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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case Nos.: CR277Feb18/STR301Mar18
CR277Feb18/EXC300Mar18
CR277Feb18/DSC078May18

In the interlocutory applications of:

Waco Africa (Pty) Ltd	First Applicant
Tedoc SGB Cape JV	Second Applicant
Superfecta SGB Cape JV	Third Applicant
Mtsweni SGB Cape JV	Fourth Applicant
Tedoc Industries (Pty) Ltd	Fifth Applicant
Superfecta Trading 159 CC	Sixth Applicant
Mtsweni Corrosion Control (Pty) Ltd	Seventh Applicant

and

The Competition Commission	Respondent

In *re* the matter between:

The Competition Commission	Applicant

and

Waco Africa (Pty) Ltd & Six Others	Respondents

Panel	: N. Manoim (Presiding Member) A. Ndoni (Tribunal Member) F. Tregenna (Tribunal Member)
Heard on	: 20 June 2018
Last Submission received on	: 02 July 2018
Decided on	: 08 August 2018

Interlocutory Applications: Reasons for Decision and Order

Introduction

[1] The respondents in this matter are alleged to have collusively tendered and set prices in relation to a contract put out for tender by Eskom in contravention of sections 4(1)(b)(i) and (iii) of the Competition Act, 89 of 1998 ("the Act").

[2] However, they have raised several objections to the complaint referral which was filed by the Competition Commission ("the Commission") on 6 February 2018.

[3] These objections are raised by way three separate applications.

[4] The applications were heard together on 20 June 2018. For convenience we will deal with them all together in this decision.

Background

[5] In March 2015 Eskom issued a tender calling for suppliers to provide scaffolding and insulation for fifteen coal fired power stations. The value of the tender was R 240 million and the contract was to run for a period of five years.

[6] Eskom says 31 suppliers responded to the invitation. Of these, four separate bids came from the respondents in this matter.

[7] They were respectively:

a. The first respondent Waco tendering on its own ("the Waco bid");
b. The first respondent tendering together with the second respondent, Tedoc SGB Cape JV ("the Tedoc bid");
c. The first respondent tendering together with the third respondent, Superfecta SGB Cape JV ("the Superfecta bid"); and
d. The first respondent tendering together with the fourth respondent, Mtsweni SGB Cape JV ("the Mtsweni bid").

(Note although in the bid documents the first respondent is referred to as SGB Cape, the latter is a division of the first respondent and we will follow the approach taken by the Commission and refer to either the first respondent or Waco).

[8] It is not clear whether the tenders of the second to the fourth respondents, which took the form of a joint venture, were incorporated or took the form of some looser legal entity. We turn to this aspect later.

[9] When the bids closed, Eskom suspected that these four bids were the subject of a collusive agreement. Eskom noted that:

a. The same person signed all the bids;
b. Technical, financial and other requirements were identical;

c. The first respondent's prices were the lowest, while two of the joint ventures submitted the same prices and the rate differences between the first respondent and the joint ventures were consistent; and

d. The terms and conditions of the joint ventures were identical and developed by the same attorney.

[10] Eskom decided to submit a complaint against the first to fourth respondents to the Commission. Later during the investigation, the Commission initiated a complaint against Waco's partners in the three joint ventures. They are the fifth to seventh respondents in this case.

[11] Waco held the majority stake in all three of the joint ventures although this stake varied (51%, 55% and 60% respectively). For this reason, we will refer to the fifth to seventh respondents where relevant as the junior partners in their respective joint ventures.

[12] About a year later Eskom, for reasons unknown, withdrew its complaint. The Commissioner nevertheless decided to continue the complaint against all the respondents and subsequently referred the complaint to the Tribunal. The detail of how he did this is important, but is discussed later in this decision.

[13] In its complaint referral the structure of the complaint is in essence that submitted by Eskom, although the Commission adds some detail.

[14] The essence of the Commission's case is that the four bids were submitted in response to the same tender. This put the respondents in competition with one another and that they were therefore, for purposes of the Act, in a horizontal relationship.

