

REPUBLIC OF SOUTH AFRICA



**IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA,
HELD IN JOHANNESBURG**

Case No: 195/CAC/Oct21

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES

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DATE

In the matter between:

TOURVEST	HOLDINGS	(Pty)	LTD
Appellant			
and,			
COMPETITION COMMISSION			First
Respondent			
SIYAZISIZA TRUST			Second
Respondent			

JUDGMENT

Summary: *Accepted competition theory in the characterisation inquiry to be undertaken under section 4(1)(b) of the Competition Act 89 of 1998 (“the Act”) / Section 4(1)(b) properly construed, requires the parties to be in an actual or potential horizontal relationship at the time that they commit the offence in issue/ Misdirection to conduct inquiry on the basis that the horizontal relationship can be located in the impugned conduct itself.*

FISHER AJA:

Introduction

[1] This matter involves a referral by the Commission of a complaint by Airports Company of South Africa (SOC) Ltd (“ACSA”) alleging collusion between a supplier of curio crafts, the second respondent (“the Trust”) and the appellant, (“Tourvest”) a specialist retailer in the sale of such craft products, in a tendering for a retail opportunity at Oliver Tambo International Airport (“ORTIA”).

[2] The appeal relates to the proper application of economic theory and competition law in the characterisation exercise to be undertaken under section 4(1) (b) of the Competition Act 89 of 1998 (“the Act”). It relates, specifically, to the situation where parties who were not previously in a horizontal relationship bid for the same tender.

Factual background

[3] Tourvest’s destination retail business (which is also known as *Tiger’s Eye*) focusses on the sale of destination-themed souvenir products to foreign visitors. Its stores are located in areas which have a large exposure to foreign tourists and mainly at the international departures airside areas in international airports.

[4] Mr Eric de Jager, the Chief Operations Officer of Tourvest explained in his evidence before the Tribunal that the ability to tender competitively for such retail concessions requires considerable resources as well as specialist skills and experience. Access is difficult and logistics are challenging. In order to ensure consistent stock replenishment, it is necessary to have strong logistical

infrastructures, good computer systems and the operational capability to trade 365 days per year and up to 17 hours per day.

[5] The Trust was founded in 1987 with the purpose of providing assistance to women in rural areas through upliftment and training projects. Ms Jane Zimmermann, its Executive Director, stated that its principal objective is to facilitate the economic viability of rural communities by promoting sustainable enterprise development support to rural crafters. This has placed the Trust in the position of “middleman” in the supply of crafts generated by these communities to retailers.

[6] On 17 February 2013 ACSA published a request for bids (“RFB”) for the leasing of retail space described as Opportunities 1, 2 and 3. Opportunity 3 (which is the relevant tender in this case) concerned three stores, in which Tourvest was then the incumbent, conducted African arts, crafts and curio retail businesses under the names *Out of Africa Impulse*, *Indaba Origins* and *Out of Africa Kiosk*.

[7] The RFB provided that bidders had to bid for each of these opportunities separately and that no single bidder could be awarded more than two of the three opportunities. This was a change in policy from previous tenders and was apparently driven by the need for enterprise development of smaller craft retailers.

[8] However, ACSA, at the same time, stipulated onerous minimum financial requirements for all the opportunities including Opportunity 3. For example, ACSA required a minimum guaranteed rental of R450 000 per month and a bank guarantee of three months’ rental. Furthermore, in order to ensure that bidders had the minimum level of experience and qualifications required to operate the various opportunities, no bid would be considered unless it met certain specified mandatory administrative requirements.

[9] One such requirement was that the bidder have “sufficient experience and/or qualifications to effectively exploit the Retail Opportunity to the mutual advantage of the Bidder and ACSA in a manner consistent with the standards set by ACSA”.

'Sufficient experience' was defined as 'the successful management of at least one retail store with minimum monthly sales of R500 000.00 or R6 million per annum in any two of the last three years.'

[10] In addition, bids would be disqualified from consideration if they failed to meet two antecedent requirements, viz. that the bidder (i) purchased the relevant bid document from ACSA and (ii) attended a bid presentation by ACSA.

[11] The Trust neither bought the bid documents nor attended the bid presentation. Tourvest did both.

[12] At the bid presentation, Tourvest asked ACSA whether it would be permissible for a bidder to be part of more than one consortium. In ACSA's minute of the presentation the answer to this question was recorded as follows:

'Yes, you are allowed as long as you will declare this involvement to ACSA as required in the RFB form (VI)(12).'

