competitiontribunal
SOUTH AFRICA

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case Nos.: CR277Feb18/EXC180Sep18

In the exception application 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	: Norman Manoim (Presiding Member) Yasmin Carrim (Tribunal Member) Imraan Valodia (Tribunal Member)
Heard on	: 29 May 2019
Decided on	: 31 July 2019

Exception Application: Reasons for Decision and Order

Introduction

[1] In this case the Competition Commission (the "Commission") alleges that the seven respondents were party to rigging a tender to provide scaffolding services to Eskom power stations in contravention of sections 4(1)(b)(i) and (iii) of the Competition Act, 89 of 1998 (the "Act").

[2] This decision does not decide the merits of this case. Instead we are asked to consider several exceptions the respondents have raised to the Commission's case. This is the second time the respondents have excepted to the Commission's referral.

[3] Note that none of the respondents have filed an answering affidavit in this matter.

[4] The first round of exceptions resulted in us giving an order on 08 August 2018 which, *inter alia,* included a directive that the Commission provide the respondents with certain further particulars before they would be obliged to file an answer.[1]

[5] The Commission duly filed a supplementary affidavit on 23 August 2018 in which it purported to comply with our order, but which the respondents contend is inadequate and still excipiable hence the present matter is before us.

Background

[6] We now will briefly set out the facts of the case. Here we rely solely on the complaint referral as no answering affidavits have been filed by any of the respondents all of whom are represented by the same legal team.

[7] In March 2015 Eskom issued a tender for firms to provide scaffolding services for several of its power stations. The tender was worth approximately R240 million.

[8] Central to this complaint are four tenders alleged to be collusive because one firm was a party to all the tenders and prepared all the tenders. That party is Waco Africa (Pty) Ltd ("Waco"), the first respondent, a company involved in business of erecting scaffolding and the incumbent supplier of these services to Eskom.[2]

[9] The three other bids were in the form of joint ventures all constituted for the purpose of bidding for the tender. Each joint venture bid had Waco as one of its members together with one other member. Although a different member was involved with Waco in each of these separate bids, they had the following features in common: each was a BEE firm and was involved in human resources and each held a minority share of the joint venture. For this reason, we will refer to them as the junior members. (Note, whether these joint ventures constituted partnerships and if they did, their potential for liability, is a contested issue in this case, so we use the term member here).

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[1] *Waco Africa & 6 Others and the Competition Commission* CR277Feb18/EXC300Mar18; CR277Feb18/DSC078May18; CR277Feb18/STR301Mar18.

[2] Note that in the bid documents the bidder is referred to as SGB Cape, but SGB is not a company but a division of Waco and we like the Commission and respondents will refer to the first respondent as Waco as it is the legal entity.

[10] According to the Commission all four bids had been completed by the same person, a Mr John Falconer, an employee of Waco. Waco is cited as the first respondent in relation to the tender where it tendered solely.

[11] The second respondent, known as Tedoc SGB Cape JV was a joint tender between Waco and the fifth respondent Tedoc Industries (Pty) Ltd, with Waco having 51% of the tender and the fifth respondent the balance. The third respondent known as Superfecta SGB Cape JV was a tender between Waco and the sixth respondent with Waco having 55% of the tender the sixth respondent the balance. The fourth respondent known as Mtsweni SGB Cape JV was a joint venture between Waco and the seventh respondent Mtsweni Corrosion Control (Pty) Ltd with Waco having 60% of the tender and the seventh respondent the balance.

[12] The tender prices differed. The Waco sole bid was priced the lowest. The second respondent's bid was the second lowest. The third and fourth respondents' bids were priced the same but were higher than both those of the first and second respondent.

[13] The junior members of the second to fourth joint ventures are also all cited separately as respondents in their individual capacities, and hence, are respectively, the fifth, sixth and seventh respondents.