[15] The Commission after detailing the structure of the four bids then relies on the same facts provided by Eskom to support a conclusion of collusion. Essentially this is the role of one John Falconer, a director of Waco, who it is alleged was responsible for preparing, signing and submitting all four bids. The Commission notes in the referral that the first respondent's bid is the lowest of the four, whilst the joint venture bids contain several points of similarity in pricing and terms.

[16] The Commission offers two theories for why the first respondent did what it alleges it did.

[17] First, it wanted to better its chances of winning the bid on its own by submitting the lowest price of the four. Second, the Commission alleges that if it was not successful in this respect it benefited from having a majority stake in each of the other bids.

[18] Finally, the Commission alleges that if the tender was cancelled on the basis of irregularities, Waco would benefit as it was the incumbent supplier at the time of the tender. The Commission goes on to allege that this is precisely what later happened. We discuss this more fully when we deal with the striking out application.

[19] None of the respondents have filed an answer to the referral. Instead all have filed four separate interlocutory applications; an application to dismiss the referral on the basis that it has not been validly initiated; an application to dismiss on the basis that the referral does not make out a cause of action; an application to strike out two paragraphs in the complaint referral; finally an application to compel the production of the Commission's record.

[20] The Commission has opposed all four applications.

[21] We will deal with each in turn.

Was there a valid initiation in respect of the first to fourth respondents?

[22] As noted, on 18 March 2016 Eskom submitted a complaint to the Commission in respect of the first to the fourth respondents, alleging, inter alia, that the respondents had engaged in collusive tendering.

[23] An Eskom employee filled in the prescribed form, (Form CC1) which was accompanied by a letter detailing the basis of the complaint.

[24] The Commission proceeded to investigate the complaint and, as it is practice, allocated a case number to the complaint.

[25] On 8 March 2017, thus almost a year after the complaint had been submitted by Eskom, the Commissioner initiated a complaint against the fifth to seventh respondents. Recall that the fifth to the seventh respondents are the junior partners in the three joint venture bids.

[26] Five days later on 13 March 2017 Eskom withdrew its complaint against the first to fourth respondents. According to the Commission, the Commissioner then decided to continue the investigation of the withdrawn complaint (i.e. the one in respect of the first to the fourth respondents).

[27] Thus to summarise the situation so that the legal argument can be understood; the fifth to seventh respondents were not the subject of the initial complaint from Eskom (rather their respective joint ventures were) but they were the subject of a later initiation initiated by the Commissioner. There is no challenge to the validity of this latter initiation. Since it had not been made by Eskom it could not be effected by its withdrawal.

[28] However, the first four respondents were the subject of Eskom's complaint and thus technically a complainant, not a Commissioner, initiated the complaint against them. Thus the legal question is what is the status of that complaint once Eskom had withdrawn it? More specifically could the Commissioner continue with the complaint against them relying on rule 16(2)?

[29] This rule states:

> "*The Commission may continue to investigate a complaint after it has been withdrawn, as if the Commissioner had initiated it.*"

[30] The respondents allege that the Commission cannot rely on rule 16(2) once a complainant has withdrawn a complaint. According to them the Commission is required in such circumstances to initiate its own complaint. The respondents allege that the Commissioner has not done so in respect of the first to the fourth respondents. They argue that rule 16(2) cannot be interpreted to give the Commissioner powers that the Act does not confer.

[31] Section 49B of the Act sets out the circumstances in which a complaint can be initiated. The Act provides for two sources; by the Commissioner in terms of 49B(1) and the complainant in terms of 49B(2)(b). The 'two stream' approach is again taken up in section 50 which deals with the outcome of a complaint and indicates how a complainant or Commissioner initiated complaint must be referred.

[32] According to the respondents this structure set out in section 49B, read with section 50, makes it clear that a complaint referral, to be valid, must be preceded by, either a complaint initiated by a complainant (in this case Eskom) or a complaint initiated by the Commissioner. (In this case they accept there is a valid complaint against the fifth to seventh respondents).