[13] David Brenner, the CEO of *Tiger's Eye* at the time and Mr de Jager thus gave consideration to a structure in terms of which the Trust could participate as a bidder for Opportunity 3 based on the support and experience of Tourvest. It was reasoned that this would give Tourvest a stake in the enterprise development aspect of the Tender and that the Trust would benefit from the acquisition of retail skills over time.

[14] The Trust and Tourvest, to this end, entered into an agreement in terms of which they would collaborate on the bid for Opportunity 3. In terms of this agreement, Tourvest would provide the necessary experience, management infrastructure, technology and training required to enable the Trust to bid for the opportunity.

[15] Tourvest decided that it would be prudent to submit an alternative bid to that of the Trust in its own name. Mr De Jager explained that Tourvest was concerned that ACSA might decide that the Trust's bid did not meet the mandatory criteria and

if the Trust were disqualified, Tourvest wanted to still be in the running in its own right.

[16] Mr de Jager and Ms Zimmerman testified that the object of providing bids by Tourvest and the Trust was to offer ACSA a choice. It could either award the bid to a rural craft enterprise development initiative in the form of the Trust (with initial management, support, qualifications and experience to be provided to the Trust by Tourvest) or to a well-established retailer with a proven track record at ORTIA, being Tourvest.

[17] The Trust was assisted by Tourvest in the compiling of its bid and specifically the calculation of the rental proposed.

[18] A Memorandum of Understanding (“MoU”) which detailed how the collaboration would be orchestrated was concluded. The MoU was submitted as part of the bid documents. In terms of this agreement, all aspects of managing the Opportunity 3 stores would, initially, be conducted by Tourvest. However, Tourvest would provide skills transfer and capacity to the Trust and, once the Trust had developed the necessary expertise to operate the stores on its own, the managerial responsibility would be assumed by the Trust. It was expected that this hand-over would take place in the third year of the business. Tourvest would receive a management fee equivalent to 7.5% of the turnover of the Opportunity 3 business for all aspects of managing the business, including product range planning, pricing strategy, retail operations and warehousing and distribution.

[19] Clause 16 of MOU reads as follows:

’16. The parties hereby note that they are aware of and agreed to the following aspects of the proposed tender for opportunity 3:

16.1 Tourvest is tendering for the same opportunity in its own right as the 100% shareholder.

16.2 The rental proposal for the tender proposed in this agreement shall be the same as that offered by the Tourvest tender referred to in 16.1 above.”

[20] Thus, it was stated in the MOU in clear terms that Tourvest would be submitting a separate bid for Opportunity 3 in its own name and that the rental proposed in the Trust's bid would be the same as that in Tourvest's bid.

[21] Mr de Jager explained that the rental offering was the same in both bids because Opportunity 3 would, in both instances, be managed by Tourvest for the first approximately three years of the tender. Tourvest therefore assumed, for purposes of determining the rental, that the performance of the businesses would be the same, irrespective of whether it or the Trust won the tender.

[22] Furthermore, the Trust did not have the capacity to calculate the rental figures for its bid. Ms Zimmermann stated:

"We have never run a shop, let alone a store the magnitude of any of Tiger's Eye shops at OR Tambo or any other destination. We have no skills within our staff to even contemplate what putting the finances together for such a bid would comprise. We simply did not have the wherewithal to either question it or put it together."

[23] As it turned out, at the opening of the bids and before any evaluation of the merits thereof, the Trust's bid was eliminated by the Bid Evaluation Committee (BEC) on the grounds the Trust had not, itself, purchased the requisite bid documents or attended the compulsory briefing session.

[24] As a result, the BEC did not proceed even to consider whether the Trust's bid had complied with any of the mandatory administrative criteria for qualification let alone evaluate the Trust's bid for functionality or price.

[25] ACSA's Bid Evaluation Report reveals, however, that, notwithstanding the upfront elimination of the Trust's bid, the BEC proceeded to compare the contents of the Trust and Tourvest's bids and noted that there were similarities between the bids in most, if not all, material respects.

[26] After further inquiry, ACSA decided to disqualify all of Tourvest's bids on the grounds that Tourvest had allegedly colluded with the Trust in respect of Opportunity 3.

[27] This was notwithstanding the clear disclosure by the Trust and Tourvest in their tender documents that they were collaborating on the Trust's Bid and the details of their collaboration.

