COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: CR133SEP15/EXC152OCT15

In re the exception application between:

CASALINGA INVESTMENTS CC T/A WASTE RITE	Applicant
And	
THE COMPETITION COMMISSION	Respondent

In the matter between:

THE COMPETITION COMMISSION	Applicant
And	
CASALINGA INVESTMENTS CC T/A WASTE RITE	First Respondent
X-MOOR TRANSPORT T/A CROSSMOOR TRANSPORT (PTY) LTD	Second Respondent

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Panel	: Andreas Wessels (Presiding Member)
	: Medi Mokuena (Tribunal Member)
	: Andiswa Ndoni (Tribunal Member)
Heard on	: 31 August 2016
Order Issued on	: 15 December 2016
Reasons Issued on	: 15 December 2016

INTRODUCTION

1. This matter concerns an exception application brought by the applicant in terms of Rule 42 of the Competition Tribunal Rules. The applicant avers that the complaint referral by the Competition Commission ("Commission") in terms of section 50(2) of the Competition Act 89 of 1998, as amended ("the Act") is excipiable.

2. The exception is based on two grounds. First that the complaint lacks the necessary averments to sustain the allegation that the applicant contravened section 4(1)(b)(i) and (iii) of the Act. Second that the complaint referral is so vague and embarrassing that the applicant will be prejudiced in conducting its defence, should the Tribunal not decide in its favour.

BACKGROUND

3. On 6 March 2014 Pikitup Johannesburg (SOC) Limited ("Pikitup") in terms of section 49B(2)(b) of the Act submitted a complaint to the Commission for investigation. After the Commission's investigation, the Commission filed the complaint referral with the Competition Tribunal ("Tribunal") against Casalinga Investments CC ("Casalinga") trading as Waste Rite ("Waste Rite")[1] and X-Moor Transport trading as Crossmoor Transport Proprietary Limited ("Crossmoor") on 16 September 2015.

4. In these reasons, Casalinga and Waste Rite are used interchangeably.

5. Crossmoor did not join Casalinga in this application. It opted to abide by the decision of the Tribunal.

6. The thrust of the conclusion of the Commission was that the response of Waste Rite and Crossmoor to the Tender Number PU298 of 2012, was indicative of a collusive agreement on how to price variable and fixed costs

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[1] The Commission did not describe Waste Rite as a "CC". This was corrected by Waste Rite during the hearing of the exception application.

as well as the hourly rate in their respective pricing schedules. The pricing schedule submitted by Waste Rite and Crossmoor to Pikitup contained prices for all nine items and their fixed costs were exactly the same for three consecutive years.

7. The conduct complained of in the main matter, was collusive tendering. On 15 October 2015, Casalinga filed an exception to the Commission's complaint referral. The exception was supported by an affidavit, which the Commission did not respond to in writing.

8. In the complaint referral, the Commission alleged that Waste Rite and Crossmoor both supply plant and equipment hire services in respect of waste management and as such they are firms in a horizontal relationship as contemplated in section 4(1) of the Act.

9. The Commission provided the basis for the referral as that Waste Rite and Crossmoor entered into an agreement to tender collusively by discussing or agreeing on the prices of the tender issued by Pikitup, thereby acted in contravention of sections 4(1)(b)(i) and (iii) of the Act.[2]

10. Under the heading *"Conduct in contravention of section 4(1)(b)(i) and section 4(1)(b)(iii) of the Act"*, the Commission set out the following: [3]

> *"14. In October 2012, Pikitup issued a tender under tender number: PU 298/2012 for the supply, operation and maintenance of plant and equipment at designated landfill, garden sites and depots, as well as ad hoc rental as and when required in and around Johannesburg. This tender was awarded to Aqua.*

[2] See paragraph 13 of the founding affidavit filed in support of the complaint referral.
[3] See paragraphs 14 to 17 of the founding affidavit filed in support of the complaint referral.

15. Crossmoor and Waste Rite agreed on how to price variable and fixed costs as well as hourly rate in their pricing schedule which they submitted when bidding for Pikitup tender number PU 298/2012.