[14] Eskom received 31 responses to the tender. It became suspicious of these four bids because it picked up on what it termed the *"cross shareholding"*.[3] Eskom's chief advisor for contracts states that it had identified four features of similarity between the four bids, inter alia, that the same person, (presumably he is referring to Falconer), had signed all four bids as the authorised person.[4]

[15] Eskom then asked the Commission to investigate the matter against the first to fourth respondents.

[16] On 13 March 2017, Eskom withdrew this complaint and it was taken over by the Commission, which then added the fifth to seventh respondents to the complaint.[5] We do not know from the referral the reasons why Eskom did so.

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[3] Letter from Eskom to the Commission dated 18 March 2016 annexed to the complaint referral. See record pages 24-5.
[4] See Eskom letter supra, record page 24. He also mentions similar technical documents, consistent differences in price rates and the same terms and conditions developed by the same attorney.
[5] The issue of whether the Commission could do so was one of the subjects of the first exception. We decided this issue in favour of the Commission.

[17] The Commission alleges in the referral that at a later stage (no date for this is given) the first respondent interdicted Eskom from disqualifying it and the second to fourth respondents from the tender and awarding it to another firm. The Commission alleges that as a result the first respondent as the incumbent supplier benefited.

The first exceptions

[18] The first round of exceptions brought on behalf of all the respondents involved a number of issues. The respondents were partially successful in making out case that the Commission had not made out a cause of action that complied with Rule 15 of the Tribunal rules. However, the Tribunal did not dismiss the referral, but required the Commission to file further particulars in relation to certain issues to cure the defects. These are set out in paragraph 2 of our order which states as follows:

"*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."

[19] The reason for this direction was explained in paragraphs 47-48 of our earlier decision, where we stated:

"*[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 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."

[20] Pursuant to this order the Commission on 23 August 2018 filed a supplementary founding affidavit.

The second exception application

[21] The question in this case is whether the Commission has complied with this order. Although the respondents raised a number of other points in the second exception these were repeats of the same issues raised in the first exception that had not been successful.

[22] At the hearing however, Mr Subel for the respondents, correctly confined argument to one issue – had the Commission complied with the terms of our order in the supplementary affidavit. Mr. Subel accepted as well that the Commission had complied with paragraphs 2.1.1 and 2.1.2 of our order. On these issues the Commission had replied as follows:

> "*6. The Second, Third and Fourth Respondents are not incorporated entities. The Fifth, Sixth and Seventh Respondents have each separately concluded a Joint Venture Agreement with the First Respondent to establish and set out inter alia the terms that govern their relationship as parties to their respective joint venture. As such the Second, Third and Fourth Respondents are essentially partnerships between the First Respondent and each of the Fifth, Sixth and Seventh Respondents, respectively.*
>
> 7. ...
>
> *8. Our presumption of collusion is only applicable as far as the First, Second, Third and Fourth Respondents are concerned, in that the First Respondent has significant shareholding or interest in the Second, Third and Fourth Respondents.*"[6]

[6] Commission's supplementary affidavit at [6] and [8].

[23] What we are left to decide whether the Commission has complied with paragraph 2.1.3. To be clear, this is not a case where it is suggested that the Commission has not attempted to comply. It has and the respondents accept this. Rather the question is whether the Commissions' reply is adequate in making out a cause of action.

[24] The respondents argue that the Commission has failed in this attempt. Central to their argument is that the Commission has failed to explain why the fifth to seventh respondents should be held liable.

