COMPETITION LAW
ALERT

27 JULY 2022

CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

FOR MORE INSIGHT INTO OUR EXPERTISE AND SERVICES

IN THIS ISSUE

Character matters! A discussion of the developing characterisation principle in competition law

In the recent *Tourvest Holdings (Pty) Ltd v Competition Commission and Another* (195/CAC/Oct21) [2022] ZACAC 5 (30 June 2022) decision, the Competition Appeal Court (CAC) upheld Tourvest's appeal and set aside the Competition Tribunal's (Tribunal) decision in terms of which the Tribunal found that the conduct of Tourvest Holdings (Pty) Ltd (Tourvest) and Siyazisiza Trust (the Trust) was in contravention of Section 4(1)(b) of the Competition Act 89 of 1998 (Act) and specifically that their conduct amounted to collusive tendering, which is a *per se* violation of the Act.

Character matters! A discussion of the developing characterisation principle in competition law

In the recent *Tourvest Holdings (Pty) Ltd v Competition Commission and Another* (195/CAC/Oct21) [2022] ZACAC 5 (30 June 2022) decision, the Competition Appeal Court (CAC) upheld Tourvest's appeal and set aside the Competition Tribunal's (Tribunal) decision in terms of which the Tribunal found that the conduct of Tourvest Holdings (Pty) Ltd (Tourvest) and Siyazisiza Trust (the Trust) was in contravention of Section 4(1)(b) of the Competition Act 89 of 1998 (Act) and specifically that their conduct amounted to collusive tendering, which is a *per se* violation of the Act.

The matter arose from a complaint filed by the 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 realtor in the sale of such craft products, in a tendering for a retail opportunity at Oliver Tambo International Airport (ORTIA).

The appeal was centred around the proper application of economic theory and competition law in the characterisation exercise to be undertaken in the section 4(1)(b) assessment and specifically in relation to instances where the parties were not in a horizontal relationship prior to the alleged contravention.

BACKGROUND

By way of background, Tourvest's destination retail business (also known as Tigers Eye) focuses on the sale of destination-themed souvenir products to foreign visitors. The Trust was formed in 1987 to assist women in rural areas through upliftment and training projects with the aim of facilitating economic viability to communities. Accordingly, the Trust has been placed in the position of "*middleman*" in the supply of crafts generated by these communities to retailers.

On 17 February 2013, ACSA published a request for bids for the leasing of retail space described as Opportunities 1, 2 and 3 (3 being the relevant tender in this case). The Trust and Tourvest entered into a memorandum of understanding (MoU) in terms of which they would collaborate and tender a bid for Opportunity 3. In terms of the agreement, Tourvest would provide the necessary experience, management infrastructure, technology and training required to enable the Trust to bid for the opportunity, for a management fee of 7,5% of the turnover of the Opportunity 3 business, on condition that the Trust would take over these functions within three years of business.

The MoU stipulated further that Tourvest and the Trust were aware of, and agreed to the fact that Tourvest would be tendering for the same opportunity in its own right and that the Tourvest tender would contain the same rental proposal as the one contained in the Trust's tender. The reasoning given for this was that in both instances, the Opportunity 3 business would be managed by Tourvest for the first three years and therefore, for purposes of determining rental, the performance was assumed to be the same.

CHARACTERISATION

The issues in dispute at appeal stage were whether, for purposes of characterisation, a horizontal relationship existed between Tourvest and the Trust before the bid took place and, if not, whether by virtue of Tourvest and the Trust tendering for the same opportunity, they became actual or potential competitors for purposes of a section 4(1)(b) assessment. And further,

Character matters! A discussion of the developing characterisation principle in competition law

CONTINUED

whether their conduct could be correctly characterised as collusive tendering between parties in a horizontal relationship.

When the matter came before the Tribunal, it found that Tourvest and the Trust became competitors by virtue of tendering for the same opportunity and that in the tender process, the Trust held itself out as a competitor of Tourvest. Therefore, the Tribunal found both parties guilty of collusive tendering and imposed an administrative penalty on Tourvest in an amount of over R9 million but did not impose a penalty on the Trust due to its status as an NPO.

The matter was taken on appeal to the CAC by Tourvest, with the Trust appearing as a respondent in support of the appeal. Given that it was not obvious that the conduct complained of was of the nature of harmful fixing of a price, it was necessary to engage in an enquiry as to whether the true character of the collaboration between the parties was such that it fell within the type of economically harmful behaviour prohibited by section 4(1)(b) of the Act.

