IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CAC CASE NO: 190/CAC/DEC20

In the matter between:

ARANDA TEXTILE MILLS (PTY) LTD	First appellant
MZANSI BLANKET SUPPLIES (PTY) LTD	Second appellant
And	
THE COMPETITION COMMISSION OF SOUTH AFRICA	Respondent

Heard Remotely by the late Acting Judge President BJ Mnguni, Judge of Appeal M Victor and Acting Judge of Appeal F. Kathree-Setiloane
Judgment handed down by M Victor JA and F Kathree-Setiloane AJA concurring.

JUDGMENT

Victor JA (Mnguni AJP and Kathree-Setiloane AJA

Introduction

[1] This appeal concerns a finding by the Competition Tribunal (Tribunal) of a contravention of s 4(1)(b)(i) and (iii) of the Competition Act, No 89 of 1998 (the Act)

based on inferential reasoning in the absence of direct evidence of an agreement or collusive tendering and with no characterisation analysis.

[2] The appeal also raises the question whether communication between manufacturer and retail distributor automatically casts it in a horizontal net. In a commercial society such as ours, discussions between manufacturer and retail distributor on price is routine when giving or obtaining prices between them. In modern commerce is there room to force a manufacturer to give a uniform price to its different customers?

The parties

[3] The first appellant is Aranda Textile Mills Pty Ltd (Aranda) a manufacturer of inter alia blankets. The second appellant is Mzansi Blanket Supplies Ltd. (Mzansi) which trades as a supplier of blankets and sources these from Aranda.

[4] The respondent is the Competition Commission (the Commission) a statutory body established in terms of the section 19(1) of the Act.

The Referral

[5] On 10 April 2019 the Commission referred a complaint to the Tribunal alleging that, "in response to this tender, the [appellants] agreed to coordinate their pricing for the tender*"*. Under the Heading "*Conduct in Contravention of Section 4(1)(B)(i) And (ii) of the Act"* the Commission alleged that "[o]n or about March 2015, the Respondents discussed and agreed how to bid for tender number: RT26-2015T. In terms of the agreement, Aranda would provide Mzansi with its tender documents including pricing schedule which Mzansi will use to prepare its own tender including pricing." The Commission also alleged that "[t]he agreement further provided that Mzansi will add 7.25% from Aranda's prices to its prices of the blankets to be submitted to National Treasury when bidding for this tender."

[6] The Commission presented a table in which different columns reflected the blanket item number, Aranda's price and then Mzansi's, and a further column reflected the percentage price difference between the two tenders. This column reflected the consistent 7.25% mark-up. The complaint referral concluded that the collusive agreement entered into by the Aranda and Mzansi was egregious and a serious contravention of the Act and that it "would destroy the basis of competitive bidding and is particularly harmful to the public because it often distorts the market for procurement. The Commission argued that the above conduct by the Respondents constitutes price fixing and collusive tendering in contravention of sections 4(1)(b)(i) and (iii) of the Competition Act.

Issues

[7] The central issue in the appeal is whether the Commission has proved the s 4(1)(b)(i) and (iii) contravention of the Act on a balance of probabilities. This inquiry requires a consideration of the role of inferential reasoning in competition law to prove a per se prohibition.

[8] Further in the absence of a characterisation evaluation, can a proper finding of horizontality in terms of section 4(1)(b) of the Act be made where Aranda and Mzansi stood in a supplier-customer relationship prior to them submitting bids in response to the same tender? In the absence of direct evidence on how Aranda and Mzansi had agreed and coordinated their bids, did the Commission discharge its onus of proof?

[9] A further issue is whether the Tribunal had failed to consider the communications between Aranda and Mzansi and their economic relationship in its appropriate context as between manufacturer and distributor.

[10] To what extent can the Tribunal depart from the case made out by the Competition Commission to make up for the deficiencies in evidence and, in particular where the Commission had not pleaded a collusive scheme and there was no witness testimony of such a scheme.

Relevant background facts

[11] On 6 February 2015, the Treasury invited prospective bidders to participate in the tender for supply of blankets, household textiles, tablecloths, sheets, and face towels to the State under Tender RT26-2015 for the period 1 April 2015 to 31 March 2016 The tender comprised some 20 contracts but at issue here are the six blanket contracts (the blanket tender). The Treasury received eight different tenders in response to the blanket tender. Aranda and Mzansi scored first and second out of the six tenderers for the blanket contracts. Although the Aranda tender was lower in price, Mzansi was awarded the tender on the basis of its BBBEE credentials.

[12] The bid requirements included that a participant disclose from whom they sourced their products and the details of their sources and make various declarations and sign the Certificate of Independent Bid Determination Form (the SBD9 form). [1] Aranda was the only manufacture that could supply the blankets in accordance with the tender specifications. The supporting documents also required moth-proof tests which had to be in accordance with the South African Bureau of Standard.

[13] Among those tendering was Aranda represented by Mr Magni, Ms Paruk of Mzansi and Mr Mandla Vilikazi of Vilankosi Enterprises CC. As the only manufacturer and supplier of blankets, Aranda imposed the following credit terms on tenderers (other than Mzansi) who sought the supply of blankets from it: (a) the provision of an irrevocable letter of credit; (b) payment of 50% deposit prior to the commencement of production; and (c) for the full duration of the tender, Aranda be a joint signatory on the tenderer's bank account into which payment was to made by Treasury for the blankets. In relation to Mzansi the terms of supply were different. Aranda confirmed in the tender letter that a "*firm supply arrangement*" was in place. Aranda and Mzansi had done business over a number of years and there was an established business relationship in place. In fact, the sole shareholder of Mzansi, Ms Paruk was the daughter in law of Mr

[1] The SBD9 form is a declaration that must be signed by a tenderer. It is aimed at preventing any form of bid rigging.

