB-Cape and Mtsweni, in terms of which a competitive restraint was imposed upon Mtsweni not to compete for the tender (the second impugned agreement). The Commission argues that Mtsweni is a potential competitor who by virtue of its partnership with SGB-Cape was prevented from competing for the tender. As such it further argues that this agreement between SGB-Cape and Mtsweni is a collusive agreement.

[37] The Commission argued that the first impugned agreement was entered into between SGB-Cape and the JVs on 21 April 2015 through the mechanism of the mandate given by SGB-Cape and the joint ventures to Mr Falconer (and in turn SGB-Cape), authorising him to complete bid documents on their behalf. The Commission submits that the collusion takes place within Mr Falconer's capacity as representative of all four bidders. Its expert, Mr Aproskie submitted

further that the moment the JVPs authorised Mr Falconer to represent them, they, through Mr Falconer, became aware of each other as well as their respective bids and SGB-Cape's bid.³²

- [38] The Commission further contends that in attending meetings of SGB-Cape's tender committee where decisions were made on, *inter alia*, bid pricing, Mr Falconer was binding SGB-Cape and the JVs to those decisions, thus removing each bidder's ability to independently determine their bids. Mr Aproskie posited that while there is no evidence of the parties physically sitting in one room and discussing the bid prices, through the mandate given to Mr Falconer, they are effectively always in the same room. He stated that:

"MR APROSKIE: So, if the argument is that there's never been a room where the joint venture partners have been in the same room, that only necessarily applies to the empowered joint venture partners, Mtsweni, and Superfecta, and Tedoc. But beyond that, once those joint ventures give a mandate and they agree as joint ventures to give that mandate to Falconer, they are effectively always in the same room, and we can't expect to see your typical agreement where everyone gets together in a smoke-filled room to sign a paper, or to talk to each other, or to shake hands, because ultimately that smoke filled room is within Falconer's head. There's no way you could observe what's happening within his head, it's just clear that the only way he can make a decision for those four entities that he represents, is to coordinate that decision."³³

- [39] The Commission submits that as a result of the mandate to Mr Falconer the bidders were aware and had control over each other's pricing decisions, which took away their ability to independently and unilaterally determine their prices.

- [40] The rationale given for this, posited in the Commission's Heads of Argument, is that Eskom was gradually reducing the number of stations to a single provider and that market intelligence showed that no firm would get more than four stations. Submitting multiple bids allowed SGB-Cape to increase its chances of getting more than four stations.³⁴

³² Transcript p 937 lines 1-7.

³³ Transcript p 928 lines 1-17.

³⁴ Consolidated Heads of Argument Bundle p 5 – 6, paras 10-11.

The Respondents' Case³⁵

- [41] The Respondents deny that SGB-Cape is in a horizontal relationship with either the JVPs or the JVs themselves and submit that the Commission's case fails to establish the material requirements for contravention of section 4(1)(b) of the Act.³⁶ In addition, they argue that properly characterized, the economic relationship between SGB-Cape and the JVs was, at the time that the bids were prepared, vertical in nature.
- [42] The Respondents submit that while SGB-Cape could alone satisfy the technical requirements of COPR3130, the same is not applicable to the JVPs. Furthermore, the only way in which the JVPs could satisfy Eskom's technical requirements would be through the formation of JVs. The JVPs were not competitors to SGB-Cape because on their own they would not be able to fulfil the requirements of the tender. As discussed above the Commission no longer persists with the allegation that SGB-Cape and the JVPs were in a horizontal relationship.
- [43] Furthermore, the JVPs were not informed of each other's identities, nor were they informed that SGB-Cape intended to submit a bid in its own name. In addition, none of the JVPs had knowledge of the prices submitted with SGB-Cape's bid or the other JV's bids. Accordingly, no agreement was entered into by the JVs or between the JVPs with each other. The Commission no longer persists with this case.
- [44] As to whether the JVs themselves colluded, the Respondents submit that SGB-Cape was the controlling mind of each JV. The fact that each JVP mandated SGB-Cape to determine the prices to be submitted to Eskom in response to CORP3130 is of no moment because the JVs would not have been able to set their prices without approval by SGB-Cape. The JVs existed only because SGB-Cape established them. SGB-Cape could not collude with itself.

³⁵ The Respondents filed a joint Answering Affidavit deposed to by Mr Falconer, with the contents thereof confirmed by Ms Peters, Mr Jiyane and Mr Mtsweni through confirmatory affidavits.

³⁶ TB 00 p 41 - 83.

The Hearing

- [45] Evidence in the matter was heard on 10,13,14,15,17,20,21,22, and 23 June 2022 with closing argument on 24 August 2022.
- [46] Four factual witnesses and two expert witnesses were called.
- [47] The Commission called one factual witness, namely Ms Asanda Mzileni ("Ms Mzileni"), the Senior Advisor, Group Commercial at Eskom. Ms Mzileni was involved in the evaluation of the bids submitted by SGB-Cape and the joint ventures.
- [48] The Respondents called three factual witnesses, namely Mr Kobus Visagie ("Mr Visagie"), the erstwhile Divisional Director of SGB-Cape, Mr Falconer, the Commercial Director of WACO Africa and Ms Helen Peters, the owner of Superfecta.
- [49] The Tribunal heard evidence from two expert witnesses. The Commission called Mr Jason Aprosiek ("Mr Aprosiek"), a Principal Economist in its employ, and the Respondents called Mr Stephan Malherbe ("Mr Malherbe"), an economist employed by Genesis Analytics. Both experts provided their views on economic issues pertaining to collusive tendering in the context of this matter.