[25] Here is how the Commission pleaded on this issue:

> "*10. The Fifth, Sixth and Seventh Respondents are brought not on the basis of section 4(2) but as partners in the Second, Third and Fourth Respondents. The Second, Third and Fourth Respondents are not incorporated entities but partnerships, therefore the Fifth, Sixth and Seventh Respondents together with the First Respondent in their respective joint ventures are jointly and severally liable for the conduct of the partnership. In any event the Fifth, Sixth and Seventh Respondents authorized John Falconer to attend to the completion of the render [tender] documents on behalf of the Second, Third and Fourth Respondents.*"
>
> "*11. Therefore, any action or conduct taken by John Falconer in the preparation or finalization of the tenders in which each of the Fifth, Sixth, and Seventh Respondents are participating via their respective joint ventures should be binding on all three of them including the utilization of the joint venture, namely the Second, Third and Fourth Respondents, to collude with each other and with the First Respondent.*"[7]

[26] Note that in this paragraph the Commission does not allege that the respective junior partners knew of Waco's own bid and the bids of the other joint venture partners. To the extent that there was any ambiguity on this point this much was conceded by the Commission during oral argument by Mr Ngobese for the Commission who stated the following:

> "***CHAIRPERSON***: *"...the tender documents on behalf of the 2nd, 3rd and 4th Respondents." Now, there's a degree of ambiguity to that sentence, because one is that each one separately and without knowledge of the others authorised Falconer to complete their documents. And the other is that they all collectively authorised Falconer. I mean there are sort of either reading that could be given to that sentence.*
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> ***MR NGOBESE***: *Yes, I see that, Chair.*

[7] Commission's supplementary affidavit at [10] and [11].

***CHAIRPERSON**: And is… [intervention]*

***MR NGOBESE**: I see the ambiguity you're talking about. It could be an issue of drafting that is involved there, but all that we are trying to say there is that each of the 5th to the 7th Respondent, in their respective JVs, not sitting together, in their respective JVs."*[8]

[27] On this point both the respondents and the Commission understand the pleading in the same way. There is therefore no need to consider whether further clarity should be ordered.

[28] The debate before us was whether this allegation was sufficient to establish (i) liability for the junior members in their capacities as separate respondents (i.e. the fifth to seventh respondents). The respondents argued that the Commission had failed to show that any of the respondents had entered into an agreement to collude with the other respondents. The Commission's approach they contended was akin to making the shareholders of a firm liable for the actions of the firm. Furthermore, the allegation of them authorising Falconer to submit a bid was insufficient to show they had authorised a collusive bid.

[29] The second contention was the Commission could not rely on the provisions of section 4(2) of the Act to presume the existence of a collusive agreement, and thus to hold the first to the fourth respondents liable. The respondents argued that this section applied only to companies and not to unincorporated joint ventures. Since no other basis for the existence of an agreement had been alleged, no cause of action had been made out against any of the first to fourth respondents. The case against all they argued fell to be dismissed.

[30] The Commission argued that once the junior partners had authorised the first respondent to complete the tenders on their behalf, they could be held liable for what it did on their behalf. Lack of specific knowledge was not a defence.

[31] Second the Commission argued that section 4(2) could apply to an unincorporated joint venture and hence they could rely on this section to allege the existence of an agreement.

[32] This argument of the Commission's raises some unique legal issues not previously decided. First can section 4(2) apply in the case of an unincorporated joint venture, what is the liability of an individual firm that is a separate legal entity but a component part of the joint venture? Can it be considered a partnership in the way the law ordinarily understands it to be? Are the constituents of the joint venture more analogous to shareholders in a company than self-standing firms who for the Act's purposes can be considered firms? Can a blanket authorisation confer liability even if the component firm in the joint venture is not aware that the senior partner has submitted a tender on its behalf?

[8] Transcript page 57, lines 16-20; page 58, lines 1-8.

[33] We do not know from the referral what the understanding was of the joint venture's functioning was, nor what mandate was given by the junior members to Falconer.