16. As a result, Crossmoor and Waste Rite submitted a pricing schedule to Pikitup which contained prices for all nine items which their fixed costs are exactly the same for three consecutive years. The nine items involved were Landfill Compactor, Bull Dozer, Excavator, Front End Loader, Articulated Dump Truck, Grader Tractor Loader Backhoe, Water Tanker and Tipper Truck.

17. This conduct constitutes price fixing and collusive tendering in contravention of section 4(1)(b)(i) and (iii) of the Act."

11. In paragraph 18 under the heading "Conclusion", the Commission submitted:

> *"…the collusive agreement entered into by the respondents, which is the subject of this referral, is egregious and a serious contravention of the Act. Collusive tendering destroys the basis of competitive bidding and is particularly harmful to the public because it often distorts markets for procurement. Such agreements are inherently inimical to competition."*

12. The applicant was obliged to file a response to the Commission's complaint with 20 business days from the date of receipt of the Complaint Referral in terms of Rule 16(1) of the Competition Tribunal Rules. The applicant chose to file an exception instead.

The Exception and Rule 15

13. Waste Rite filed an exception to the Commission's Complaint Referral seeking the following order:[4]

(i) Setting aside the Commission's complaint referral on the ground that it lacks averments necessary to sustain a complaint that Waste Rite has contravened section 4(1)(b)(iii) and/or section 4(1)(b)(i) of the Act; and/or

(ii) A declaration that the complaint referral is vague and embarrassing to an extent that it prejudices Waste Rite in the conduct of its defence and ordering the Commission to file a supplementary affidavit to cure the defects in the complaint referral; and

(iii) Ordering the Commission to pay Waste Rite's costs; and

(iv) For such further and/or alternative relief as the Tribunal deems fit.

14. Waste Rite also filed a founding affidavit deposed to by one Lillian Naicker ("Naicker"), a member of Waste Rite, in which it listed its grounds for the exception as failure by the Commission to allege:[5]

1. *"an agreement, concerted practice or decision by firms in a horizontal relationship on which it relies, or intends to rely in submitting that Waste Rite is a party to collusive tendering;*

2. *relevant facts or circumstances that are indicative of an agreement having been reached, to which Waste Rite had been a party;*

[4] See paragraphs 1 to 4.
[5] See paragraphs 7.1.

3. *the person or persons said to have represented Waste Rite and its alleged fellow-conspirator in the collusive arrangement Waste Rite purportedly participated in."*

15. Naicker denied that Waste Rite has been a party to collusion, as alleged by the Commission.

16. The basis of Waste Rite's exception application is the failure by the Commission to meet the requirements of a valid complaint referral under the Act.[6] In paragraph 10, Naicker said, "*The facts that are material to a complaint referral must, in each instance be informed by the statutory provisions on which the complaint referral is based.*" In paragraph 13, Naicker contended, in order to make out a case under section 4(1)(b)(i) and (iii) of the Act, the Commission must advance and prove factual allegations (not mere assertions) that:

(i) an agreement existed; or
(ii) that there had been a concerted practice in place; or
(iii) that there had been a decision involving an association of firms;
(iv) between parties in a horizontal relationship;
(v) that involved collusive tendering or price fixing.

17. Relying on the grounds discussed above, Waste Rite's case is that the Commission has failed to set out material facts and points of law in support of the Commission's assertion that Waste Rite was a party to a collusive tendering arrangement in contravention of the Act. The Commission is required to amend its complaint referral by providing the above, to which Waste Rite refers as material facts, failing which this Tribunal must dismiss the complaint referral filed by the Commission.

18. As indicated above, the Commission did not file an answer to Waste Rite's exception founding affidavit supporting the application. During the hearing

[6] See paragraph 8.

the Commission made oral submissions contained in its written heads of argument.

19. Both parties correctly pointed out that, at the heart of the issue raised by Waste Rite is the interpretation to be accorded, and the application of, the provisions of Rule 15 of the Tribunal Rules.