[28] Significantly, it was later acknowledged in the internal motivation of the BEC to the ACSA Board that:

"Tourvest Holdings nevertheless declared their relationship with the other bidder, Siyazisiza Trust as required in the bid conditions."

[29] In light of the fact that the Trust's bid was technically not allowed in, Mr Maritz SC argued on behalf of Tourvest that this Court should find that there was no tendering to speak of and that section 4(1)(b) was thus not even engaged. We have decided that, in light of the findings of the Tribunal, it is best that the matter be dealt with on competition principles and on the arguments made on behalf of Tourvest by Mr Wilson SC and by Maenetje SC for the Trust and Mr Ngcukaitobi SC for the Commission.

The Disputes

[30] First, there is a dispute as to the existence of a horizontal relationship. The Commission argued and the Tribunal found that Tourvest and the Trust became actual or potential competitors when they tendered for Opportunity 3 and that they were, thus, in a horizontal relationship for the purposes of the section 4(1)(b). Tourvest and the Trust argue that accepted competition law and economic principles dictate that the inquiry into horizontality be characterized absent the impugned agreement and that the Tribunal erred in failing to apply these principles to this part of the characterization inquiry.

[31] Second, there is a dispute as to whether the conduct was correctly characterized as collusive tendering. Tourvest and the Trust argue that the bids were

neither intended to be nor portrayed as competing bids but rather as alternative forms of the same bid. The Commission argues that the conduct of submitting materially the same bid constitutes collusive tendering in terms of section 4(1)(b) and that the intention of the parties and object and effect of the collaboration is irrelevant given the per se status of the prohibition.

[32] The Commission expressly abandoned its initial case that the respondents were competitors in a retail market prior to the submission of their bids. Thus, the appeal centres on the characterization inquiry in relation to the bid process only

[33] The Tribunal found the appellant and the Trust guilty of collusive tendering. It imposed an administrative penalty on Tourvest in an amount of in excess of R9 million but did not impose an administrative penalty on the Trust given its non-profit status. The Commission does not appeal against the Tribunal decision in this respect. Tourvest appeals the whole of the Tribunal's decision. Whilst the Trust does not appeal it did participate as a respondent in support of the appeal. The finding that it contravened section 4(1)(b)(iii) of the Act obviously impacts adversely upon the Trust's reputation and this is material to its ability to attract donations to fund its activities. It relied on pro bono representation in the appeal.

The competition law and economic framework

[34] Section 4(1)(b) of the Act concerns the per se prohibition of specific collusive practices between competitors. The per se nature of the prohibition means that no defence is available if the conduct is found to fall within the practices described in this section of the Act.

[35] Section 4(1) provides as follows in relevant part –

“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 - ...

(b) 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) dividing markets by allocating customers, suppliers, territories, or specific types goods or services; or

(iii) collusive tendering". (Emphasis added)

[36] This case is not the common situation where the conduct complained of is of the nature of obviously harmful fixing of a price. It was thus necessary for the Tribunal to engage in an inquiry as to whether the true character of the collaboration between the parties was such that it falls within the type of economically harmful behaviour covered by section 4(1)(b).

[37] the concept of characterisation was incorporated into our law as a result of the judgment in *American Natural Soda Ash Corporation and another v Competition Commission and others*¹ ("ANSAC").

[38] ANSAC recognised that there are instances where conduct may, on the face of it, seem to be collusion as to pricing but when closer scrutiny is brought to bear on the conduct it emerges as benign.

[39] In their judgment in ANSAC Cameron and Nugent JJA formulated the inquiry to be undertaken when there was doubt as to whether the conduct in question was of the character of the per se conduct contemplated in section 4(1)(b).

[40] After comparing the US position of judicial evaluation to the South African statutory scheme embodied in section 4(1), the learned Judges concluded :

'Whichever approach is adopted, the essential enquiry remains the same. It is to establish whether the character of the conduct complained of coincides with the character of the prohibited conduct: and this process necessarily embodies two elements. One is the scope of the prohibition: a matter of statutory construction. The other is the nature of the conduct complained of: this is a factual enquiry. In ordinary language this can be termed 'characterising' the conduct – the term used in the United States, which Ansac has adopted.'²

¹ *American Natural Soda Ash Corporation and another v Competition Commission and others* 2005 (6) SA 158 (SCA) ('ANSAC') at paras 43 – 47.

² *Id* at para 47.