Analysis

- [50] In terms of section 4(1)(b)(i) and (iii) of the Act:

"An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if- it involves any of the following restrictive horizontal practices:

- (i) *directly or indirectly fixing a purchase or selling price or any other trading condition;*
- (ii) *[...]; or*
- (iii) *collusive tendering.*”

[51] Section 4(1)(b) prohibits agreements or concerted practices by firms in a horizontal relationship, relating to specific types of conduct listed therein, namely, direct or indirect price fixing; market division (by allocating customers, suppliers, territories or specific types of goods or services); or collusive tendering. The Competition Act defines “horizontal relationship” as a relationship between competitors.

[52] The agreements or concerted practices contemplated in section 4(1)(b) are considered to be *per se* offences where harm to competition is presumed and the Respondents are not permitted to put up justification or defences. In the US these would be viewed as “hard-core cartels”. Agreements or concerted practices contemplated in section 4(1)(a) are considered to be rule of reason offences where the Commission is required to show harm to competition and the Respondents are permitted to raise defences or justifications. In the US these would be viewed as soft-core cartels.³⁷

[53] When assessing whether the conduct complained of falls within the ambit of section 4(1)(b), such conduct must be properly characterised. In other words, such conduct must be the type of conduct which the legislature intended the Act to condemn *per se*, with no scope for justification.

[54] Characterisation was introduced into South African law through the judgment of the Supreme Court of Appeal (“SCA”) in *American Soda Ash Corporation and another v Competition Commission and others*³⁸ (“ANSAC”). The SCA formulated an inquiry to be undertaken in the event that there is uncertainty as

³⁷ *The Competition Tribunal’s guide to select cases decided from 1999 to 2021*, p 237-242.

³⁸ 2005 158 (SCA) (“ANSAC”).

to whether the conduct complained of was of the character contemplated in terms of section 4(1)(b).

- [55] The Competition Appeal Court (“CAC”) in *Competition Commission v South African Breweries Ltd & others*³⁹ (“SAB”) held that when conducting a characterisation exercise under the Act, it must be determined: “(i) *whether the parties are in a horizontal relationship, **and if so** (ii) whether the case involves direct or indirect fixing of a purchase or selling price, the division of markets or collusive tendering within the meaning of section 4(1)(b).*”⁴⁰ (own emphasis)
- [56] The first step in our enquiry is therefore to assess the economic relationship between the parties and whether, for purposes of section 4(1)(b), they were competitors. The second step in the enquiry would be to assess whether the conduct complained of is of the type contemplated within the scope of section 4(1)(b).
- [57] The CAC went on to state that “...since characterisation in this sense involves statutory interpretation, the bodies entrusted with interpreting and applying the Act (principally the Tribunal and this Court) must inevitably shape the scope of the prohibition, drawing on their legal and economic expertise and on the experience and wisdom of other legal systems which have grappled with similar issues for longer than we have.”⁴¹
- [58] In the recent case of *Tourvest Holdings (Pty) Ltd v Competition Commission and Another*⁴² (“*Tourvest*”) the CAC established the test for horizontality in the context of alleged collusive tendering. The CAC found that the accepted economic discipline employed in the determination of horizontality is to examine the relationship in the absence of the impugned agreement.⁴³ It found that this economic approach is espoused in the EU and US guidelines on potential competitors and that “*the application of this discipline enables an*

³⁹ 2014 2 CPLR 339 (CAC) (“SAB”).

⁴⁰ Ibid para 37.

⁴¹ Ibid para 37.

⁴² (195/CAC/Oct21) 2022 ZACAC 5 (30 June 2022) (“*Tourvest*”).

⁴³ Ibid para 47.

examination of the counterfactual position (where there is no agreement) to the existing factual position (where the agreement is in place). This is generally accepted as the appropriate means to determine whether the agreement itself resulted in harm to competition or not and, therefore, whether the conduct should fall into the type of economic offences for which no defence should be permitted.”⁴⁴

[59] It went on to state that the question posed in terms of the counterfactual analysis is whether the parties were competitors absent the impugned agreement. Moreover that *“If the answer to the question is in the affirmative, then competition may have been harmed as the agreement would then have removed a potential competitor from the market and therefore, itself, resulted in potential harm to competition. For instance, this would be the case in a situation of blatant market division. However, if the answer to this question is in the negative - i.e. the two firms would not have been competitors absent the agreement - then the agreement itself did not remove a potential competitor from the market and, therefore, the agreement could not have harmed competition.”⁴⁵*

[60] A fundamental enquiry into section 4 therefore involves determining whether the parties are in a horizontal relationship or competitors, absent the impugned behaviour.

Were the parties in a horizontal relationship?

[61] The Commission’s case and counterfactual are predicated upon its contention that SGB-Cape and the JVs were in a horizontal relationship. It submits that in submitting four separate tenders, SGB-Cape and the JVs became competitors in respect of the tender and the collusion between them came about as a result

⁴⁴ Ibid para 48.