20. Rule 15 provides:

> *(2) "... a complaint referral must be supported by an affidavit setting out in numbered paragraphs -*
>
> *(a) a concise statement of the grounds of the complaint; and*
> *(b) the material facts or the points of law relevant to the complaint and relied on by the Commission…"*

21. Waste Rite's submission is that the Commission's complaint is not on all fours with Rule 15 in that it lacked the averments necessary to enable it to plead. The Commission agrees with the applicant on the provision of the rule but argues that the founding affidavit contained a concise statement of the grounds of the complaint and the material facts and points of law. All that the respondent in the complaint referral is expected to do is aver facts and not answer each and every fact mentioned. The respondent also has an opportunity to supplement its answer in terms of Rule 16(6).

GENERAL LEGAL PRINCIPLES APPLICABLE TO EXCEPTIONS

22. Relying on the judgments of the High Court and the Supreme Court of Appeal, Waste Rite argued, that material facts are "*every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court*". [7] According to Waste Rite, in pleadings where these qualities are lacking, exception is properly taken. It further argued that

[7] See Applicant's heads of argument at page 4, paragraph 8

an exception on the ground that it is vague and embarrassing involves a two-fold consideration. Firstly, '*whether the pleading lacks particularity to the extent that it is vague'*. Secondly, '*whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced'*. Regarding whether or not there is prejudice, so argued Waste Rite, having an exception-proof plea as the only and the most important test, could defeat the object of pleadings to enable parties to come to trial prepared to meet each other's case and not be taken by surprise. As such, Waste Rite contended, it is possible to plead to particulars of claim, which can be read in a number of ways by simply denying the allegations made as is the case with a pleading, which leaves one guessing as to its actual meaning. In other words, according to Waste Rite, the fact that a pleading leaves it open for the other party to deny an allegation does not take away the fact that such a pleading is excipiable on the basis that it is vague and embarrassing.[8]

23. Waste Rite also put forward considerations in exceptions as postulated in the decisions of this Tribunal[9] as: (a) given that the procedures of this Tribunal are not purely adversarial, the role of pleadings as the sole determinant of the issues and the formality of the pleadings is thus diminished, as such the language of the referral must not be approached with undue technicality; (b) the quality of the pleading must have regard to the question of fairness; (c) the seriousness of the prejudice to the respondent must also be considered in deciding whether or not an exception is well taken; and (d) the level of detail required in pleadings must be assessed on a case by case basis – as there is no absolute standard that provides guidance in this regard.

24. Waste Rite also argued that material facts can, therefore, be taken to be all *[our emphasis]* the facts that would be essential to the cause of action, and pertinent to the Tribunal's enquiry in relation to that cause of action. Waste

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[8] See Applicant's heads of argument at page 4, paragraph 9.

[9] American Natural Soda Ash Corporation v Botswana Ash (Pty) Ltd 49/CR/Apr00 & 87/CR/Sep00; National Association of Pharmaceutical Wholesalers et al V Glaxo Welcome (Pty) Ltd 45/CR.Jul01; Competition Commission v Senwes Ltd 110/CR/Dec06.

Rite added that the wording of Tribunal Rule 16 that "*a concise statement of the grounds on which the complaint referral is opposed, the material facts or points of law on which the respondent relies'* and '*an admission or denial of each ground and of each material fact relevant to each ground set out in the complaint referral'* mandates great formality in the reply to the complaint. Waste Rite further asserted that "[e]*ach ground of complaint must be addressed, and therefore each ground of complaint must be capable of comprehension*."[10]

25. We have amply discussed the approach that ought to be adopted in our proceedings in a number of our previous decisions. We have said:

> "*… like trial proceedings the pleadings may be supplemented by evidence, but unlike trial proceedings the pleadings are in affidavit form and contain some if not all the evidence that may be led in the proceedings. By this we acknowledged and accepted that by the nature of these proceedings it may not be necessary or even possible for a party to place all its evidence in the pleadings. In our view, pleadings in the context of our proceedings ought to serve the purpose of ventilating the issues for the other party to know what case to answer to or the nature of the allegations made against it."*[11]

26. In the recent *Rooibos* decision, the Tribunal reiterated the *sui generis* nature of our proceedings – that it is guided by the need to conduct its proceedings fairly, and to the extent permissible, informally. In that decision it also held:[12]

> *Once we have accepted that fairness depends on context then analysing cases without regard to context leads to error…* [I]*t does not follow that because the Commission can ascertain certain*

[10] See Applicant's heads of argument at pages 6 and 7, paragraphs 12.1 – 12.2.
[11] National Association of Pharmaceutical Wholesalers and Others v Glaxo Wellcome and Other, Case No: 45/CRJul01 ('National Wholesalers') at page 18, paragraph 55.
[12] Rooibos Ltd v Competition Commission, Case No 129/CR/Dec08.

facts prior to referral that it must disclose them all in its referral in order to make proceedings fair.