[41] The process of characterisation was described by this court in *Competition Commission v South African Breweries Ltd & others*³ (“SAB”). Davis JP and Rogers AJA (as they then were) explained the characterisation principle thus:

“The animating idea of the characterisation principle is to ensure that s 4(1)(b) is so construed that only those economic activities in regard to which no defence should be tolerated are held to be within the scope of the prohibition. Whether conduct is of such a character that no defence should be entertained is informed both by common sense and competition economics”.

[42] They went on to explain that the South African legislature, in passing the Act, favoured a statutory rule rather than the judicially constructed one preferred in the US and set out the process under the statutory inquiry thus:

“the “characterisation” that is required under our legislation is to determine: (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).⁴

[43] They went on to state:

‘... , 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.’⁵

[44] The economic thinking behind the per se offences that are intended to be captured under section 4(1)(b) is that there is, almost certainly, harm to competition from such conduct and rarely, if ever, redeeming features that might outweigh such harm.

³ *Competition Commission v South African Breweries Ltd & others*(SAB)) [2014] 2 CPLR 339 (CAC) paras 25-47.

⁴ *Id* at para 37.

⁵ *Id* at para- 37.

[45] Mr James Hodge, employed by Tourvest, was the sole expert on economics in the case. Mr Hodge was called on to explain the economic principles behind the two elements of the characterisation exercise. He succinctly described relevant economic theory and emphasized that it has its roots in an underlying economic determination of the potential for such agreements to result in harm to competition.

[46] Mr Hodge made the point that it is important rigorously to apply economic disciplines to the facts of each case. He pointed out that economic competition theory operates on the basis that parties must be potential or actual competitors at the time that they enter into the impugned agreement. Their status, at this time, defines the economic inquiry to be undertaken.

[47] The accepted economic discipline employed in the determination of this status is to examine the relationship in the absence of the impugned agreement.

[48] The EU and US guidelines on potential competitors both espouse this economic approach.⁶ The application of this discipline enables an 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.

[49] The question posed in this counterfactual analysis is whether the parties were potential competitors in the absence of the impugned agreement. If the answer to the question is in the affirmative, then competition may have been

⁶ European Commission (2011). "Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements." para. 10 reads as follows in relevant part:

"A company is treated as a potential competitor of another company if, in the absence of the agreement...

United States Federal Trade Commission and Department of Justice (2000), "Antitrust Guidelines for collaborations among competitors define a potential competitor in much the same way: *"A firm is treated as a potential competitor if there is evidence that entry by that firm is reasonably probable in the absence of the relevant agreement.*" (emphasis added).

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.

[50] 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.

[51] Put simply, where the firm in question is not a potential competitor in either the factual scenario or the counterfactual scenario, it follows that competition is the same in each scenario.

[52] This counterfactual discipline was recognised and employed in *SAB* by this Court in the characterisation of an agreement which, as in this case, had both vertical and horizontal elements.⁷ The court held 'if an undertaking would have not competed, absent the impugned agreement, then the agreement itself cannot be said to have been entered into between horizontal competitors but rather stands to be classified as an agreement between an upstream manufacturer who is engaged in a new distribution strategy with its downstream suppliers.'⁸

[53] This approach has sound economic foundations. If the counterfactual scenario is indeed that one party would not be active in a market at all, then competition cannot be any worse as a result of an agreement between that party and an existing market participant in terms of which the former party becomes active in the market on terms determined by the agreement. In neither the factual nor the counterfactual scenario does the one party bring any independent competition to the market and therefore one cannot say that the agreement has worsened competition as there was none to start with.

⁷ Reference was made to the European Commission in its *Guidelines to Technology Transfers Agreements (2004)* which states:

'In order to determine the competitive relationship between the parties it is necessary to examine whether the parties would have been actual or potential competitors in the absence of the agreement. If without the agreement the parties would not have been actual or potential competitors in any relevant market affected by the agreement they are deemed to be non-competitors.'

⁸ *SAB* at par 41.

[54] The purpose of section 4(1)(b) is to capture conduct which is so egregious that no defence is permitted. Thus, it stands to reason that it does not seek to capture conduct which is not of character that causes harm to competition.

[55] I now move to a discussion of the horizontal case in this matter with these principles in mind.

The Horizontal case

The Tribunal's decision

[56] In its horizontal inquiry the Tribunal accepted, on the authority of its own decisions in *Eye Way*⁹ and *Aranda*¹⁰, that the Trust and Tourvest became actual or potential competitors by reason of the fact that they both tendered for the same opportunity.¹¹ This acceptance is fundamental to its decision.