Paruk who owned Africhoice, a company which had also done business with Aranda over many years.

[14] Sometime after the award of the blanket tender, Mr Vilikazi a member of Vilankosi Marketing Enterprises CC (Vilankosi) found out that the prices Mzansi received from Aranda were below those that he had received from Aranda. He became suspicious and reported this to Ms Yvette van Niekerk the deputy director of procurement at Treasury. She invited Mr Vilikazi to lodge a complaint with Treasury which he did. She then on-referred the complaint for investigation into possible collusion in respect of the blanket tender by Aranda and Mzansi to an internal specialized audit services committee (SAS).

[15] SAS issued a report suggesting that there could be collusive bidding based on the letter between Aranda and Mzansi dated 2 March 2015. This letter, according to the report, was in conflict with the declarations and the SBD9 form.

[16] The Tenderer was required to declare that there was no consultation, communication, agreement or arrangement with any competitor regarding prices or formulas to calculate prices with the aim of winning or not winning the bid.

[17] SAS found that Aranda tendered with the intention not to win the bid in conflict with the Form SBD9. It suggested that the Aranda prices were marginally below those of Mzansi and way above those quoted to Vilankosi. It found that there were potential contraventions of sections 4(1) (b) (i) and (iii) and or 9(1)(c) of the Act and the matter was referred to the Commission. [2]

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[2] S 9(1) (c) of the Act provides that Price discrimination by dominant firm prohibited

(1) An action by a dominant *firm,* as the seller of *goods or services,* is prohibited price discrimination, if—
  (a) … (b) … and
  (c) it involves discriminating between those purchasers in terms of—
    (i) the price charged for the *goods or services;* (ii) any discount, allowance, rebate or credit given or allowed in relation to the supply of *goods or services;* (iii) the provision of services in respect of the *goods or services;* or
    (iv) payment for services provided in respect of the *goods* or *services.*

[18] The tender was ultimately awarded to Mzansi and implemented.

Aranda's case on appeal

[19] Aranda's case on appeal is broadly that the Tribunal erred in concluding that there was cooperation between Mzansi and itself. It failed to take into account that the relationship was one between supplier and distributor that did not involve any engagement on their respective tender prices. The Tribunal hypothesised about the alleged collusive scheme in circumstances where the Commission had not pleaded such a scheme, and presented no *viva voce* evidence at the Tribunal proceedings about such a scheme. The Tribunal made these findings notwithstanding the direct evidence of Mr Magni of Aranda and Ms Paruk of Mzansi that there was no agreement or collusion or pricing information exchanged. The Tribunal gave no reasons for rejecting the evidence of Mr Magni and Ms Paruk and failed to characterise the alleged contravening conduct.

Mzansi's case on appeal

[20] Mzansi also highlighted several aspects on which it contended the Tribunal erred. In particular, it argued that there was no evidence of an agreement or concerted practice relating to pricing. The communication between Aranda and Mzansi on the courtesy check list as to what documentation had to accompany the tender was neutral, as Aranda had also advised other tenderers of this. The analysis of the SBD9 form and the "lets get it done email" was not proof of collusion as it was properly explained. Mzansi also asserted that there was neither the theory of harm applied, nor horizontality and verticality characterisation applied. There was also no rationale for the impugned conduct. Mzansi also made common cause with Aranda on the appeal issues.

The Commission's case

[21] The Commission relied for its case on the bid prices because Mzansi added a consistent 7, 25% price mark up on the price that Aranda gave it. It also relied on Aranda's close historic relationship with Mzansi and Africhoice, the latter company

belonging to Ms Paruk's father-in-law. Aranda had a previous commercial relationship with Africhoice.

[22] The Commission contended that Aranda treated Mzansi and Africhoice interchangeably. Aranda and Mzansi's knowledge that they were both bidding for the annual blanket tenders prior to their tender submission date on 9 March 2015 was a factor. So too was the checklist of documents for submission which Aranda provided to Mzansi during the bid preparation stage. This was aimed at ensuring that Mzansi submits a responsive tender.

[23] The Commission also highlighted the assistance which Mzansi provided to Aranda's bid at the bid preparation stage by reminding it, in an email, to include an additional test report to its (Aranda's) bid documents otherwise "both" their bids would be disqualified. The Commission submitted that the communication between Aranda and Mzansi and the "let's get it done" email was indicative of an agreement or collusion. A further aspect relied upon by the Commission to support its case, was Aranda's pricing out of the running for the tender of every single other competitor, by providing them with prices about 56% more than Mzansi's eventual bid price. They also contended that the annual, predictable nature of Treasury's blanket tenders and Aranda's historic relationship with Mzansi and Africhoice led to some cooperation.

[24] The Commission was also concerned with two key drivers of the bid price. These were the cost price of the blankets and the B-BBEE scores. The tender specifications confirmed, in this regard, that the tender was to be assessed on a "90/10" basis in favour of BBBEE and Mzansi was thus a convenient vessel to reach the maximum number of points.

The statutory overview

[25] Aranda and Mzansi had to meet a case based on a contravention of s 4(1)(b)(i) and/or (iii) of the Competition Act, which provides 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) […]
>
> (iii) collusive tendering.

[26] Cartels have long been understood to be prohibited conduct which attracts a per se prohibition and constitutes one of the most pernicious forms of anti-competitive conduct that results in harm to consumers and the economy. The consequences of a contravention are wide ranging and attract heavy penalties of a dissuasive nature that serve as a deterrent. Whilst I accept that it may not always be easy for the Competition authorities to secure direct evidence, thereby forcing them to rely on inferences and probabilities, nonetheless the rigours of judicially accepted rules pertaining to reasoning by inference must apply.