27. We reiterated our approach to exceptions in our proceedings. Firstly:

    "it must be borne in mind that the principles of exception, which parties exhort to us emulate in our proceedings are derived from adversarial proceedings whose objectives it is to provide a forum for the vindication of private rights. Ours in contrast are to provide a forum to vindicate the public interest. Given this difference in objectives we should be alive to the danger inherent in grafting the principles of exceptions developed by adversarial courts uncritically on our proceedings. Secondly, the Tribunal may step into the ring at its discretion exercising its inquisitorial powers, and impoverishment of fact or legal averment hence pleadings play a less central role in our procedures. The effect of both of these observations is that our approach to pleadings will be less strict than would be a High Court."

28. We have also held that this cannot mean that a respondent is required to answer any type of pleadings, regardless of its impoverishment of fact or legal averment. Fairness is also a standard that our procedures must meet. Respondents are entitled to understand the case being made out against them. The standard set out in Rule 15 of the Tribunal Rules must be adhered to.[13]

29. We have postulated on the correct test as that which balances the amount of detail that has to be pleaded against the criterion of fairness to a respondent as to how it should plead. We held that Rule 15 does not oblige the Commission to present the minute details of its case but only the material facts and points of law. We emphasize that what amounts to minute details will vary depending on the facts of each case.

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[13] Ibid, see paragraph 6.

30. As we observed in *National Wholesalers,* Rule 16 "*requires a respondent to admit or deny each ground of the complaint referral and each material fact to such ground. It is thus not necessary for the respondent to respond to every averment in the complaint referral but only to those which constitute grounds and the facts which are material to those grounds.*[14]

31. We found that in the absence of the particularity sought, a denial coupled with an allegation that the allegations are not within the respondent's knowledge suffice for the purpose of Rule 16(6) hence the qualification, "*if necessary in the circumstances*" in that rule. Such a denial does not amount to a bare denial but a qualification of a denial.[15]

32. As held in *National Wholesalers: "*There are compelling policy reasons for this restrictive interpretation of the requirement of Rule 16. There is a risk of chilling legitimate complaints because parties fear that they will be burdened with an interminable set of interlocutory applications long before they get to trial. Added to this is the fact that such an approach negates the fundamental purpose of pleadings, that being to define the issues between the parties so that the burden of adducing possibly peripheral evidence at the hearing is reduced."[16] We have held that the circumstances where they will be entertained are rare as we do not consider that the procedure is appropriate, invariably useful and we can foresee instances where it can serve as a ready tool of delay and abuse, negating two of the core procedural requirements our proceedings, as stated in section 52(2) of the Act - that proceedings are informal and expeditious.

33. Before we deal with each of the grounds of exception raised by Waste Rite, we wish to reiterate our forewarning that, respondents are required to read

[14] National Wholesalers (Note 11 above), page 9, paragraph 24.
[15] National Wholesalers (Note 11 above), page 6, paragraph 13.
[16] National Wholesalers (Note 11 above), page 9 paragraph 25.

complaint referrals in their totality and not isolate specific paragraphs so as to cry foul that the case against them is inadequately ventilated.[17]

THE GROUNDS FOR THE EXCEPTION

Failure to allege an agreement in terms of section 4 of the Act

34. In relation to the agreement, Waste Rite contended that, in order to sustain a case under section 4(1)(b) of the Act, the Commission must allege that Waste Rite had concurred with its competitor and that it had expressed an intention to conduct itself in the market in accordance with that which has been discussed between the parties. It pointed out that the Commission does not reveal who acted on behalf of either party in the alleged agreement and fails to allege:

    (i) the date (or approximate date) on which the agreement was reached;
    (ii) whether the agreement was made orally or in writing;
    (iii) whether, if it was made orally, it was made telephonically or in person;
    (iv) whether, if it was made in writing, it was delivered by hand, faxed, emailed or in some other form;
    (v) the Commission made no allegation that the individual was said to be representing Waste Rite in coming to the alleged agreement, had been authorised to come to such an agreement, or acted within the bounds of authority of that person.