[57] The Tribunal found also that the parties “held themselves out to be competitors” and it appeared to find that this could be a basis for finding that they were in a horizontal relationship.

[58] It concluded as follows in relation to its horizontal inquiry:

“Accordingly, we find that at the point the bid was submitted, the Trust was in fact holding itself out as a competitor of Tourvest and the other bidders. We therefor conclude that Tourvest and the Trust were in a horizontal relationship in relation to Opportunity 3.” (Emphasis added.)

[59] This conclusion elides two findings: first, that the parties became competitors merely by bidding and second, that the Trust was holding itself out to be in a competitive relationship. The Tribunal appears also to have found that the parties were potential competitors on the basis that the Trust would, as a result of the

⁹ Competition Commission v Eye Way Trading and Another CR073Aug16/ CR074Aug16.

¹⁰ *Competition Commission v Aranda Textile Mills (Pty)Ltd; Mzansi Blanket supplies* Case no CR016APR 18.

¹¹ Tribunal decision para 128. The decision in this case was reversed in

assistance provided to it in terms of the MoU, be able to compete independently with Tourvest and other retail outlets at some time in the future.¹²

[60] Thus the Tribunal's findings on the horizontal case are, simply stated, as follows: although the parties were not in a horizontal relationship before they bid in the tender, they became actual competitors by bidding in the tender; they furthermore became potential competitors under the agreement; alternatively, they became competitors because they held themselves out in the tender to be bidding against each other.

[61] Messrs Wilson and Mr Maenetje argue that these findings of horizontality are at odds with the applicable statutory and economic prescripts.

[62] I move to deal with each of the findings with reference to the legal and competition prescripts outlined above.

Horizontality by bidding

[63] The *Eye Way* and *Aranda* decisions relied on for this finding, in fact, demonstrate that, had the proper economic discipline been consciously applied in both cases, the lack of horizontality in the relationships would have been clear.

[64] Applying the discipline to *Eye way* – the parties were potential competitors in the vertical space absent the agreement in that the tender was for the supply of fabric not manufacture and thus it mattered not that Eye way had no manufacturing capacity. Thus, the correct application of the legal and economic prescripts leads to the same conclusion that was ultimately reached by the Tribunal in *Eye Way* - albeit via a different route - being that the parties were competitors.

[65] The application of the discipline to the facts in *Aranda* yields a similar conclusion. Aranda was the only manufacturer and supplier of the type of blankets

¹² Tribunal decision, paras 120-128, Vol 24, p 2450:25 – p 2454:17.

required by the tender. It bid in the tender itself and also imposed significantly more onerous supply terms on other bidders in the tender, save for Mzansi which was its preferred customer in the vertical space. The horizontal relationship in issue related to the supply of blankets under the tender. The Tribunal found, incorrectly, that the parties were in a horizontal relationship.

[66] This finding was reversed on appeal to this Court.¹³ On the proper application of competition law and economics it is clear that the parties in *Aranda* were not in a horizontal relationship in that, absent the impugned supply agreement, they could not be competitors.

[67] This Court found that the Tribunal had incorrectly applied the characterisation process because it had failed to appreciate that the conduct in issue was a function of the vertical relationship between the parties as supplier and customer in relation to Mzansi's bid, and not a function of the horizontal relationship between them as bidders in the tender.¹⁴

[68] A case which has similar features to this case is *A' Africa Pest Prevention CC and Another v Competition Commission of South Africa*.¹⁵ In *A' Africa* the bids were submitted by two associated entities and the bids, in effect, amounted to a conflation of the running of their affairs, staff complement, equipment, management strategy and businesses. As in this case, the same person decided on the prices contained in both tender forms and other identical information submitted therein.

[69] The Tribunal, adopting similar reasoning to the one adopted in this case, found that this amounted to price fixing. This finding was based on the submission of two quotations which, in its view, exhibited dishonest behaviour directed at gaining a BEE advantage over others. In its view, "the appellants could not be allowed to benefit from their dishonest actions and the illusions of competing for the work."¹⁶ (Emphasis added.)

¹³ *Aranda Textiles (Pty) Ltd and Another v The Competition Commission of South Africa* (190/CAC/Dec20) [2021] ZACAC 1.

¹⁴ *Id* at para 87.

¹⁵ (168/CAC/Oct18) [2019] ZACAC 2 (2 July 2019)

¹⁶ *A' Africa* at para 64.