[27] Reasoning by inference is also recognised in the European Court of Justice. In *Aalborg Portland v Commission,* it recognised that there must be careful and rigorous analysis of a complaint and it must be subject to a fair hearing. Although the case involved a merger, the business subject to proceedings, had to be "afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and, on the documents, used by the Commission to support its claim. Its right to a fair hearing must be respected even if the communication is fragmentary and sparse and details are reconstituted by deduction.

> "if the Commission discovers evidence explicitly showing unlawful conduct between traders, such as the minutes of a meeting, it will normally only be fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction". [3]

[3] Cases C-204/00 P etc EU:C:2004:6.

[28] To this we would add an important feature that is specific to South Africa. Section 1(2)(a) of the Competition Act provides expressly that the Act 'must be interpreted – 'in a manner that is consistent with the Constitution'.

[29] The Constitution governs the entire Act and each of its provisions must be interpreted through a constitutional lens which includes that proper consideration must be given to evidence presented by the parties in their defence.

[30] The Tribunal in this case adopted a model of reasoning that relied through-out on inferences, applied inferential reasoning to the 2 March 2015, "let's get it done" email between Aranda and Mzansi, where Dr Mansoor, the spouse of Ms Paruk, apparently instructed a secretary of Aranda to make sure that all the necessary specification reports were attached to its bid.

[31] The Tribunal also adopted the inferential model of reasoning to the pricing evidence, when it concluded that the pricing arrived at by Aranda and Mzansi was consistent with collusive tendering. The inference drawn was based entirely on the fact Aranda gave Mzansi a better price per blanket than it gave to other tenderers, and that it imposed more stringent payment conditions on the other tenderers.

Inferential reasoning in competition law

[32] It is necessary to consider the role of inferential reasoning in competition law and whether the inferential reasoning principle should be applied differently from that established in our current jurisprudence in other areas of the law. It is trite that a party may prove a fact in issue in legal proceedings through adducing direct evidence on the primary or secondary facts; or with circumstantial evidence; or by leading evidence of one or more other facts from which a court may be invited to infer the particular fact in issue. Is it any different from that required in other areas of the law which requires proper proof of the primary facts before the question of drawing an inference properly can arise?

[33] In a case of prohibited cartel conduct which is a per se prohibition as provided in s 4(1)(b) of the Act and where there is no direct evidence of an agreement or collusive tendering, there may be instances where it is permissible for the court to infer that the agreement or the collusive conduct took place by considering circumstantial evidence. There are however stringent checks and balances. In circumstances where it is evident that a hypothesis has been formulated of prohibited conducted, and reliance is placed on the best possible explanation based on circumstantial evidence for the prohibited conduct, it may well serve as a blinker and undermine any direct evidence which is provided by an alleged contravening party to prove a primary fact. The best possible explanation as a yardstick in per se contraventions is subjective in nature often overlooking glaringly objective facts.

[34] In this case, the direct evidence of Aranda and Mzansi was largely ignored by the Tribunal save that it cherry picked bits of their direct evidence which it adopted to support its mosaic hypothesis. A cautious and fact sensitive approach must be adopted when relying wholly on circumstantial evidence in order to conclude that there has been a contravention. This approach may also be warranted in the context that we have here, where the Commission was unable to lead direct evidence of the contravening conduct.

[35] In cartel cases, it may well be difficult to find direct evidence which means a combination of direct and circumstantial may be necessary or only circumstantial evidence. As stated, often cartels are clever and avoid traces of evidence thereby concealing their conduct. Arrangements are made on a nod and nothing is noted on paper; leaving the court to rely on the best evidence which may be circumstantial. Although this could lead to a finding of a contravention based solely on a mosaic of postulations and inferences, such a finding can only be made based on sound legal principles and reasoning.

[36] There are different types of circumstantial evidence that may be of assistance to a court in competition law cases. In a cartel case, for example, the circumstantial evidence may generally be divided into communication evidence and economic

evidence.[4] Circumstantial communication evidence is evidence that communications between competitors took place. In this case Aranda and Mzansi were in a vertical relationship as manufacturer and distributor and communication would of necessity taken place. Circumstantial economic evidence, on the other hand, includes conduct evidence of an economic nature. [5] This requires cogent economic reasoning, and often this is where the evidence of an expert can assist. There was, however, no expert evidence produced in this case on the effect of the alleged pricing contravention despite its relevance to the circumstantial economic evidence.

[37] Conduct evidence is evidence that competitors behaved consistently with the existence of the alleged cartel agreement. Conduct evidence will be most persuasive if it cannot be explained by ordinary market forces or competitive business behaviour. A judge should consider whether particular behaviour would have occurred in the absence of a cartel, having regard to unilateral commercial and economic interests of the competitors. Conduct evidence can include evidence of bidding patterns, information exchanges between competitors, abnormally high sustainable profits and past violations of competition laws.[6] It could also include structural evidence which is evidence that explains why certain structural features make a particular market more susceptible to cartel conduct.[7] In fact, the cross examination of Mrs Paruk on profitability, showed that Mzansi's profits were very modest.

[38] Evidence has to be assessed holistically and not in a vacuum. No one piece of circumstantial evidence would provide a sufficient basis on its own to infer an agreement or collusion. Where a piece of circumstantial evidence may be capable of supporting a number of inferences, it has to be the most plausible. [8] It must be assessed contextually. The reasoning should not be aimed at using the inferences to answer a question which the adjudicator has an inclination for.