35. Waste Rite's oral submissions hinged on what it described as "*what is completely absent from this referral is a description of the facts underpinning the allegation of an agreement.*"

36. It submitted that when the Commission alleges an agreement, there is a standard that such an allegation must meet. It argues that the Commission has failed to give details of what occurred at the time when the Commission

[17] The Competition Commission of South Africa and Others v United South African Pharmacies and Others, Case No 04/CR/Jan02 page 5.

comes to the legal conclusion that there is an agreement.[18] Missing in the Commission's complaint referral, it argued, is "*what constituted the agreement".[19]* In other words, on what does the Commission base its conclusion that there was an agreement between Waste Rite and Crossmoor? It argues that "*The requirement that the Commission provide the material facts showing that agreement was reached is one that cannot be escaped, for without an agreement, no cause of action exists".[20]*

37. In support of the above argument, Waste Rite relied on our decision in *AGS Fraser*.[21] The matter concerned a specific species of collusive tendering by furniture removal firms, i.e. conduct referred to as "cover pricing". The Commission described cover pricing "*as a price that is provided by a firm that wishes to win a tender to a firm that does not wish to win a tender, to submit a higher price. A cover price may also be provided by a firm that does not wish to win a tender to a firm that does wish to win the tender, to enable the firm that wishes to win the tender to submit a lower price."*

38. We concluded in that case that it followed from this definition of cover pricing that cover pricing requires some form of conduct on behalf of the recipient of the request, namely, AGS Frasers. Absent conduct by AGS Frasers, we found the Commission's complaint referral reduced the conduct impugned by section 4(1)(b)(iii) to unilateral conduct. In other words, what was missing in the manner in which the Commission pleaded its case was the element of coordinated conduct in relation to a specific instance of cover pricing. We thus held that the Commission was required to allege what AGS Fraser did in order to 'glue' the actions of the two respondents together.

39. Relying on our finding in *AGS Fraser*, Waste Rite, submits that the Commission must, similarly in this present matter, allege the particular conduct of the parties that led the Commission to conclude that an

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[18] See Tribunal hearing transcript, at page 6 – 7, paragraph 20.
[19] See Tribunal hearing transcript, at page 8, paragraph 1.
[20] See Applicant's Heads of Argument, at page 11 paragraph 29.
[21] See Tribunal hearing transcript, at page 8, paragraphs 5 – 10.

agreement was reached.[22] It submitted that the Commission's complaint referral is silent on whether the agreement was in writing or oral and who represented the two firms (to which Waste Rite could plead absence of authority for that individual to act on its behalf), and when that agreement was concluded.[23] According to Waste Rite, the Commission's complaint referral "*amounts to no more than a statement of a legal conclusion",* as contemplated in *AGS Fraser,* in that the Commission does not explain what Waste Rite did to arrive at this conclusion and fails to indicate when the agreement was concluded.

40. Citing the ruling by the Competition Appeal Court in *Netstar*, the Commission submitted that the agreement contemplated in section 4 of the Act extends beyond that contemplated in contractual arrangement.[24] It argued that *"[the] facts constituting the agreement need not rise to the level of precision sufficient to satisfy the requirement of certainty applicable to private law contracts, i.e. the precision needed to defeat an argument that the alleged agreement is void for vagueness"*[25] The Commission implored us not to confuse the agreement contemplated in section 4 of the Act with a contract at private law.[26]

41. In its oral argument, the Commission took the view that the objections raised by Waste Rite in relation to the complaint referral highlight a real risk of trivialising the proceedings of this Tribunal.[27] According to the Commission, page 13, paragraph 12 of its referral affidavit set out the nature of the agreement in question by pointing out the bilateral agreement between Aqua and Midmar as well as that between Waste Rite and Crossmoor.