[33] Where a complaint is withdrawn by a complainant, so the argument goes, the complaint cannot be taken over by the Commissioner; a new complaint must be initiated. This is because once a complainant withdraws a complaint no complaint exists and the Commissioner has to commence *de novo* with a complaint initiation which on the facts of this case does not, in the opinion of the respondents, appear to have happened. To the extent the Commission seeks to rely on rule 16(2), this must be considered *ultra vires* the Act.

[34] In argument the Commission relied on the validity of its rule 16(2). In the alternative it argued that the Commissioner's decision of 16 March 2017, in any event constituted a tacit initiation of the complaint.

[35] We do not need to make a finding if rule 16(2) is *ultra vires* the Act.

[36] We can decide this case solely on the question of whether there was a tacit initiation on 16 March 2017.

[37] Since the decision of the Supreme Court of Appeal in the case of *Omnia*[1] it has now become clear that there are no formalities required for a valid initiation of a complaint by the Commissioner – even what the Court termed a "tacit" initiation suffices to give it validity. Put differently, a complaint may still be validly initiated by the Commissioner even in the absence of a form CC1 signed by the Commissioner.

> "*Since no formalities are required, s 49B(1) seems to demand no more than a decision by the Commission to open a case. That decision can be informal. It can also be tacit. 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 of the Act.*"[2]

[38] This approach was subsequently followed by the Competition Appeal Court (CAC) in the *Power*[3] case, where the CAC recognised that even a letter from the Commission could be regarded as an act giving rise to an inference of a prior act constituting a tacit initiation by the Commissioner.[4]

[39] In the present case we have before us only the facts made out by the Commission in its referral.

[40] The Commission alleges that the Commissioner took a decision, three days after Eskom had decided to withdraw its complaint, to continue with the complaint against the first four respondents. This decision is a juristic fact. The Commissioner applied his mind to the fact that a complaint against these respondents had been withdrawn but in his opinion it needed, notwithstanding this, to be pursued. Whether the Commissioner properly understood whether he needed to fill in a new form CC1 or could simply rely on rule 16(2) to affect this decision, is of no relevance; that places form over substance.

[41] By deciding to pursue the complaint after Eskom had withdrawn it, this decision constituted, an overt, albeit not formalised, act of initiation, or at the very least, an act of tacit initiation, in respect of the first four respondents. On the present case law that suffices to constitute a valid initiation of a complaint against the first to fourth respondents.

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[1] *Competition Commission v Yara (SA) (Pty) Ltd and Others* (784/12) [2013] ZASCA 107.
[2] *Competition Commission v Yara (SA) (Pty) Ltd and Others* at par [21].
[3] *Power Construction (Pty) Ltd and the Competition Commission* 145/CAC/Sep16.
[4] *Power Construction (Pty) Ltd and the Competition Commission* at par [40].

[42] The application for the complaint referral to be dismissed against them on this ground is dismissed.

No cause of action

[43] The respondents' cause of action objections are fragmented and overlapping. In essence the respondents take issue with the fact that the Commission has not alleged any of the material facts necessary for a complaint of this nature; in summary they allege: the Commission has not alleged that the respondents are in a horizontal arrangement, that they reached an agreement, that they fixed prices, and that the formation of a joint venture by the first, fifth, sixth and seventh respondents constitutes collusion. Finally, they allege that the Commission has failed to characterise the conduct and that it has failed to advance a theory of harm.

[44] Let us consider what the Commission has alleged. It alleges that Eskom put out a tender for which the first to fourth respondents all put in separate bids. Insofar as the allegations that they are not in horizontal relationship this objection has no substance. The practice alleged is that of collusive tendering and price fixing in response to the request for the tender. Whatever the respondents may have been prior to the tender, in relation to the tender they were competitors and the Commission has made this perfectly clear. (See also our decision in *Eyeway*[5] where a similar point was argued by respondents to a tender and rejected by the Tribunal.)

[45] Next is the question of the existence of an agreement. The Commission does make a case out that each of the junior partners entered into separately an agreement with the first respondent in respect of the three joint venture tenders.

[46] It is clear that at least the first respondent was fully aware of all the tenders and hence it had reached agreement between it and all the junior partner respondents and by inference with their joint ventures. The Commission alleges that Mr. Falconer, a director of the first respondent, had prepared, signed and submitted all the four tenders that are in issue in this case.