[70] On appeal, this Court (per Boqwana JA as she was then) reversed this finding. Although the case was decided on the basis of the application of section 4(5), It was held that the submission of the two separate bids in the same terms could not, on its own, bring the impugned conduct within the ambit of section 4 (1) (b).¹⁷

[71] Again, the application of counterfactual economic theory to the facts of *A'Africa* yields the conclusion that the two entities were never in an actual or potential horizontal relationship.

Horizontality by illusion

[72] Reference to the above quotation from the decision in *A'Africa*, shows that the Tribunal adopted a similar approach to the one adopted in this case being that horizontality can be found in the creating of an 'illusion' of competition'.

[73] The Tribunal reasons that because the parties sought to 'hold the Trust out as a competitor' they can and should be found to be in a horizontal relationship.¹⁸

[74] This approach to horizontality defies logic. It holds within it the assumption that the parties are not actually in a horizontal relationship. Thus it constitutes, in and of itself, a finding which is contrary to the express provisions of section 4(1)(b) which requires the parties to be in an actual (or potential) horizontal relationship.

[75] The section cannot be construed so as to import strict liability to a party for pretending to be a competitor when it is not one.

[76] This approach of the Tribunal is founded on an incorrect reading of *United States v Reicher*.¹⁹ The Tribunal cited the following passage as purported authority for the proposition that, if a party holds itself out as a competitor for the purposes of bid rigging, it can be held to be in a horizontal relationship:

¹⁷ *Id* at para 67.

¹⁸ *Tribunal Decision para [128]*

¹⁹ *United States v Reicher* 983 F.2d 168 (10th Cir. 1992).

“Here the decisive circumstances in defining “competitors” is the simple fact that Giolas Sales submitted a bid for the OCA contract. Despite its ultimate inability to perform the contract, Giolas held itself out as a competitor for purposes of rigging what was supposed to be a competitive bidding process. This is exactly the sort of “threat to the central nervous system of the economy” ... that the antitrust laws are meant to address ...”²⁰

[77] *Reicher* involved a charge of conspiracy to rig bids in violation of the Sherman Act. The tender in question was for a project involving the building of a specialised structure for laser testing at a national laboratory. The laboratory compiled a list of prospective bidders and Reicher was on the list. The procurement procedure entailed that there be at least two bids for the tender to proceed. As the deadline for bid submission approached, it became clear that Reicher’s company was likely to be the only bidder. To ensure that the bid process went ahead and that his company would be the successful bidder Reicher arranged with James Giolas, the proprietor of another potential bidder appearing on the list of prospective bidders to sign a blank bid form which Reicher then completed and submitted in the name of Giolas. Giolas had neither the ability nor the inclination to perform the project. In essence, Giolas’ bid was a ‘dummy’.

[78] Reicher’s company was awarded the bid as the low bidder. Thus, notwithstanding Giolas’ undisputed incapacity, through their agreement Reicher and Giolas were able to manipulate the bidding and lull the laboratory into the belief that it had the benefits of true competition. Having bid on the job, and having created the appearance of legitimate competition in a bidding process, the court held that they could not escape the inevitable conclusion of dirty dealing by denying that they were competitors.²¹

[79] The Tribunal approached *Reicher* on the basis that it, like the Tribunal’s decisions in *Eye Way* and *Aranda*, is authority for the proposition that horizontality can be achieved merely by bidding. As set out above this is contrary to the plain meaning of section 4(1)(b) and accepted competition economic theory.

²⁰ Ibid para 170.

²¹ *Reicher*, 983 F.2d 168, 172.

[80] In fact, *Reicher* was decided on the basis that a determination of a *per se* antitrust violation depends on whether there was an agreement to subvert the competition, as opposed to whether each party to the scam could perform.

[81] The argument of the Trust and Tourvest that the Trust could not carry out the tender without Tourvest because it was in a vertical relationship without the agreement, was met with reliance by the Commission on the proposition in *Reicher* to the effect that ability to perform was not a relevant consideration in the evaluation. But this is to misunderstand that, in *Reicher*, the parties were actual or potential competitors absent the bid rigging arrangement. They both appeared on the list of potential bidders and were both invited to bid. On the application of the economic principles, the only purpose of the arrangement was thus to subvert competition.

[82] In *United States v Sargent Elec. Co*²² which was relied on in *Reicher* the Court defined 'competitors' for bid rigging purposes according to who was eligible to bid.²³ The Court held:

'There is no potential competition between a party not on an approved list of vendors and a party on such a list.'²⁴

[83] Put simply, if the parties are found to be 'ineligible' as competitors in a tender for reasons which attach to the environment in which they trade, they are not potential competitors.