42. It is thus reasonably possible and within Waste Rite's ability to establish when the agreement, if any, may have been reached. We say, 'any',

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[22] See footnote 13 above.
[23] See Tribunal hearing transcript, at page 9, paragraphs 10, 15 and 20.
[24] Netstar (Pty) Ltd & Others v Competition Commission of South Africa & Others 2011 (3) SA 164 (CAC) at para 25.
[25] See Commission's Heads of Argument, at paragraph 9 and 11.
[26] See Commission's Heads of Argument, at paragraph 11.
[27] See Tribunal hearing transcript, page 27, line 15.

because whether or not an agreement was concluded is a matter of evidence, which will be fully traversed during the hearing of this matter. Secondly, the collusive agreement alleged by the Commission is confined to a specific tender issued by Pikitup in October 2012, a tender to which Waste Rite and Crossmoor responded. Thirdly, in *FFS Refiners*, we accepted that in the nature of the conduct impugned by the Act, certain information can be extremely difficult to obtain, even for the Commission with all its investigative powers.[28] This is particularly so in respect of collusive conduct, which by its nature is clandestine.

43. In *FFS Refiners*, we held that the party filing the complaint referral must, at the very least, allege facts that enable us to draw an inference in relation to that which is being alleged against the respondent. In that decision, we accepted that an allegation that a respondent has contravened section 8(d)(iv) may be made out by way of inference as opposed to direct allegations. We also pointed out that such inference must, however, be founded on some reasonable factual basis in the pleadings and not amount to mere speculation. [29]

44. We are satisfied that the Commission's complaint referral with regard to the allegation of the existence of an agreement between Waste Rite and Crossmoor satisfies the standard we discussed above. We, accordingly, disagree with Waste Rite that the Commission's complaint referral in this regard amounts to a legal conclusion and leaves Waste Rite in the dark as to what it is alleged to have done and when it may have done so or that it is left unable to establish these aspects in its alleged conduct. We reiterate the importance of respondents reading the complaint referral in its entirety and not isolate specific paragraphs so as to cry foul that the case against them is inadequately ventilated.

Failure to allege relevant facts or circumstances that are indicative of an agreement having been reached

[28] FFS Refiners v Eskom and Others 64/CR/Sep02 ('FFS Refiners').
[29] *ibid,* Page 5, paragraph 18.

45. According to Waste Rite, an agreement as contemplated by section 4(1)(b) of the Act "*requires that the firms in question to have expressed their joint intention to conduct themselves in the market in a specific way and there should be concurrence of wills between the parties concerned.*"[30] It argued that the Commission "*must therefore allege that the firm had concurred with its competitors* and that [Waste Rite] *had expressed an intention to conduct itself in the market in accordance with that which has been discussed between the parties*" [our emphasis].[31]

46. Regarding the facts that underpinned this agreement, the Commission submitted that these facts are set out in its complaint referral which allege the context in which the agreement arose – this being in relation to the tender issued by Pikitup. As regards how the agreement was struck, the Commission argued that the complaint referral points out that Waste Rite and Crossmoor agreed on how to price variable and fixed costs as well as hourly rates in the pricing schedules that they submitted to Pikitup.[32]

47. The Commission submitted that the pricing schedule submitted by each of Waste Rite and Crossmoor in the tender is the embodiment or the manifestation of what was discussed between Waste Rite and Crossmoor. Put differently, the Commission's argument is that, the terms and facts underpinning the collusive agreement between the parties are manifested by the striking similarities in the pricing schedules, which formed part of the tenders that were submitted by Waste Rite and Crossmoor to Pikitup. Therefore, it is in the pricing schedules wherein the agreement and, thereby, the breach of the Act is manifest. From the striking similarities in relation to variable and fixed costs of the nine items specified by the Commission in the referral affidavit, the Commission contended that an inference can be drawn that an agreement to collude must have been reached between Waste Rite and Crossmoor.

[30] See Applicant's Heads of Argument, at page 9 paragraph 19 and 20.
[31] See Applicant's Heads of Argument, at page 9 paragraph 20.
[32] See Tribunal hearing transcript, page 28, line 11.