⁴⁵ Ibid paras 49 and 50.

of them authorising Mr Falconer (in turn SGB-Cape) to attend to the preparation and submission of tender documents on their behalf.

[62] As indicated, the Commission concedes that the JVPs, Tedoc and Superfecta are not in a horizontal relationship with SGB though it does argue that Mtsweni was a potential competitor (which we turn to later). Hence there is no need for us to deal with the relationship between SGB-Cape and each JVP (save for Mtsweni) or the relationship between JVPs *inter se*.

[63] The Commission's expert report relies on three arguments.

63.1 Firstly, it points to the fact that each JV entered a separate bid in its own name.

63.2 Secondly, it relies on the matter of *Competition Commission v Eye Way Trading and Another*⁴⁶ ("Eyeway") and the decision of the Tribunal in *Competition Commission v Tourvest*⁴⁷ to argue that where firms bid on the same tender they become competitors at the point of bidding.

63.3 Thirdly, it argues that the JVs are able to separately meet the requirements of the tender in each case (even where the JVPs are not able to) and that the counterfactual is four independent and competing bids.

Bidding for the same opportunity

[64] During the hearing, both the Commission's factual witness, Ms Mzileni, and the economic expert, Mr Aproskie, focused on the fact that separate bids were entered as evidence of horizontality.

ADV SUBEL SC: *So if I'm understanding you, you're talking at a high level. You're saying because they are now bidding for the same... [intervention]*

⁴⁶ CR073Aug16/ CR074Aug16 ("Eyeway").

⁴⁷ (CT) (29 Sept 2021) Case no: CR022May15.

MS MZILENI: Yes.

ADV SUBEL SC: ...contracts, therefore each one is a competitor or potential competitor. That's as I understand you.

MS MZILENI: Yes.⁴⁸

[65] When requested to provide a view as to the nature of the parties' relationship, Mr Aproskie also testified that by submitting bids, the JVs and SGB-Cape held themselves out to be competitors. He testified as follows:

MR APROSKIE: Right, so horizontality here means that they're competitors. And as I mentioned earlier it's clear that the JVs, the three JVs, Joint Ventures, that they are competitors to SGB as they are – they have put bids in...if you hold – put yourself in for a bid you're a competitor for that bid, which makes sense...⁴⁹

[66] However, the Tribunal's decision (in *Tourvest*) relied upon by the Commission was overturned by the CAC. In *Tourvest*, the CAC held that bidding on the same tender opportunity is insufficient to prove horizontality. The Court expressly did not support this approach to horizontality in isolation. With reference to *A' Africa Pest Prevention CC and Another v Competition Commission of South Africa* ("A' Africa") the CAC states that "*the submission of the two separate bids without more cannot, on its own, bring the impugned conduct within the ambit of section 4(1)(b).*"⁵⁰

[67] Hence, it would be insufficient to find that the Respondents are competitors solely on the basis that they submitted bids for the same opportunity (tender) and it is necessary to understand more fully whether the parties would be competitors absent the impugned agreement. This includes a consideration of the context and the counterfactual.

⁴⁸ Transcript, page 136 lines 15-21.

⁴⁹ Transcript p 956 lines 6-9, 18-20.

⁵⁰ 168/CAC/Oct18) [2019] ZACAC 2 (2 July 2019). ("A' Africa") at par 67.

The context and the counterfactual

- [68] The Commission argues that the three JVs were separate companies that could have done the work independently:

MR APROSKIE: But, of course, even SGB's argument and Malherbe also refers to this argument that they represented – Eskom were somehow presented with a set of options. The idea of a set of options presupposes that all those firms in the set of options can do the work. So, it's clear that the three JVs and SGB itself, are competitors in this case, as they've all made bids in their own names.⁵¹

- [69] It was argued that notwithstanding SGB-Cape being common to all bids and holding the majority interest in the JVs, there are mechanisms which could have been put in place to ensure that the bids were independent of each other. Mr Aproskie hypothesised on a range of possibilities which could have been explored to achieve independence, the first being for the JVPs to determine the labour prices of the bids, alternatively, through the appointment of an independent third party to act in each JV as a form of Chinese wall to guard against information sharing.⁵²

- [70] The Commission submits that had such mechanisms been introduced to ensure that there was no coordination in the pricing of the four bids, then the correct counterfactual would have been the submission of four independent bids⁵³.

- [71] Mr Aproskie seemed to argue that the JVPs should have played a bigger role in setting prices (for individual labour components for example) rather than

⁵¹ Transcript p 956 lines 20-21, p 957 lines 1-5.

⁵² Transcript p 946 lines 3-21, p947 lines 1-15.