[47] What is less clear, and here is the respondents – or at least some of them – real cause of complaint; were any of the junior partners and thus by inference their respective joint ventures, aware of the actions of the first respondent? It may well be on these facts that none of them were aware that their particular joint venture was competing either with the first respondent's own bid, or the other bids the first respondent had with the other junior

[5] *Competition Commission v Eyeway Trading (Pty) Ltd; Seardel Group Trading (Pty) Ltd t/a Berg River Textiles* CR073Aug16/CR074Aug16.

partner respondents. The Commission appears to rely solely on the presumption contained in section 4(2) of the Act which states:

> *"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) 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 that restrictive horizontal practice."*

[48] However, the respondents are entitled to know whether this is the only basis for the agreement's extent or whether there are other facts the Commission will rely on.

[49] Hence, we have ordered further particularity on this point which deals with both the agreement objection and the joint venture objection at the same time.

[50] The Commission has described how the first respondent fixed the prices of all the bids. To the extent the other respondents are liable in this respect will again turn on the answer to the particulars sought out above.

[51] As far as alleging a theory of harm this objection is difficult to fathom. Collusive tendering and price fixing are *per se* offences in terms of section 4(1)(b). Their essence as harmful is regarded as self-evident in terms of the Act and need not require the pleader in terms of the Act to further elaborate. Despite this, the Commission does advance what the harm is; both specifically on the facts of this case and more generally about the harm of collusive tendering. Thus it alleges specifically in paragraph 32 that:

> *"I submit that the First Respondent used the bids of the Second, Third and Fourth Respondents to better its chances to win the tender. I further submit that in the event the First Respondent loses the tender, it stood the chance to benefit, as a major interest holder of the Second to the Fourth Respondent, if any of the Second to the Fourth Respondent wins the tender."*

[52] Then on the general theory of harm it alleges in paragraph 37 that:

> *"I respectfully submit that collusive agreements of the type between the respondents are egregious and serious contraventions of the Act. Price fixing and collusive tendering deny consumers competitive pricing and product choice. Such agreements are inherently inimical to competition."*

[53] As far as the characterisation objection is concerned we are of the view that this objection is premature. The cases which the respondents rely on for characterisation all came up after the respondents in the particular case had filed an answer or at the conclusion of evidence in the case.

[54] The leading case on characterisation is *Ansac*.[6] In that case the Supreme Court of Appeal introduced the concept of characterisation borrowing the concept's usage from United States antitrust law in, particular the *Broadcast Music Incorporated* ("*BMI*") case.[7]

[55] Essentially the U.S. case cautions against "*literalness*" in interpreting the Sherman Act (the U.S. equivalent of our Act). This is because conduct may literally fall into the four corners of the language of the prohibition in the statute, but its real character is something different to the behavior the statute is trying to prevent. Hence it is necessary in some cases to characterise conduct.

[56] The issue in this case is not whether characterisation is warranted, but whether it constitutes a ground for exception at this state of proceedings.

[57] The respondents in this case have not filed an answering affidavit. In *Ansac* the court was dealing with a case for characterisation made out on facts advanced by the respondents. In paragraph 4 of the decision the Court notes:

> *"It seems that the evidence that the Tribunal had in mind was the evidence that Ansac* [the respondent] *wished to lead to establish that it was a legitimate cost saving efficiency producing joint venture."*

[58] In *SAB* again a case where characterisation was relied on, the point was decided on at the end of the case after hearing evidence.