[84] This ineligibility factor is not merely about exclusion from a tender but the character of the relationship. In this case, the Trust was not eligible to participate in the tender because it did not meet the criteria - and thus it was excluded - but it also, was not a business which had the means, experience, acumen, structure and character which would allow it to be a competitor in the first place.

²² *United States v. Sargent Elec. Co*, 785 F.2d 1123 (3d Cir.) (1986)

²³ *Id* at 1129.

²⁴ *Id.* at 1130.

[85] In contrast, the parties in *Reicher* were potential competitors for the horizontality analysis absent the agreement. They were both on the list of prospective bidders and thus fell into the realm of eligibility. *Reicher* is not authority for the proposition that the act of bidding determines horizontality. Were this the case, the characterisation exercise would be redundant. Parties in cases such as this one would axiomatically become competitors.

[86] The lead opinion in *Sargent* confirmed that the initial inquiry is whether each party to a conspiracy was “an actual or potential competitor in that market” and that “[a]n agreement among persons who are not actual or potential competitors in a relevant market is for Sherman Act purposes *brutum fulmen* [an empty threat].²⁵

[87] Applying economic theory in the pre-tender environment (which is the correct environment to assess the existence or otherwise of actual or potential competition) the Trust could never have been assessed to be a competitor. And, hypothetically, even if it were pretending to be a competitor, this would not make it a competitor

[88] This brings me to a discussion regarding the Tribunal’s understanding that the Trust could be characterised as a potential competitor by virtue of the impugned agreement.

Potential competitor via the agreement

[89] The Tribunal’s finding that the parties horizontal relationship could be found in the potential for the Trust to compete in the future in light of the enterprise development purpose of the tender is also illogical and contrary to the provisions of section 4(1)(b).

[90] The MoU itself reflects the extent of the deficit in experience and infrastructure the Trust had at the time. It was disclosed that It was only with this agreement that the Trust could overcome this deficit.

²⁵ *Id* at 1127.

[91] The accepted evidence of Ms Zimmerman was that absent the agreement the Trust would not have been able to develop the skills and resources which would allow it to occupy a specialised retail space.

[92] Section 4(1)(b) provides that the prohibited agreement must be between parties in a horizontal relationship. It is illogical to suggest that this potential can be found within the impugned agreement. Section 4(1)(b) properly construed requires the parties to be in a horizontal relationship when they commit the offence in issue.

[93] Thus in sum on the horizontal case, accepted economic theory and the proper application of the terms of section 4(1)(b) does not accommodate the approach taken by the Tribunal, being that the horizontal relationship contemplated in the Act may be located within the impugned conduct itself. Such an approach is anathema to the statutory scheme created by section 4(1) and accepted competition economic theory.

[94] Having made its erroneous determination on the horizontal case, the Tribunal proceeded to consider the second component of the characterisation exercise, namely whether the respondents' conduct constituted collusive tendering in contravention of section 4(1)(b)(iii). It concluded that it did.

[95] The case for thus characterising the conduct is simply that the parties literally fixed the price.

[96] Once it is accepted that the parties were not in a horizontal relationship, an enquiry as to the characterisation of the conduct as collusive tendering cannot follow as a matter of law.

I will, however, deal briefly with the Tribunal's theory of collusive tendering.

Collusive tendering

[97] On the case accepted by the Tribunal, the 'collusion' lay in the fact that the parties tendered on the same terms and at the same price. It went on to theorise that Tourvest had forced the Trust to bid at the same rental and thereby prevented it from

putting in a competitive bid.²⁶ This was purely on the basis that Mr de Jager conceded that Tourvest would not provide its services under the MoI at a lower rate.

[98] Thus, the Tribunal worked backwards in its reasoning. Having decided that the price was “fixed” in terms of the MoU, it reasoned that this must, somehow, mean that there was collusion of the sort contemplated in section 4(1)(b)(iii). It then sought to develop a theory of collusive tendering. This led to it having to construct, by inference, a corrupt design. Its collusion theory failed to take into account that the collaboration was disclosed and that there was no anti-competitive object which could be found in the MoU. The Tribunal, somewhat cryptically, theorised that this disclosure was designed to create the illusion that the two bids were competitive.²⁷ But this does not explain any anti-competitive purpose.

[99] There is nothing objectionable about working backward for the purposes of the assessment. However, in embarking on an assessment in this direction, one must be cautious not to make the determination and then contrive a case which seeks to support this determination.