⁵³ TB 00 p 172 paras 26, Transcript p1129 lines 10-18.

mandating Mr Falconer to set prices. Mr Aproskie's testimony focused on the importance of independence for achieving competitive outcomes, stating:

***MR APROSKIE:** So, independence is critical for competition and then critical for competitive outcomes. As you remove independence you get closer to a coordinated situation, because if you're not making your decisions independently as a competitor, you're making them in coordination with other people and their incentives. And when you're making that decision on a more coordinated fashion, then you're considering the incentives of not just yourself, but everyone else, you start making decisions for the whole in terms of various parties or coordinating, rather than just yourself. So, independence is a core part of competition. I think that also came through the I-Way (sic) judgment where, once you become a competitor, once you put yourself up as a competitor to these tenders you need to be acting independently, otherwise you can't expect competitive outcomes. You can't expect the correct outcome in terms of a competitive market.⁵⁴*

- [72] However, Mr Aproskie could not point to any commercial or economic incentive a company would have to create four competing bids with itself for the same tender, other than the crowding out theory posited by him and which we discuss later.
- [73] More importantly, the factual evidence led by the Commission to support Mr Aproskie's propositions was limited. No evidence was led to suggest that four separate bids was a possible or probable outcome in the absence of the impugned behaviour.
- [74] While Ms Mzileni, the Commission's witness, testified to her concern over similarities between the bids, she conceded under cross-examination that she was unaware of the JVPs and their ability to render any services to Eskom or to have bid for the tender themselves.⁵⁵ She further testified that she had no

⁵⁴ Transcript p 944 lines 3-17.

⁵⁵ Transcript p 82 lines 21-22, p 83 lines 1-6, p 244 lines 8-21, p 245 lines 1-21, P 246 lines 1-5.

knowledge as to SGB-Cape's requirements in selecting JVPs and/or the information shared between SGB-Cape and each JVP.⁵⁶

- [75] The Respondents argue three points on horizontality. Firstly, that the JVs and bids were devised by a single controlling mind of SGB-Cape. Secondly, that the different apparent competitors are actually an "*artefact of the impugned conduct*" meaning they came into existence as a result of the alleged impugned conduct. Thirdly, that the firms are not in a horizontal relationship but rather that they are in a vertical relationship with the JVPs providing an input of skilled, semi-skilled and unskilled labour services to each JV and SGB-Cape as the core provider of specialized services to the JV.
- [76] In support of these arguments the Respondents' factual witness Mr Visagie testified that SGB-Cape had decided to explore the submission of multiple bids with different partners prior to approaching these partners.⁵⁷ This is supported by an email sent at the time from Mr Visagie to members of the SGB-Cape tender committee, which included a list of options for different configurations and partners.⁵⁸ This was sent a week prior to the emails sent out to JVPs inviting them to bid.⁵⁹
- [77] Furthermore, the factual witnesses testified to why four independent bids were not possible. Mr Falconer and Mr Visagie testified to the processes involved when SGB-Cape receives a tender of the magnitude of CORP3130. In order to respond to a tender valued at R70 million or above, SGB-Cape's processes require that an internal tender committee be allocated (as required in terms of the company structure), and that this committee presents their strategy to the CEO of WACO International who in turn obtains approval from the board of directors of WACO.⁶⁰ Mr Visagie testified that he could not imagine how four independent bids for the same tender (as theorised by Mr Aproskie) could be created and approved within the existing governance structures at WACO with

⁵⁶ Transcript p 95 lines 6-18, p 104 lines 10-22, p 105 lines 1-8.

⁵⁷ Transcript p 481 lines 5-16, p 482 lines 17-18.

⁵⁸ TB 01 p 242-246.

⁵⁹ TB 01 p 251 – 258.

⁶⁰ Transcript p 372 lines 10-21, p373 lines 13-21, p 374 lines 1-7.

a single tender committee, one executive management team and a single board.⁶¹ Mr Visagie testified as follows:

MR VISAGIE: *Chair, I cannot see how that could've worked in our business. I think it was not possible, it was not practical. We simply have not had the resources, we, I mean, for example, Mr Nathan Naicker had what we call an estimating manual. That's a manual that they use to calculate the basic prices on. So, if, I mean, how – but I just can't see how we could've set up four different teams to do that. It's unthinkable. And the JV partners, not having had the experience or the expertise, my belief is we also couldn't hand it to them to prepare.*⁶²

[78] When asked how the notion of four independent bids would have applied at Board level, Mr Visagie testified that:

MR VISAGIE: *...I – in my view I cannot see that the board would've been, it wouldn't have made sense for the board to now consider four different bids for the same tender by the same company.*⁶³

[79] When asked what the impact of different bids would be on price, Mr Visagie testified that:

MR VISAGIE: *.... I would say in terms of the material prices, they would all start off from the same base in terms of what supplier has the best price that suppliers could provide to us. The same reference in terms of labour rates domain. It's difficult to answer this in the context, but if everybody abide to the same policies and principle in terms of mark-ups, I don't believe it would've served any, the outcome would've been different. It's unthinkable.*⁶⁴

⁶¹ Transcript p 427 lines 3-21.

⁶² Transcript p 427 lines 4-12.

⁶³ Transcript p 428 lines 1-4.

⁶⁴ Transcript p 428 lines 14 -20.

[80] While the Commission has speculated as to how a firm in such a JV could have behaved with respect to negotiations, there is no evidence that these companies did not contract in a manner that was a reasonable best response (outcome) for them.

[81] The Respondents' expert, Mr Malherbe argues that while the JVs are in fact all able to undertake the work separately, this is by design by SGB-Cape as a single controlling mind, and secondly that the appearance of the JVs as competitors is a result of the way in which they were constructed:

***MR MALHERBE:** ...the apparent multiplicity of competitors is an artefact only of the impugned conduct and if you remove the impugned conduct, the JVs themselves disappear as competitors to one another. You end up with only one player instead of four. You don't end up with two or three or four players. So therefore all of these competitive concerns disappear.⁶⁵*

[82] The Respondents make the argument that this is ultimately one firm presenting different options rather than four companies colluding, leading to the conclusion that collusion is not possible.