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[4] OECD Policy Roundtables: Prosecuting Cartels without direct evidence. 2006 page 10
[5] Competition Primer for ASEAN judges September 2018
[6] ibid
[7] Ibid
[8] Ocean Accident and Guarantee Corporation Ltd v Koch 1963 (4) SA 147 (A) at 159B - D, citing Wigmore on Evidence 3 ed para 32.

[39] The process of inferential reasoning calls for an evaluation of all the evidence and not merely selected parts.[9] The inference that is sought to be drawn must be consistent with all the proven facts. If it is not, then the inference cannot be drawn or it must be the 'more natural, or plausible, conclusion from amongst several conceivable ones when measured against the probabilities.

[40] The inference or inferences to be drawn from circumstantial evidence should be assessed by a judge holistically. If the Commission's version is to prevail, its version must be the best explanation having regard to all the evidence. However, in this case, the Tribunal simply ignored key aspects of Ms Paruk and Mr Magni testimony in its evaluation of the evidence.

[41] Whilst the existence of the alleged agreement or collusion may be inferred from circumstantial communication and conduct evidence, proving an agreement or concerted practice with indirect or circumstantial evidence remains problematic. Of the two, communication evidence is considered to be the more important as economic evidence is invariably ambiguous unless supported by expert evidence.[10] As much is clear from this case, where the Tribunal found that the economic evidence regarding pricing was a compelling factor in support of a contravention, yet no expert evidence of the economic structure was presented by the Commission.

[42] The nature of the present proceedings is therefore not conducive to resolving the factual issues underlying the alleged contravention by way of inferential reasoning as the Commission has failed to provide proof of primary facts regarding an agreement or collusive tendering.

[43] This much is settled law. In *Knoop NO* [11] Wallis JA stated that:

> "Only if there is proper proof of the primary facts can the question of drawing an inference properly arise. The drawing of inferences from the facts must be based on

[9] South African Post Office v De Lacy 2009 (5) SA 255 (SCA)
[10] Ibid note 4
[11] In *Knoop No* and another v Gupta and another 2021 (3) SA 88 (SCA

> proven facts and not matters of speculation. As Lord Wright said in his speech in Caswell v Powell Duffryn Associated Collieries Ltd:
> 'Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish . . . . But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture."[12]

[44] In *Gralio v Competition Commission,* Dambuza JA stated the following

> "In my view, even in Tribunal hearings, inferences and probabilities must be distinguished from conjecture and speculation. There can be no proper inferences drawn unless there are objective facts from which to infer the facts sought to be established. If there are no positively proved facts from which the inference can be drawn, the method of inference fails and what is left is mere speculation.
> Tribunal hearings need to adhere to the principles of legality and its decisions must be founded on credible evidence. The flexibility allowed in its proceedings is not intended to permit abuse of the process."[13]

[45] In my view, the approach to inferential reasoning in competition law is the same as in other areas of the law. Where inferential reasoning is adopted, the proper analytic rigours must be applied to ensure a fair hearing and comply with our constitutional imperatives. The current case is not suitable to inferential reasoning as there is simply no evidence contradicting that of Mr Magni of Aranda and Ms Paruk of Mzansi.

Has the Commission proved its case on a balance of probabilities?

[46] For the conduct of Aranda and Mzansi to fall within the provisions of section 4(1)(b) of the Act, there must be an agreement or a concerted practice. In *Netstar* Wallace JA emphasised that a concerted practice is distinct from an agreement. An agreement when used in relation to a prohibited practice "includes a contract,

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[12] [1939] 3 All ER 722 (HL) ([1940] AC 152) at 733E – F, cited in Motor Vehicle Assurance Fund v Dubuzane 1984 (1) SA 700 (A) at 706B – D; MV Pasquale della Gatta; MV Filippo Lembo; Imperial Marine Co v Deiulemar Compagnia di Navigazione Spa 2012 (1) SA 58 (SCA) ([2011] ZASCA 131) para 24. See also Great River Shipping Inc v Sunnyface Marine Ltd 1994 (1) SA 65 (C) at 75I – 76C and particularly the statement that 'evidence does not include contention, submission or conjecture'.

[13] *Competition Commission of SA v Gralio (Pty) Ltd* [2011] 2 CPLR 225 (CAC) (*Gralio CAC*)

arrangement or understanding, whether or not legally enforceable," whilst a concerted practice means "co-operative, or co-ordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement".[14]

[47] The Commission's case was pleaded on the basis of a section 4(1)(b) of the Act. It suffices for present purposes to say that the emphasis was on horizontality. Section 5 being a restrictive vertical practice was not pleaded. It is clear therefore that the Commission must prove an *agreement* or *collusive tendering* on a balance of probabilities.

[48] It was incumbent on the Tribunal to find that the Commission had proved on a balance of probabilities that the conduct amounted to prohibited conduct under s 4(1)(b) of the Act. [15] Two bids by a manufacturer and distributor for the same tender does not of itself establish a per se contravention. In this matter there were two bids, one by Aranda and one by Mzansi. In *A'Africa Pest Prevention CC*, Boqwana J stated as follows on the question of two separate bids by two companies with overlapping directors:

> "Secondly, the submission of the two separate bids without more cannot on its own bring the conduct within the ambit of section 4 (1) (b), something more is required. There must be an "agreement" or "concerted practise" by competitors to fix the price, or of collusive tendering. That presupposes an involvement by more than one firm, as we know behind "firms" that are corporations there are individuals." [16]

[49] In this case neither of the two witnesses called by the Commission had personal knowledge of an agreement or collusive conduct between Aranda and Mzansi. The Commission's witnesses were Ms Van Niekerk an employee of the Treasury who