The Commission further submitted that, although *AGS Fraser*[33] is a species of collusive tendering, i.e. cover pricing, it is distinguishable on the facts from the present case in that *AGS Fraser* uniquely involved cover quoting. Although both the present case and *AGS Fraser* were concerned with collusive tendering, the nature of bilateralism required in these two cases differs.

48. The Commission further argued that not only was an agreement reached between Waste Rite and Crossmoor, it was also acted upon. The existence of the agreement came to light precisely because it was executed.

49. We are in agreement with the Commission that, although *AGS Fraser* is a species of collusive tendering, it is distinguishable from the present case on the facts. The allegation in respect of or the aspect of bilateralism, which we found missing in *AGS Fraser*, is canvassed in the present matter. As correctly pointed out by Waste Rite with regard to our approach to exceptions, the level of detail required in pleadings must be assessed on a case-by-case basis. The manner in which bilateralism is pleaded in the present matter does not require the same approach as that which we adopted in *AGS Fraser*. In the present case, that an agreement was reached between Waste Rite and Crossmoor is inferred by the Commission from the subsequent conduct of these parties. This subsequent conduct is the submission of pricing schedules bearing striking similarities in relation to their fixed and variable costs, as well as the hourly rates, of each of the nine items specified by the Commission in its referral affidavit. Clearly these pricing schedules were in writing. Consequently, the Commission concluded that the only reasonable inference that it could draw from these facts or evidence is that a collusive agreement must have taken place between Waste Rite and Crossmoor. The Commission's complaint referral alleges

[33] AGS Frasers International (Pty) Ltd v Competition Commission; Competition Commission v AGS Frasers International (Pty) Ltd; *In re* Competition Commission v AGS Frasers International (Pty) Ltd & Another CT Case no.: CR025MAY15/DEF098AUG15; CR025MAY15/EXC099JUL15 [07 April 2016] ('Frasers').

that Waste Rite submitted a pricing schedule that is identical in the respects discussed above to that submitted by Crossmoor.

50. Our view is that, whether or not the Commission's inference is a reasonable one, is a matter of evidence to be dealt with during the hearing of this matter.

51. We are also not convinced that, in order for Waste Rite to answer whether or not collusion took place in the tender it submitted to Pikitup, the Commission must provide it with the name of the person who submitted the tender to Pikitup on Waste Rite's behalf. According to Waste Rite, the missing details are necessary to enable it interrogate the collusion allegations made against it by the Commission. We disagree.

52. Whether or not a discussion took place or that an agreement exists, in our view is a matter for evidence. Rule 15(2) does not require the Commission to lay bare all its evidence on which it seeks to rely.

53. We are thus not persuaded that the manner in which the Commission pleaded its complaint referral has left Waste Rite unable to sufficiently prepare its answer.

Failure to allege person or persons said to have represented Waste Rite and its co-conspirator in the collusive agreement

54. Waste Rite also argued that the Commission must plead the identity of the person who represented the parties in the alleged collusion. It would then be for Waste Rite to plead the absence of the authority, if Waste Rite so wished to rely on absence of authority. Without the identity of the person that acted on its behalf in concluding the agreement, so argued Waste Rite, it is not in a position to interrogate the allegations made against it.

55. On the facts of this present matter, we are not persuaded that the absence of this detail has left Waste Rite unable to sufficiently prepare its answer.

The allegation concerning the authority of the persons who concluded the alleged agreement is not a requirement in terms of section 4 of the Act. It is sufficient to allege that an agreement was reached. Nor are we convinced that it would be impossible for Waste Rite to establish which of its employees represented it in concluding the agreement.

56. Accordingly, this exception is dismissed.

ORDER

The following orders are thus made:

1. The application is dismissed;
2. No order is made regarding costs;
3. Waste Rite must file its answer to the Commission's complaint referral within 20 business days from the date of this decision.

______________________ **15 December 2016**

Medi Mokuena **Date**

Andiswa Ndoni and AW Wessels concurring

Tribunal Researcher and Case Manager:	Lulama Mtanga and Alistair Dey-van Heerden
For the Applicant:	Greta Engelbrecht *Instructed by*: Phillip Silver Swartz Inc.
For the Respondent:	Tembeka Ngcukaitobi and Tholoana Motloenya *Instructed by*: Mokwana Incorporated Attorneys