[59] The Commission is not obliged to anticipate in the complaint referral every defence of characterisation a respondent might raise, before it has even presented its defence in an answering affidavit. It is quite clear from *Ansac* that not every case of price fixing (read this to include collusive tendering) requires characterisation. As the Court put it:

> *"Where competitors have reached an agreement to set uniform prices, without more, all that might be required in order to establish a transgression of s4(1)(b) is to produce their*

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[6] *American Natural Soda Ash Corporation and Another v Competition Commission of South Africa* (554/2003) [2005] ZASCA 42.
[7] See paragraph 44 -50 of that decision and the reliance on the case of *Broadcast Music, Inc. v. CBS, Inc.* 441 U.S. 1.

agreement, because its very terms may admit of no conclusion but that it was designed to eliminate price-competition."[8]

[60] Nor is there anything in the *Ansac* decision to suggest that if characterisation is required this be done in the complaint referral. In several paragraphs the Court makes clear that characterisation also entails a factual enquiry. Since at referral stage not all the facts are before the Tribunal this also suggests that such an enquiry is made at some stage in the case but is not required for the Commission to deal with in the referral to make out its cause of action. Indeed in one passage the Court speaks of the characterisation enquiry needing to be performed *"... at some stage"*.[9] If the Court believed that characterisation was a prerequisite of a valid referral it would have said so and not referred to it taking place at some stage.

[61] If the respondents having pleaded make out a case justifying characterisation, then this can be considered in due course. It is not a necessary allegation that the Commission has to make in the present referral, given that on its facts, this is conduct falling squarely within the requirements of section 4(1)(b). Were the respondents to show, after having pleaded or led evidence, that this is not a case for *"literalness"*, then the Commission may be obliged to respond to this issue in reply or at trial.

[62] We thus find that only the particulars we have ordered are required to remedy the cause of action exceptions at this stage of proceedings.

Striking out application

[63] The respondents seek to have clauses 33 and 34 of the complaint referral struck out on the grounds that they are scandalous, irrelevant and vexatious. These paragraphs state:

> *"[33] I further submit that the First Respondent, as the incumbent, also stood to benefit by continuing to supply the services if this tender is cancelled on the basis of these glaring irregularities that are occasioned by it submitting tenders on behalf of three other entities.*
>
> *[34] In fact, I am advised that the First Respondent interdicted Eskom from disqualifying it and the Second to the Fourth Respondent from the tender and from awarding it to another firm. As a result the First Respondent, as an incumbent, continues to benefit by supplying the services to Eskom whilst it has interdicted Eskom from awarding it to a new supplier."*

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[8] *American Natural Soda Ash Corporation and Another v Competition Commission of South Africa* (554/2003) [2005] ZASCA 42 at par [52].
[9] American Natural Soda Ash Corporation and Another v Competition Commission of South Africa (554/2003) [2005] ZASCA 42 at par [51].

[64] The basis for this strike out are that these allegations are irrelevant to the issue at hand. However, this is not correct. The respondents themselves complain that no theory of harm is advanced. However, these paragraphs are relevant precisely to that issue. They set out an alternative theory of why the first respondent which is the chief protagonist in this matter may have acted as it did. The allegation relates to a rational commercial motive that the first respondent may have for its conduct (it is the present incumbent and if the tender was unsuccessful it would remain the supplier of these services and hence benefit.) The remaining facts alleged support the plausibility of the theory i.e. remove it from the realm of the speculative to the actual.

[65] We therefore find that these facts are relevant to the issues at hand and hence once relevant the other objections fall away.

[66] The application for a strike out is dismissed.

Rule 15 application

[67] Rule 15 of the Commission's rules insofar as it is relevant to this matter provides that any person may inspect a copy of any record of the Commission if it is not restricted information. Restricted information has a wide definition including documents which are always regarded as restricted (i.e. those subject to claims of privilege of internal deliberations by the Commission (rule 14(d)) and those which are restricted at a particular stage in the proceedings but not thereafter (rule 14(c)(i)). In relation to a complaint, the Commission's investigation record is only restricted information until the time of referral, but not thereafter.

[68] The respondents seek access to the non-restricted, non-privileged record of the Commission in this case.

[69] The respondents' attorney alleges that this record is not likely to be extensive and that it will not consume much of the Commission's resources to prepare it.

[70] The Commission chose not to file an answering affidavit and so these factual allegations have not been disputed.

[71] The Commission opposed the application for the record simply as a matter of legal argument. The respondents it argued were not entitled to the record at this stage of proceedings and must wait till discovery.