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[14] *Netstar (Pty) Limited& Others vs Competition Commission South Africa &another* 2011 (3) SA 164 (CAC) para 25-26

[15] also *Competition Commission v Roadspan Services (Pty) Ltd and another,* Case Number**:** Cr163nov16 *onus to prove the existence of an agreement rests with the Commission to sustain a contravention of section 4(1) (b) (ii) of the Act."*

[16] A'Africa Pest Prevention CC& 1other v Competition Commission of South Africa 168/CAC Oct 18

evaluated the bids on the Tender, and Mr Vilikazi who had first raised his suspicion. Their speculation was based on the pricing. As submitted by Aranda, the witnesses could do little more than read the contents of their witness statements into the record and offer their opinion that there had been unfairness because Aranda had treated Mzansi differently from the other bidders. The Commission produced no evidence pointing to an agreement on pricing. Their evidence was intuitive, speculative and based on a facial analysis of what was contained in the documents.

[50] Moreover, the Commission's witnesses could not support core averments in the Referral that: "[i]n terms of the agreement, Aranda *would provide Mzansi with its tender documents including pricing schedule* which Mzansi *will use to prepare its own tender including pricing*." and that the agreement further entailed that Mzansi will add 7.25% "on Aranda's prices of the blankets to be submitted to National Treasury when bidding for this tender." There was no evidence supporting the terms of the Referral save for the reference to the 7.5% pricing methodology which Mzansi added on to the prices Aranda gave it.

[51] No evidence could be gleaned from the testimony of Mr Magni and Ms Paruk to support the basis of the contravention as pleaded in the Referral.

[52] In addition, Mr Magni was adamant that he had no agreement with Mzansi relating to pricing and nor had he colluded with Mzansi. It was clear from his evidence that he favoured Mzansi, trusted its payment commitments and did not regard it as a payment risk. These views were justifiably held, based on their long business relationship and the previous relationship with Ms Paruk's father-in-law, the owner of Africhoice.

[53] Mr Magni, under cross examination, confirmed the manufacturer and distributor relationship between Aranda and Mzansi when he said that Aranda would not contact customers including Mzansi, but it is the customer that contacts Aranda.

[54] It is a flawed approach to square communication between manufacturer and distributor into a horizontalist net without rigorous analysis. Commerce is robust in our modern era and many discussions would routinely take place between manufacturer and distributor and even where they are competitors such as in this tender. Caution must be exercised when drawing inferences from communication that take place simply because one is a manufacturer and the other a distributor of the product.

[55] In light of the lack of evidence, that is of proven facts, the Tribunal had no basis to draw the inferences it did in concluding that Aranda and Mzansi directly or indirectly fixed a price for the tender or agreed any other trading condition or that there were collusive dealings on a balance of probabilities between Aranda and Mzansi.

Is the *2012 manufacturing agreement indicative of collusion?*

[56] The Tribunal found that the 2012 manufacturing agreement was of concern and indicative of collusion. When cross examined on the manufacturing agreement both Ms Paruk and Mr Magni understood that a manufacturing agreement would be as contained in the letters of 2015. The manufacturing agreement in the 2015 letters would not be the same manufacturing agreement of 2012. In the November 2012 manufacturing agreement, reference was made to Aranda accessing Mzansi's bank account in "lieu of its agreed share of proceeds i.e. invoices for the related blanket delivery." The 2012 agreement also contained the words "should Mzansi succeed in securing the tender, this business arrangement would form the basis to establish a platform for further cooperation into possible new ventures. The 2012 agreement also expressly provided that it terminated on delivery of all blankets for the tender unless extended through Board resolution." This was a reference to the 2013 Tender. In cross examination Ms Paruk of Mzansi was questioned about the agreement. She had not seen the agreement for many years and only select paragraphs were put to her. There was also a non-disclosure agreement. Her recollection of these agreements was poor.

[57] The Commission, in cross examination, put paragraph 1 of the 2012 Agreement to Ms Paruk: "a business arrangement has been agreed to between Aranda and Mzansi

for the fulfilment of tender No RT26-2013T, the tender, wherein Aranda and Mzansi assume the role of B-BBEE distributor within the ambit of SBD 6.1 clause 2.2, 2.3 and 2.5"

Mr Daniels: What exactly does that mean."

Ms Paruk explains BBBEE: *"it means that we fulfil the role of BBBEE, a company that fulfils the role of being a BBBEE company . We had a certificate at that point, which grades us as a BBEEE contributor."*

…

Mr Daniels: *Now do the basic … well, do these two documents still serve as the basis for your arrangements with Aranda going back from 2012 forward? In other words, do you and Aranda still regard yourselves as being bound by these two agreements? ..*

…

[58] Ms Paruk was unable to recall the contents of the agreements but stated that in 2012 it was a new business with Aranda and she wanted to do online business with them and she assumed the document was part of that.

[59] Not satisfied with the answer –

Mr Daniels: *All I want to know is whether these two agreements signed in 2012 still govern your relationship with Aranda today. In other words, when you tendered for the 2012 and the 2015 and the 2016 RT26 contracts, did these still apply to that relationship. That's all want to know.*

Ms Paruk: *So at this point is doesn't.*

…

Mr Daniels: *At this point.*

Ms Paruk: *I would have to read the document in full to see whether it is applying.*

Mr Daniels*: okay no, I accept that. I'm happy to accept for the purposes of my questioning that it does not apply today, but from 2012 onwards up to some point in the*

future, say 2013,2014,2015 and 2016 did these two agreements, the non-disclosure agreement, for example, and the business agreement given your relationship with Aranda? It's a simple question, Ms Paruk, and I'm really not trying to trick you. I just want to understand these. If you can't answer, you are free to say you can't.