***MR MALHERBE:** ...to paraphrase what the Chair stated this morning perhaps in question form and that is I too believe that a firm cannot compete with itself and if it cannot compete with itself, it cannot collude with itself.⁶⁶*

[83] Mr Visagie testified that as part of its bidding strategy, SGB-Cape unilaterally decided that it would submit a bid in its name and three other bids as part of JVs in order to increase its chances of meeting the ownership criteria specified in the tender and winning additional power stations.⁶⁷ This was already communicated to Eskom. The JVs were established for the purpose of this particular tender and did not exist in the pre-tender environment.

⁶⁵ Transcript p 1361, lines 16-20.

⁶⁶ Transcript p 1362 lines 16-19.

⁶⁷ Transcript p 500 lines 5-13.

- [84] Mr Visagie further testified that SGB-Cape alone was responsible for putting the proposals together, and would have been responsible for supplying the technical and operational services, materials, financial, project and commercial management, and administration of the JVs.⁶⁸ Furthermore, the rates were all determined by SGB-Cape.⁶⁹ The emails between members of the senior executive, CEO and estimators while the bids were being prepared show that the management team was involved in discussions of the minutiae of the bids.⁷⁰
- [85] Moreover, the evidence from Ms Peters was that the JVPs could contribute by providing specific inputs, but that they would not have considered bidding for such a tender absent the specific knowledge and financial strength of SGB-Cape. The JVPs were never competitors to SGB-Cape.
- [86] Ms Peters' evidence supported the contention that SGB-Cape was the single controlling mind.

***MS PETERS:** The reason why I felt comfortable with them completing it is because that is their core business. They'd be able to know that material is needed where, what scaffolding is required for what. That's their – they were aware of the tender. That type of tenders would pass me, I wouldn't even take a second look at those types of tenders. At the time in my view I wouldn't be able to go, I wouldn't have been able to go to a company and say this is my services that I'd like to contribute, let's go into a JV and let's do this. SGB was my first client, still is my only client in that specific work activity with scaffolding and insulation. So, that's the only – they had all of the knowledge and they also came with all of the monetary guarantees that is required for that type of work. I wouldn't have been able to bankroll, for lack of a better word, to bankroll those kind of activities because I don't have any guarantee of when I'd be receiving payment.⁷¹*

⁶⁸ Transcript p 415 lines 3-21, p 416 lines 1-17.

⁶⁹ Transcript p 420 lines 11-21, p 421 lines 1-14, p 423 lines 1-13, p 424 lines 1-21.

⁷⁰ TB 01 p 270-273.

⁷¹ Transcript p 788 lines 4-18.

- [87] Thus, the evidence before us shows that the JVs were devised by the single controlling mind of SGB-Cape. It alone devised all the key components of all four bids including the commercial proposal, financial, technical, quality and SHE proposals. The creation of the JVs was specific to this tender opportunity, and they did not exist for any other purpose.
- [88] The Commission has proposed that the first impugned agreement was the provision of the mandate to Mr Falconer *after* the JVs were set up. This theory, however, relies on the assumption that the JVs were independent competitors. As discussed above, in *Tourvest* the CAC held that analysis of potential competition should apply in “*the pre-tender environment (which is the correct environment to assess the existence or otherwise of actual or potential competition)*.”⁷²
- [89] The JVs were clearly established by SGB-Cape for the sole purpose of bidding for this specific tender and the decision by SGB-Cape to provide multiple bids with different partners.
- [90] But even if we were to assume for purposes of argument that it was technically feasible to duplicate estimating and accounting resources that SGB-Cape utilised to develop their bids, the Commission’s arguments might apply only in a scenario where the four JVs would be competing for different tenders. That is, it would not be commercially rational for a firm to establish four entities in which it is the controlling mind or majority shareholder, and then allow each one of them to bid independently in competition with each other, without having some influence in the pricing decisions of those firms, for the *same piece of work* or tender. If it failed to exercise some influence in the pricing decisions of these entities – either by providing guidelines or determining the margins – it would run the risk of cannabilising its own margins.

⁷² Supra at para 87.

- [91] Thus, it would not have made economic or business sense for SGB-Cape to allow the JVs – which it had established – to run off and set their own pricing for the *same* tender.
- [92] Further, it is not clear how this would work within the existing governance structures at WACO with a single tender committee and board that needs to approve these tenders. While the Commission has speculated as to how a firm in such a JV could have behaved with respect to negotiations there is no evidence that these companies did not contract in a manner that was a reasonable response for them.
- [93] Extensive time was spent at the hearing by the Commission on the JVPs' ability to determine labour rates in respect of the tender to support the contention that the counterfactual was four independent bids from the different JVs. Ms Peters in particular was painstakingly taken through various line items of the tender to determine which components she was able to estimate on her own. While Ms Peters did concede that there were aspects she could estimate, on balance her evidence suggested that this was not straightforward or practical and included, for example, needing to investigate prices (for example, through asking employees for payslips) that SGB-Cape already had on record and phoning for quotations on equipment (and in many instances asking SGB-Cape for input information) to estimate prices that SGB-Cape already had actual prices for on record.⁷³
- [94] In our view, this does not assist the Commission's case. Whether or not the JVPs were able to determine certain line items of the tender, the incentive to do so for a JV needs to be considered in the context of SGB-Cape's authority structures, business incentives and whether it is rational for the JVPs to go to great lengths to collect information that SGB-Cape already had in order to develop four separate bids.