[72] However there have been two decisions by the Competition Appeal Court which make clear that the Commission may not rely on this basis to refuse to supply the record within a reasonable time. The Court has made it clear that we are bound by these decisions.

[73] The Commission during oral argument attempted to persuade us that the CAC had not exhausted all the issues that may arise in relation to such a request and that we were still at large to consider its new arguments. It was not clear from the oral argument what these points were, so we gave the Commission a further opportunity to file additional heads of argument on this point. The Commission duly did so.

[74] However we are not persuaded that the Commission has raised any new argument that the CAC has not already considered and dismissed in its two decisions in *Group Five*[10] and *Standard Bank*[11].

[75] The Commission argued that it was entitled to rely on its rule 14(1)(e) which states that it is entitled to treat as restricted information any document which a public body would be entitled to restrict access to in terms of the Promotion of Access to Information Act, 2 of 2000. However this question was considered in both cases and the CAC has made it clear that this PAIA restriction does not apply to the Commission's record in complaint proceedings after referral.

[76] We are bound by these decisions and therefore order the production of the record.

[77] We have not granted the respondents' second prayer contained in prayer 1.1.2 of their Notice of Motion. In this prayer the respondents sought a copy of the Commission's record of decision. Since this application relies on Rule 15 and is not a review of the Commission's decision to refer, such a prayer is not appropriate, nor was an order of this scope granted by the court in the *Standard Bank* matter. The order we have given is the same as that granted in *Standard Bank* by the court.

[78] Although rule 15 does not provide a time period in which the record must be provided, in *Group Five* the court held this must be within a 'reasonable' time. The respondents suggested a period of 10 business days for compliance. Given that the Commission has not disputed the respondents' allegations that the record is not likely to be extensive or require much time to prepare, we will follow this suggestion in our order.

Conclusion

[79] As is our normal practice in complaint proceedings involving the Commission as the complainant, we give no order as to costs.

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[10] *Group Five Ltd v The Competition Commission* 139/CAC/Feb16.
[11] *The Standard Bank of South Africa v The Competition Commission* 160/CAC/Nov17.

ORDER

Application to Strike Out

1. The application to strike out is dismissed.

Exception Application

2. The Applicants' exception application is upheld in the following respects:

2.1. Within ten (10) business days of this order, the Commission must file a supplementary affidavit in which it provides the following particulars:

2.1.1. Whether the joint ventures (the Second, Third and Fourth Applicants) were incorporated or not;

2.1.2. Does the Commission rely solely on the provisions of section 4(2) of the Competition Act, No 89 of 1998 ("the Act") to presume that the fifth to seventh respondents were party to the alleged collusive tendering and/or price fixing agreement/s? ; and

2.1.3. If not, the Commission must allege what other facts it relies on to establish that the fifth to seventh respondents were party to the alleged collusive tendering agreement and/or price fixing agreement/s.

2.2. The remaining prayers in terms of this application are dismissed.

Time bar/Valid initiation

3. The Applicant's contention that there was no valid initiation of this complaint is dismissed.

Rule 15 Application

4. The Applicant's Rule 15 application is upheld in the following respect:

4.1. The Commission must, in terms of Rule 15 of the Rules for the Conduct of Proceedings in the Competition Commission, produce, within ten (10) business days of the date of this Order:

4.1.1. All non-privileged and unrestricted portions of the Commission's record of:

4.1.1.1. Its investigation into the matter referred under CT Case No. CR277Feb18 and CC Case No. 2016Mar0115 and 2017Mar0033 (including all information and documents it received during the course of its investigation of the complaints); and

4.1.2. An index of the record, indicating which portions of the record are restricted (if any) and the reasons for being so restricted.

5. There is no order as to costs.

Presiding Member
Mr Norman Manoim

08 August 2018
Date

Concurring: Ms Andiswa Ndoni and Prof. Fiona Tregenna

Case Manager:	Kameel Pancham
For the Applicants:	A. Subel SC and M.M. Le Roux instructed by Werksmans Attorneys
For the Commission:	M. Ngobese and K. Modise, M. Tambani (heads of argument only) and O. Motshudi (heads of argument only)