Ms Paruk: *So, I guess they could hold me with this, if I were to default on something or other, because I did sign it, but it has not come up.*

Ms Paruk*: It has not come up again. So, I'm finding it difficult to answer, because it's something that I had signed at that time with regards to not only RT26, but with regards to other businesses that I've had with Aranda*,

Mr Daniels: *I accept that*.
Ms Paruk*: So I guess they could hold me with this, if I were to default on something or the other, because I did sign it, but it has not come up.*
…
… Mr Daniels presses her
Mr Daniels: *So won't you listen to the question, please*?
Mr Daniels *okay, now my question is a very simple one. Did you still regard these two agreements as still governing you manufacturing arrangement with Aranda?*
Ms Paruk: *I forgot about these agreements, but technically yes, it would be bound.*

[60] It is clear that Ms Paruk needed to peruse the agreement to refresh her memory, but was not given the opportunity to do so. Ms Paruk had forgotten about these agreements, but believed from what Mr Daniels put to her that technically yes, she would be bound.

[61] Whilst Mr Daniels ultimately pressed her into conceding that the 2012 agreement applied going forward, she had not been given an opportunity to read the agreement and could not have made a considered concession because, in any event, the agreement came to an end once the 2013 tender had been awarded. That critical point that the

2012 agreement had terminated was not put to her. Hence the persistent questioning of Ms Paruk on a point where the agreement had self-evidently come to an end was nothing but an unfair form of entrapment. The Tribunal considered the 2012 agreement read with the March 2015 letter as an important piece of circumstantial evidence. The contents of the agreement were not properly traversed with Ms. Paruk in cross examination. Accordingly, the extent of the cross examination on the 2012 agreement was insufficient to draw an inference that there was a contravention in 2015.

[62] On deciding to give substantial weight to the 2012 agreement, the Commission was under a duty to traverse its contents extensively during cross examination of Ms. Paruk. This would have assisted her in understanding that she was required to deal with all aspects of the agreement, and not a few select paragraphs that were put to her. The Tribunal erred in concluding that an agreement which had terminated by the effluxion of time, could be juxtaposed to two letters of March 2015 as evidence of collusion. It was clear that the 2012 agreement was in furtherance of the 2013 tender. Plucking clauses from the agreement knowing that the 2012 agreement had come to an end amounted to Ms Paruk being tricked into agreeing that it still applied. The Tribunal also drew an inference of collusion from a clause in the 2012 agreement which indicated that Aranda would have viewing facilities of the Mzansi bank account. This was no different from what Aranda imposed on the other tenderers in 2015. The Commission also failed to put to Ms Paruk that the agreement could only be extended by the Board and in any case it had not resolved such an extension.

[63] There was also the question of Mzansi's banking password which had to be given to Aranda. There was nothing unusual about this requirement as Aranda had also imposed it on the other tenderers. The 2012 agreement does not confirm a commercial relationship which is inappropriate and suggestive of collusion.

Analysis of the findings of the Tribunal

[64] The Tribunal in essence found that the 56% price difference which Aranda gave to Mzansi to be staggeringly high and that it put a tenderer like Vilankosi at a significant

disadvantage. There was no evidence to suggest that despite Aranda giving Mzansi a good price it was left at a loss. Price discrimination cannot of itself indicate collusion. Insufficient economic evidence was led on this. There are too many variables involved in pricing. In the absence of a proper analysis this fact of alleged price discrimination found by the Tribunal is wrong.

[65] The Tribunal also found the checklist to be consistent with a contravention. Ms Bell testified on behalf of Aranda and described that many bidders would request information, the letter of authorisation, moth protection certificates, SABS specifications and the like. This was not a courtesy extended only to Mzansi but also to others. The check list is a neutral fact in the light of Ms Bell's evidence.

[66] The Tribunal sought to draw an inference from the fact that Mr Magni would personally give prices to Mzansi. This too is a neutral fact. It does not corroborate prohibited conduct. Ms Paruk attributed this to a long standing relationship and nothing in my view turns on this. If one business person elects to talk directly to a particular customer and not through his or her secretary, no inference can be drawn from this. Mr Magni had known Ms Paruk' s family for years. Nothing turns on this personal communication between Ms Paruk and Mr Magni. The Tribunal thought it sinister that original documents were given to Mzansi in the evening. In the absence of more comprehensive evidence on this aspect, it is not a probability one way or the other.

[67] Even the Commission's witness Ms van Niekerk saw nothing wrong with Aranda providing Mzansi (as well as other tenderers) with a check list. Mr Vilikazi did not ask for a check list because Aranda had supplied it with all the necessary documentation. The Tribunal found Ms Paruk' s explanation to be improbable because documents could be submitted late after the submission of the Tender. Ms Paruk's evidence was clear. Her direct evidence was that Mzansi lost the 2014 tender because it omitted to attach a certain document. The Tribunal rejected her explanation simply because she was an experienced businesswoman who should have known better.

"Let's get it done" email

[68] The Tribunal found it significant that Dr Mansoor, Ms Paruk's husband, reminded Ms Bell in an email that Mzansi failed to submit a test report and was disqualified. He reminded her to include them in Aranda's bid, lest they both get disqualified from their 2015 bid. He was anxious about the test report as was Ms Paruk. It was, therefore, not untoward for Dr Mansoor to try and speed up the process. The words "so let's get this done" is not the only inference to be drawn as one being consistent with more than just a normal business relationship as the Tribunal found. It could also plausibly be consistent with friendliness on the part of Dr Mansoor and motivating her to get the report out as soon as possible. Aranda submitted that Aranda as the manufacturer and Mzansi as the distributor had bid for these tenders historically. It was not implausible for Dr Mansoor to have assumed that Aranda was going to put up a bid for 2015. Aranda also submitted that if he wished to prompt Ms Bell into action, it was not strange for Dr Mansoor to have copied her boss Mr Magni on the email.