⁷³ Transcript p 761 line 7, p 756 lines 3-20, p 757 lines 4-20.

- [95] To our minds the speculation that a company would as a counterfactual create four independent bids for the *same* tender is unrealistic and at odds with the evidence provided by the factual witnesses.
- [96] The more plausible counterfactual, and the one supported by evidence led in this case, is that forwarded by the Respondents who argue that the counterfactual is a single bid from SGB-Cape (likely in a JV with one or more partners).
- [97] The relationship between the JVs in this matter cannot be classed as horizontal competition. The JVs were constructed for the specific purpose of this tender by SGB-Cape and absent the decision to create JVs for this bid they would not exist.
- [98] If SGB-Cape is the single controlling mind, it follows that it cannot collude with itself.
- [99] There are parallels with the CAC's decision in *A'frica*.⁷⁴ In this case the CAC found that a firm could not collude with itself as follows: *"[a]lthough on paper, by virtue of being separate entities, firms may be capable of colluding, ultimately, the actual role players behind those firms are natural persons. The question in this case, is who was Labuschagne colluding with? Could she collude with herself, or engineer collusion between the two firms she completed the forms on behalf of, and what would the effect of that be? In my view, those are the questions that the Tribunal ought to have asked, because more and more they highlight the reason why the conduct ought to have been characterised. This on its own lacks the hallmarks of collusion, which necessarily would involve individuals behind the firms conducting prohibited practices. Labuschagne had no colluding partner, so I find it hard to find that she could collude with herself in submitting the two tenders on behalf of the appellants."*⁷⁵

⁷⁴ Supra.

⁷⁵ Ibid par 71.

- [100] The Commission has suggested that there is a danger in finding that there is a single controlling mind and that this would give rise to companies being able to collude by providing a mandate to a single individual. This is incorrect. If the JVs were comprised of different scaffolding companies that met the tender criteria and would have absent the JV tendered on their own this mechanism would be collusive. Alternatively, if the JVs were used as a conduit for different labour companies to exchange information about labour pricing with each other, this would also be prohibited. However, in this instance the JVs are bidding with each other for a particular tender solely on SGB-Cape's strength and design.
- [101] The Commission's hypothesis for multiple bids is that more bids would allow SGB-Cape to get more than four stations (the crowding out hypothesis). However, the idea that Eskom would provide four stations per bidder only appears in internal SGB-Cape emails on 27 January 2015. This occurred prior to the actual tender being published on 13 March 2015.⁷⁶ The tender documents themselves make no mention of a maximum number of stations per bid but rather provide Eskom with the authority to apportion stations at its own discretion.
- [102] Furthermore, this hypothesis might hold true if SGB-Cape faced no external competition. The evidence however shows that SGB-Cape ultimately faced external competition from other large construction companies such as Kaefer, RJ Southey, Basadi and TSI, of which they were aware as evidenced by their internal documents⁷⁷ and from attendance of the compulsory tender briefing. Multiple different bids from the same company would not change the underlying competitive dynamics of a bid in a case in which they had strong competing companies that were also tendering and could undercut their pricing strategy.
- [103] Furthermore, there is some evidence that SGB-Cape did not attempt to hide the multiple bids. This includes that (i) the initial letter of acknowledgement sent

⁷⁶ TB 01 p 116.

⁷⁷ TB 01 p 268.

to Eskom included the name of SGB-Cape and three JVs, (ii) the fact that every bid cross-referenced other bids in describing the joint discount that would apply and, (iii) that all JVs included the name SGB-Cape explicitly. This is not congruent with a situation in which the appearance of completely independent and competing companies is created with the purpose of deception. Mr Visagie's evidence confirms this:

MR VISAGIE: *Chairperson, my recollection and understanding was that the way we would submit our bids was a joint bid and we would cross-reference all the joint venture tenders, and we would make sure that the partner names, everything is transparent. So, and the key in terms of my recollection is that it would have been submitted as a joint bid.*⁷⁸

[104] In addition, the behaviour did not occur in a vacuum but rather is in the context of SGB-Cape being in discussions with Eskom over their empowerment credentials. It is important to note that on SGB-Cape's version this structure was aimed at improving empowerment options for Eskom in that had Eskom mixed and matched SGB-Cape and the JVs across stations to fulfill its empowerment objectives (in terms of youth owned and woman owned companies) there could be arguments that this would benefit Eskom and the BEE partners. The evidence from Ms Peters suggested that her small business had benefitted greatly from entering into past joint ventures with SGB-Cape.

[105] Finally, it appears that partnerships and JVs were encouraged by Eskom and that the rules did not expressly prohibit the submission of multiple bids by the same bidder.⁷⁹ But even if it was a strict rule there is still a question as to whether this would make the behaviour collusive or whether it would be a form of tender fraud or misrepresentation.