[100] The tribunal appears to have been fortified in its approach by the inability of Mr Hodge to point it to any authority where a ‘bid rigging’ case was decided as lawful because of characterisation. This begs the question. The point is it was not bid rigging in the first place.

[101] In ANSAC the SCA noted:

‘There is in principle no reason why the enquiry should not be conducted in reverse. The enquirer might choose first to identify the true character of the conduct that is the subject of the complaint, and only then turn to whether the conduct (so characterised) constitutes price-fixing as contemplated by s 4(1)(b). (This is how the enquiry is conducted in the United States, though there the two elements tend to be elided, because the scope of the prohibition is itself a matter of judicial rather than legislative determination.)²⁸

²⁶ *Tribunal Decision, paras 129-142.*

²⁷ *Tribunal Decision at para 146.*

²⁸ *ANSAC at para 46.*

[102] The Court was, however, at pains to explain that, whilst 'price fixing' always involves consensual price determination by competitors, it does not follow that price fixing has necessarily occurred whenever there is an arrangement between competitors that results in their goods reaching the market at a uniform price. In the language that the Act uses, the 'collusive tendering' by competitors refers to conduct designed to avoid competition, as opposed to conduct that merely has that incidental effect.²⁹

[103] This Court in *SAB* referred to the US Supreme Court's decision in *BMI* which cautioned against an overly literal approach to price fixing. It quoted the following passage in relation to the characterisation of the conduct:

' But this is not a question simply of determining whether two or more potential competitors have literally 'fixed' a 'price'. As generally used in the antitrust field, 'price fixing' is a shorthand way of describing certain categories of business behavior to which the per se rule has been held applicable. The Court of Appeals' literal approach does not alone establish that this particular practice is one of those types or that it is 'plainly anticompetitive' and very likely without 'redeeming virtue'. Literalness is overly simplistic and often overbroad . . . ' ³⁰

[104] Thus although the Tribunal repeatedly posed the question why Tourvest bid in its own name and made much of Ms Zimmerman's concession that the Trust's bid could, in theory, be seen to be in competition with that of Tourvest, it was unable to put up a cogent collusion theory. On the other hand, Mr de Jager's explanation that the Tourvest bid was put in because there was a rational fear that the Trust would be disqualified from the bid leaving Tourvest *between two stools* is an obvious explanation.

Conclusion

[105] In conclusion, the central misdirection of the Tribunal in this case was the failure to appreciate that the accepted legal and economic prescripts did not allow it to embark on a characterisation enquiry which failed to take account of the character

²⁹ *Id* at para 47.

³⁰ *Broadcast Music, Inc v Columbia Broadcasting System, Inc* 441 US 1 at 7-9 and 19-23 (1978), quoted with approval in *SAB*, at paras 33 and 35.

of the parties' relationship absent the impugned agreement – which relationship was, on all the facts, plainly vertical.

[106] The approach by the Tribunal on characterisation does not accord with the approach outlined in *ANSAC* and this Court's jurisprudence in *SAB* and more recently in *Dawn*.³¹

Order

[107] The following order is thus made:

1. The appeal is upheld.
2. The Tribunal's order of 29 September 2021 is set aside and replaced by the following order:

“The Competition Commission's Complaint Referral against Tourvest Holdings (Pty) Ltd and Siyazisiza Trust (under CR 022May15) is dismissed.”

3. The Commission is ordered to pay the appellant's costs including the cost of two counsel where employed

³¹*Dawn Consolidated Holdings (Pty) Ltd & Others v The Competition Commission* (155/CAC/Oct2017) [2018] ZACAC 2 (4 May 2018).

D FISHER AJA

ACTING JUDGE OF THE COMPETITION APPEAL COURT

I concur,

PP

M VICTOR AJP

ACTING JUDGE PRESIDENT OF THE COMPETITION APPEAL COURT

I concur,

PP

L NUKU

ACTING JUDGE OF THE COMPETITION APPEAL COURT

Date of hearing: 29 April 2022.

Judgment delivered: 30 June 2022.

APPEARANCES:

For the Appellant: Adv N.G.D Maritz SC.
Adv J Wilson SC.

Instructed by: MacRobert Attorneys.

For the Commission : Adv T Ngcukaitobi SC.
Adv K Monareng.

Instructed by: Ndzabandzaba Attorneys inc.

For the second respondent: Adv N Maenetje SC.

Instructed by: Werksmans Attorneys.