Change of its case by the Commission.

[69] Although the Commission's referral affidavit made no mention of the 2012 agreement between Mzansi and Aranda, the Tribunal found the agreement to be a proven fact of an agreement determining their conduct going forward from date of signature of that agreement being 30 November 2012 to at least the year 2015 (the date of the complaint). This became a central consideration by the Tribunal in finding a contravention. It was submitted by Aranda that it clearly understood the Commission's case as one concerned with collusion on price which it denied. The Tribunal observed the price trends between Aranda and Mzansi being the 7.25% mark up and concluded that there had been collusion in particular, because far higher prices had been given to the other tenderers by Aranda. Aranda submitted, that the dual position of Aranda as manufacturer/bidder and supplier of quotes to other would-be bidders was fully explained and reliance was placed on the following evidence of Mr Magni:

"*Aranda has no control over, and has never sought to dictate to [Mzansi] the prices quoted by it. The prices reflected in the Tender were most certainly not the consequence of any anti-competitive agreement reached between Aranda and Mzansi"*.

Aranda denied that it had "*agreed to coordinate its pricing for the Tender with Mzansi, or indeed with any other party"*. In particular, Aranda pleaded that "*No discussion was held and no agreement was reached on 'how to bid' for the Tender"* and "*There was no agreement for Aranda to supply its 'tender documents including pricing schedule', or for Mzansi to use Aranda's tender documents to prepare its own tender, including pricing"*.

Aranda pleaded directly that its representatives had no knowledge of the prices that were to be quoted by Mzansi in the tender, nor of the "*percentage profit that Mzansi would seek to take when 'on-selling' the blankets obtained from Aranda"*. Mr Magni asserted that "*I have no knowledge of why [Mzansi] might have elected to add the margins in the manner that it did"*.

[70] This direct and undisputed explanation by Mr Magni's is relevant and material. It was, however, ignored by the Tribunal without giving reasons for rejecting it. The Tribunal used the now terminated 2012 agreement as an anchor on which to make its findings.

[71] Aranda pointed out that the Commission's referral affidavit made no mention of the price differential quoted by Aranda to other prospective bidders when compared with the favourable price quoted to Mzansi. The referral also did not make mention of the imposition of more stringent payment terms to the other customers, yet the Tribunal relied on these differences as a proven fact from which to draw the inferences of the contravention. Aranda argued that the pleading and referring to Mzansi, it pleaded that "*Savings to Aranda in the supply chain management are reflected in quotes to this customer"* and that Aranda had "*no knowledge of the manner in which Mzansi tenders.*

All that I know is that Aranda supplies to Mzansi such documents as are required by the Department of Trade and Industry in tenders issued by it and where the tendering party relies on supply from a third party".

[72] Mzansi filed its answer on 10 May 2018. Ms Paruk explained that Mzansi "adopts a simple cost plus pricing strategy" which "entails the addition of a percentage mark-up on the cost prices of the goods to determine the prices for purposes of onward sale". She explained further that this was also its pricing strategy in the Tender, with the "percentage mark-up on its cost prices that [Mzansi] settled upon, after long and careful deliberation informed by the objective of keeping its pricing to levels that were as keen and competitive as possible, was a fixed 7,25%." Ms Paruk denied any collusion with Aranda, asserting that her interactions between Mzansi and Aranda were "in pursuance of bona fide and arm's length business transactions honestly concluded between them". The Commission elected not to file a reply.

[73] The pleadings fully alerted the Commission to the case of Mzansi and Aranda yet it stuck to the case made out in the referral. The change in case from the pricing methodology between themselves transformed into price and trading terms discrimination by the end of the case. Clearly there was a change in the Commission's case.

Pricing discrimination by Aranda

[74] The Tribunal found that in the 2015 tender preparation, Aranda had supplied Mzansi with prices way below that supplied to Vilankosi and this triggered suspicion. There was also a consistent percentage mark up by Mzansi. This too was suspicious. It found that the 56% pricing difference in relation to Vilankosi put it at a significant disadvantage. This pricing differential also placed the pricing issue in a "different light."

[75] The Tribunal concluded that pricing evidence on its own was insufficient an inference to draw a conclusion of bid rigging. The Tribunal found however that the

pricing evidence and the context of all the other inferences placed the pricing in a "different light." The Commission failed to establish that the alleged price discrimination was of such a nature that the only plausible inference that could be drawn was one of collusion.

[76] Aranda and Mzansi submitted that rigour was required in the analysis and characterisation of the alleged cartel conduct required.

Characterisation

[77] Both Aranda and Mzansi submitted that characterization of cartel conduct required that the conduct be characterised as to whether, on the face of it, it fell within the ambit of Section 4(1)(b) of the Act as well as within the *objects* of section 4(1)(b) of the Act. Because it is per se prohibited conduct, it was necessary for the Tribunal to characterise the conduct in order to explain the real character of the conduct.