[106] Based on the above analysis we find that the JVs are not horizontal competitors for purposes of section 4(1)(b). The JVs did not exist as independent

⁷⁸ Transcript p 602 line 20, p 603 lines 1-5.

⁷⁹ Invitation to Tender TB 04.

competitors but were created specifically by SGB-Cape for purposes of the one specific tender. SGB-Cape retained control over the JVs and was the controlling mind of the JVs and could not collude with itself. Furthermore, the alleged impugned behaviour as now articulated by the Commission, namely the granting of the mandate to Mr Falconer, cannot be characterized as collusion within the meaning of section 4(1)(b).

The second impugned agreement

- [107] Recall the Commission is no longer persisting with the case that the JVPs colluded with SGB-Cape by forming the JVs or that the JVPs colluded with each other through the JVs. The Commission seems to accept, other than in the case of Mtsweni, that the JVPs were not competitors to SGB-Cape. But if there is any doubt as to this, the evidence of Ms Peters was clear. The JVPs would not have been able to submit a tender of this nature on their own without the assistance of SGB-Cape.
- [108] Furthermore, there is no evidence that any of the JVPs used the structure to co-ordinate labour prices or markups with each other using SGB-Cape as a conduit for collusion. Instead, all terms and prices were set by SGB-Cape and labour administration fees were negotiated bilaterally with different partners who did not know each other.⁸⁰
- [109] Hence there is no evidence whatsoever that the JVPs colluded with each other or with SGB-Cape.
- [110] As the arguments raised with respect to Mtsweni are different, we deal with these separately below.
- [111] The second impugned agreement which the Commission alleges gave rise to the collusion is that between SGB-Cape and Mtsweni. The Commission alleges that Mtsweni was restricted by SGB-Cape from submitting a bid in response to

⁸⁰ Transcript p 603 lines 11-17.

CORP3130 either on its own or with another bidder, thus excluding an actual or potential competitor from participating in the tender.

- [112] Mtsweni is differentiated from the other two JVPs as it had some construction and scaffolding experience, had attended the compulsory briefing on 26 March 2015 and had inquired with SGB-Cape as to whether it could submit a separate bid. This occurred during a meeting with Mr Visagie in which Mr Mtsweni asked whether he could tender as part of a joint venture and on his own, alternatively whether he could submit a tender and subcontract the entire scope of work to SGB-Cape.⁸¹
- [113] On 21 April 2015, Mr Visagie had addressed an email to Mr Falconer (with Mr Mtsweni in copy) confirming a telephone conversation with Mr Mtsweni in which Mr Mtsweni “*confirmed telephonically that he understands our requirement that if we enter into a Joint Venture for the Eskom Maintenance Tender that Mtsweni Corrosion Control will not submit a tender on their own. This to avoid possible conflict of interest. Sibusiso agreed to this.*”⁸²
- [114] The Commission’s argument is that preventing Mtsweni from bidding on its own was collusive. The argument made is that Mtsweni could have bid on its own or through subcontracting and that the impugned agreement with SGB-Cape prevented this.
- [115] The starting point again is whether the restraint that SGB-Cape placed on Mtsweni can fall under section 4(1)(b). As a first step we need to consider whether Mtsweni was a potential competitor or competitor.
- [116] The only evidence led in this case about Mtsweni’s ability to compete on CORP3130 (absent the joint venture) relates to the clarity sought by Mr Mtsweni from Mr Visagie on whether he could bid alone and an untested paragraph in Mr Mtsweni’s witness statement, indicating that (i) he had

⁸¹ Transcript p 435 lines 10-20.

⁸² TB 01 p 407-408.

preliminary discussions with other bidders,⁸³ (ii) he has some experience in scaffolding and heat insulation⁸⁴, and (iii) Mtsweni operates a fleet of five trucks.⁸⁵

[117] The CAC in *Dawn Consolidated Holdings (Pty) Ltd and others v Competition Commission* (“*Dawn*”) held that a potential competitor does not mean merely a company with sufficient resources to enter the market. The potentiality must be on realistic grounds, not just theoretical possibility.⁸⁶ The evidence led before this Tribunal does not support the contention that, absent the JV, Mtsweni was a potential competitor.

[118] Even the Commission’s own expert on questioning by the panel was at pains to explain in which way Mtsweni could pose a competitive constraint on SGB-Cape:

MR APROSKIE: *Yes. But maybe just to differentiate. So, they’re not an actual competitor where I would look at them by themselves. As a potential competitor it’s only with respect to the fact that they could join with someone else. I don’t know if that answers your question. So, they’re not a potential competitor or an actual competitor by themselves. The potential is very much with – in respect of the fact that they could form a competitor through joining someone else.*⁸⁷

[119] Hence the Commission’s own expert concedes that Mtsweni could not be considered as a competitor to SGB-Cape on its own. Nor could it be considered as a potential competitor on its own. It could only be considered as a potential competitor in the fact that it could *join with someone else*.

⁸³ He states in this paragraph that the discussions did not lead to any formal proposals.

⁸⁴ He states that he has been employed in the scaffolding and heat insulation business and is familiar with the skill requirements for such services. This notwithstanding, Mr Mtsweni further provides that he has not provided scaffolding on the scale or with the technical requirements of CORP3130.