[34] But, the respondents, in their written heads of argument, also raised some unique legal points. They put it this way:

> *"It is a legal and factual impossibility to collude with oneself as pleaded by the Commission in the supplementary referral affidavit. The only alternative is for the First Respondent to have submitted one of four bids only, with no benefit to the competitive process and a loss of potentially attractive options to Eskom. This would also undermine the ability and equitable opportunity of SME and HDI-owned firms to participate in the economy, as required by section 2(e) of the Act."*[9]

[35] What we understand them to argue is that offering a customer a choice between a range of bids does not amount to the same thing as collusive tendering. This, again, is a unique argument, which has not been made before. But we don't have to take a view now on whether this is good in law. The respondents are relying on facts which we do not have before us at the exception stage when they have yet to plead. This submission anticipates facts not yet pleaded. As Harms points out in his treatise: *" In deciding an exception a court is bound by the factual allegations contained in the pleading excepted against."*[10]

[36] All this raises for us the issue of whether it would be appropriate for us to decide the points of law raised by exception now. We do not think so given the novelty of the points raised by both parties as we have discussed above.

[37] But the problem is not confined to the mere novelty of the points of law. We do not have all the facts before us on which a point of law can be appropriately decided. For instance the description of an entity as an unincorporated joint venture tells us little about whether as a question of fact it lies closer to the shareholder end of the spectrum of possibilities (as suggested by the respondents) or whether each constituent party constitutes a self-standing firm for the purpose of liability in terms of section 4(1)(b). Nor if the issue of the mandate given to Falconer is relevant do we know all its terms and whether it was the same for all the junior members. Nor do we know from the customer's (Eskom) perspective whether this was a competitive tender in which each bidder was expected to bid, unconnected to any other bid, or whether, as the respondents in their anticipatory defence seem to suggest, a party was entitled to dance with many other partners to give the customer a choice of the best pairing.

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[9] Applicant's heads of argument at [84].
[10] Harms, *Civil Procedure in the Superior* Courts Issue 63 (October 2018) page B-170(2), paragraph B23.12

[38] Harms in his treatise makes the point that a court has a discretion as to decide whether to determine a point of law raised by way of exception at pleadings stage (as we are being asked to here) or to leave it over to trial.

[39] He states: "*A court may allow the question raised by an exception to stand over for decision at trial especially if it appears that the question may be interwoven with the evidence that will be led at trial.*"[11]

[40] We have decided that this case raises a number of novel legal issues that moreover are interwoven with facts not before us. It would not be appropriate for us to decide novel matters before we have further facts before us.

[41] This applies as well to the narrower legal point also raised by the respondents as to whether the case against just the four junior members (the fifth to seventh) should be dismissed. We agree that this too should not be decided now. An unincorporated joint venture can qualify as a firm for the purpose of the Act. This is because in terms of the Act a firm inter alia includes a person. While the term person is not further defined in terms of the Act it has an extended meaning in the Interpretation Act and includes: *"...2(c)... any body of persons, corporate or unincorporate;"*

[42] If an unincorporated entity can constitute a firm for the purpose of the Act and is found liable for a contravention, how is the liability to be imposed on its constituent parts, if the entity, as in this case, may have no assets or indeed no existence beyond the tender bid for which it was created, unless the constituent members themselves are cited as respondents, as the Commission has done in this case. We are of the *prima facie* view that the fifth to seventh respondents are correctly cited as respondents in this matter, but if evidence of the composition of the joint venture should suggest otherwise, this view can be altered and hence does not fall to be finally determined now.

Conclusion

[43] The exception is dismissed.

[44] 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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[11] See Harms *supra*. This approach has also been followed more recently by the Land Claims court in *Macassar Land Claims Committee v Maccsand CC and Others* (LCC 37/2003) [2008] ZALCC 16 (18 April 2008) where Gildenhuys J cited the same cases as Harms does to recommend deferring a decision where the issue is so interwoven with the evidence to be led at trial. See paragraph 14 of that decision.

Order

1. The Applicants' exception application is dismissed.

1.1. Within twenty (20) business days of this order the Applicants are to plead over and file their answering affidavit setting out their defence.

2. There is no order as to costs.

Presiding Member
Mr Norman Manoim

31 July 2019
Date

Concurring: Ms Yasmin Carrim and Prof. Imraan Valodia

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