[78] Characterisation is an analysis that must take place in assessing the conduct of the parties. There may be instances where a firm's conduct will, on the face of it, fall within the ambit of section 4(1)(b), but their conduct will not be found to fall within the *object* of the section 4(1)(b) in which case no contravention will be established. [17]

[79] Both Aranda and Mzansi submitted that because the prohibitions are *per se* prohibitions the real character of the conduct must be analysed. The question of characterisation was settled in *American Natural Soda Ash Corporation* where Cameron JA and Nugent JA stated:

> "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

[17] The Development of Characterisation in South African Competition Law by Stuart Strachan. Competition Chronicle 4 October 2019

> 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."[18]

[80] In the *Competition Commission v South African Breweries*, Davis JP and Rogers J described characterisation as this:

> 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 s 4(1)(b). However, 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. " [19]

[81] In a further exposition on the importance of characterisation Rogers JA in *Dawn Holdings* explained that "the existence of a horizontal relationship and the characterisation of the impugned conduct – involve factual matters .. "In addition conduct, which on its face may seem to contravene the prohibition, may be found not to do so pursuant to a proper process of characterisation."[20]

[82] In other words, the absence of a characterisation enquiry could well produce a false positive, meaning that a contravention is found when upon a proper analysis by way of characterisation the true object of s 4(1)(b) will not be found. A characterisation enquiry into the conduct should be made irrespective of whether it is a s 4 (1) (a) or (b) contravention as this makes for a constitutionally compliant approach.

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[18] American Natural Soda Ash Corporation and Another v Competition Commission of South Africa (554/2003) [2005] ZASCA 42; [2005] 1 CPLR 1 (SCA); [2005] 3 All SA 1 (SCA) (13 May 2005) para 47

[19] the Competition Commission v South African Breweries Ltd and Others 2015 (3) SA 329 (CAC) at para 37

[20] Dawn Consolidated Holdings (Pty) Ltd and Others v Competition Commission (155/CACOct2017) [2018] ZACAC 2 (4 May 2018) paras 13 and 14

[83] Whilst some writers[21] and even the case of *Northern Pacific Railway*[22] may suggest that a per se contravention has no redeeming value because of the egregious nature of the conduct, prolonged economic enquiry is unnecessary .

[84] The Tribunal accepted that Aranda and Mzansi were in a vertical relationship but, notably, so were all the other bidders as Aranda was the only manufacturer. All bidders would have had to engage with Aranda. The Tribunal however found that it did not matter much, as their relationship in relation to the 2015 tender was of importance. They were competing against each other and because they were vying for the same business, this amounted to a "specific horizontal relationship".

[85] The Tribunal also found that "it was therefore not axiomatic to confine themselves to that concept of horizontality but could view the conduct through section 5 of the Act". The Tribunal did not explain how it concluded that restrictive verticality could apply in the absence of it being pleaded by the Commission. The only explanation provided by the Tribunal was the reliance placed on the case of *Berg River.* [23] It simply asserted that properly characterised it was conduct designed to restrict competition. It found that characterisation did not assist them as both Aranda and Mzansi had submitted competitive bids. The failure by the Tribunal to properly characterise the conduct was fatal to their finding of a contravention.

[86] In sum, characterisation is important as it ensures that competition law does not unnecessarily hamper or obstruct pro-competitive and genuine commercial transactions from occurring. [24]

Conclusion

[87] A substantive problem facing the Commission is that it based its argument on the communication between parties in a vertical relationship without proving this to be

[21] Lusunga Matonga A discussion of the characterisation doctrine as applied in South Africa
[22] Northern Pacific railway v United States 330 US 1(1958)
[23] Id note 17
[24]

improper, and simply argued that it was a horizontal relationship because both of them tendered on the same tender and this necessarily restrains competition. There was no significant attempt to illustrate how the effects of this alleged relationship harms competition.

[88] Although the existence of an anti-competitive practice or agreement can be inferred from circumstantial evidence and other coincidences which, taken together, may *apparently* support a mosaic hypothesis. In the absence of proven facts and the exclusion of another plausible explanation, an infringement cannot be made by way of inferential reasoning. The Commission ought to have put up a case on a balance of probabilities drawn from proven primary facts thereby excluding other plausible alternative explanations.

[89] I find that the Commission has not discharged its burden of proof and that the Tribunal erred in this regard. The Tribunal omitted to take into account that the Commission had failed to indicate with any certainty or probability precisely how Aranda and Mzansi had co-ordinated their bids.

[90] The Tribunal amplified the case stating that the conduct was a specific form of horizontality and that in any event the conduct also amounted to a prohibited vertical practice. This was never the Commission's case. It is also a conflation as the case was one of a horizontal contravention not a tangential case of verticality. I also find that that the communications between Aranda and Mzansi was not communication consistent with a contravention in terms of Section 4 of the Competitions Act as found by the Tribunal. Principles relating to a model of reasoning relying wholly on inferential reasoning must nonetheless follow the rules of evidence as established in our jurisprudence. The Tribunal selected various pieces of evidence such as communication and economic details which had not been proven, whilst ignoring the direct evidence of the Ms Paruk and Mr Magni. It did this without providing a reasoned explanation for rejecting their evidence.

[91] For these reasons, the appeal must be upheld with costs.

Order

1. The appeal is upheld.
2. The Tribunal's order of 4 December 2020 is set aside and replaced by the following order:
   "The Competition Commission's Complaint Referral against Aranda Textile Mills (Pty) Ltd and Mzansi Blanket Supplies (Pty) Ltd is dismissed."
3. The Commission is ordered to pay the first and second appellants costs including the cost of two counsel

M Victor Judge of Appeal
Competition Appeal Court
of South Africa

Counsel for first Appellant:	Adv MJ Engelbrecht SC
Instructed by:	Nochumsohn and Teper Attorneys
Counsel for second Appellant:	Adv Aadil Mohamed - Salim Mayet
Instructed by:	Mayet Attorneys Incorporated
Counsel for Respondent	Adv H Drake
Instructed by:	Ndzabandzaba Attorneys Inc.
Date of hearing:	17 June 2021
Date of judgment:	17 December 2021