⁸⁵ Transcript p 1096 lines 8-10, Mr Aproskie testified that Mtsweni could provide to the joint venture instead of hiring out.

⁸⁶ [2018] 1 CPLR 1 (CAC) at para 23.

⁸⁷ Transcript p 1241 lines 8-15.

[120] But there is no evidence to support that any agreement was likely to be reached with the firms that Mr Mtsweni had approached for preliminary discussions (Topfix, Oram Scaffolding, Zizwe Insulation and Joburg Scaffolding, which tendered as FBC Johannesburg Scaffolding JV).⁸⁸ In any event these companies tendered in their own name. Allowing Mtsweni to be classed as a potential competitor on the basis that it could possibly compete “*through joining someone else*” is merely theoretical and not based on any realistic grounds. Mtsweni is not a competitor or potential competitor and hence cannot be said to be colluding with SGB-Cape.

[121] We now turn to deal with the restraint placed against Mtsweni submitting additional bids. We do not find that SGB-Cape’s conduct in restricting Mtsweni from submitting additional bids to be unreasonable, regardless of whether Mtsweni was indeed a potential competitor (which we find he is not) on his own or in a partnership. A restraint in these circumstances was necessary in order to guard against the flow of information which Mtsweni could have carried through different bids. Restraints in the context of a JV for a specific bid have commercial and economic validity where they prevent a conflict of interest. A company may not want its partner to share its information with its competitors. On its own, a restraint on a partner who is engaged in a specific sub-component of the work cannot be viewed as collusion. The restraint is common and incidental to the JV, it does not exist outside the JV.

[122] This rationale for exclusivity was conceded by the Commission’s expert in response to a question from the Panel.

MR APROSKIE: *if I’m thinking about a JV. So, the exclusivity here is saying that, as I understand the exclusivity provision in these JV agreements is to say the Joint Venture will exclusively use that particular Joint Venture partner for labour and the other one for the other goods. It would be difficult to conceive exactly how it work if that was not exclusive. Ultimately, those two partners are coming together to form a*

⁸⁸ TB 00 p 160 para 13.1.

*business and they're doing that work together to form something new which is able to meet the requirements of the tender. So, in that sense, without anything else on my mind, I would think it is fine, because that's the ultimate purpose of their Joint Venture of coming together. It's not a completely hands-off vertical supply agreement where you say, this person is supplying that person, but you could buy your product from someone else. These are two firms who are coming together for a specific purpose to serve Eskom in this tender and to work together in doing that...*⁸⁹

[123] Accordingly, we find that Mtsweni was not a potential bidder for CORP3130 and the restriction placed against it by SGB-Cape did not have the effect of removing a competitor from bidding for CORP3130. Furthermore, we find that that such a restraint would not have been collusive in the context of parties creating a JV for the purpose of a tender opportunity.

[124] During Mr Aproskie's cross-examination, he was directed to Mr Mtsweni's witness statement and questioned on certain aspects thereof. Mr Ngcukaitobi objected to this on the basis that the content of Mr Mtsweni's witness statement was inadmissible given the Respondent's failure to call him as a witness. The objection was raised in circumstances where the Commission had actually introduced Mr Mtsweni's statement.⁹⁰ The objection was thus not upheld and the evidence was allowed. We note from the Commission's Heads of Argument⁹¹ that it makes further references to Mr Mtsweni's witness statement, furthermore, the Commission's objection was not raised during closing argument. In the circumstances, we do not take the matter any further.

⁸⁹ Transcript p 1242 lines 3-20.

⁹⁰ Transcript p 1091 lines 2-21, p 1092 lines 1-15.

⁹¹ see Consolidated Heads of Argument Bundle p 18, para 36.

Conclusion

- [125] We find that the Commission has failed to prove the first leg of the requirement of section 4(1)(b), namely that the Respondents are in a horizontal relationship.
- [126] We find that the JVs are not in a horizontal relationship and that the counterfactual is a single bid by SGB-Cape (with or without a partner). The relationship between the JVs cannot be classed as horizontal competition as they would not have existed outside of this tender opportunity. The JVs were constructed for the specific purpose of this tender by SGB-Cape and absent the decision to create JVs for this bid they would not exist. Ultimately SGB-Cape as the controlling mind, could not collude with itself for the same piece of work. We further find that the JVPs did not collude with each other.
- [127] The Commission's theory of harm is not supported by the facts of this case.
- [128] Accordingly, we find that there has been no contravention of section 4(1)(b)(i) and (iii).

ORDER

We make the following order:

- [1] The Commission's referral under case no. CR277Feb18 is hereby dismissed.
- [2] There is no order as to costs.

Signed by: Shaista Goga
Signed at: 2023-05-30 14:08:02 +02:00
Reason: Witnessing Shaista Goga

Sha'ista Goga

30 May 2023

Ms Sha'ista Goga

Date

Ms Yasmin Carrim and Dr Thando Vilakazi concurring

Tribunal Case Managers: Matshidiso Tseki, Camilla Mathonsi and Baneng Naape

For the Applicant: Adv Tembeka Ngcukaitobi SC and Adv Hannine Drake, instructed by Ndzabandzaba Attorneys

For the Respondents: Adv Arnold Subel SC and Adv Michelle Le Roux SC, instructed by Werksmans Attorneys