In characterising the conduct of Tourvest and the Trust, the CAC considered the characterisation test formulated in *American Natural Soda Ash Corporation and Another v Competition Commission of South Africa and Others* [2005] 1 CPLR 1 (SCA) and *Competition Commission v South African Breweries Limited and Others* [2013] 2 CPLR 391 (CAC). The CAC also considered the EU and US guidelines on potential competitors, which promote the economic approach that enables the examination of the counterfactual position (where there is no agreement between the parties) to the existing factual agreement (where there is an agreement in place between the parties). This is accepted as the appropriate means to determine whether the agreement itself resulted in harm to competition and if the alleged conduct should fall into the type of economic offence for which no defence should be permitted.

POTENTIAL COMPETITORS

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 harmed as the agreement would then have removed a potential competitor from the market and therefore, itself, resulted in potential harm to competition. If the answer is negative, then the agreement itself did not remove competition from the market as without the agreement there would, in any case, have not been any competition.

Character matters! A discussion of the developing characterisation principle in competition law

CONTINUED

CASE LAW

The CAC considered and corrected the Tribunal's approach and application in the cases of the *Competition Commission v Eye Way Trading and Another* CR073Aug16/CR074Aug16 and *Competition Commission v Aranda Textile Mills (Pty)Ltd*; Mzansi Blanket supplies Case no CR016APR 18. In the Eye Way case, the parties were potential competitors in the vertical space in the absence of the impugned agreement and in the *Aranda* case, Aranda was the only manufacturer of the type of blankets required by the tender. In *Aranda*, the Tribunal found incorrectly that the parties were in a horizontal relationship and the CAC in *Aranda Textile Mills (Pty) Ltd and Another v The Competition Commission of South Africa* (190/CAC/DEC20) [2021] ZACAC 1 (17 December 2021) upheld the appeal as it found that without the impugned supply agreement, the parties could not be competitors. The CAC found that the Tribunal incorrectly applied the characterisation test given that it failed to appreciate that the conduct complained of was a function of the vertical relationship between the parties and not a horizontal relationship.

A case that that has similar features to the current instance and which was considered by the Tribunal, is *A' Africa Pest Prevention CC and Another v Competition Commission of South Africa* [2019] 1 CPLR 122 (CAC), wherein the court found that the submission of the two separate bids on the same terms could not on its own, bring the impugned conduct within the ambit of section 4(1)(b).

In applying the facts of A'Africa, the CAC found that Tourvest and the Trust were never in an actual or potential horizontal relationship as without the input of Tourvest, the Trust could not function as an independent competitor in the specialty retail store market.

The CAC further found that the Tribunal incorrectly applied the case of *United States v Reicher* 983 F.2d 168 (10th Cir. 1992), as *Reicher* was decided on the basis that a determination of a per se antitrust violation depends on whether there was an agreement to subvert competition as opposed to whether each party to the agreement could perform, and that in applying economic theory in the pre-tender environment (which is the correct environment) to assess the existence of actual or potential competition, the Trust could never have been assessed to be a competitor. And hypothetically, even it was pretending to be a competitor, this would not make it a competitor.

The CAC found that the Tribunal's finding that the parties' horizontal relationship could be found in the potential for the Trust to compete in the future was illogical and contrary to the provisions of section 4(1)(b). The CAC held that accepted economic theory and the proper application of the terms of section 4(1)(b), do not

Character matters! A discussion of the developing characterisation principle in competition law

CONTINUED

accommodate the approach taken by the Tribunal, being that the horizontal relationship contemplated in the Act may be located within the impugned conduct itself.

In relation to the collusive tendering finding made by the Tribunal against the parties, the CAC held that in the ordinary course, once it is accepted that the parties are not in a horizontal relationship, that is the end of the enquiry and the enquiry as to the characterisation of the conduct as collusive tendering cannot follow as a matter of law. Nonetheless, the CAC held that 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. The Tribunal therefore worked backwards in its reasoning, having decided that the price was "*fixed*", it reasoned that this meant that there was collusion of the sort contemplated in section 4(1)(b)(iii). Ultimately, the Tribunal should have taken account of the fact the character of the parties' relationship was simply vertical and should have ended its enquiry there.

FINDING

The CAC ultimately upheld the appeal by Tourvest and set aside the Tribunal's decision, stating that the parties were not in a horizontal relationship at the time of the alleged contravention and that the fact that they tendered for the same opportunity did not necessarily create horizontality between them due to the fact that, as previously stated, without the agreement between Tourvest and the Trust, the Trust could not have existed as an independent competitor in the market.

It is imperative for the relationship between parties to an agreement to be properly characterised for purposes of establishing a contravention in terms of section 4(1)(b) of the Act. Recent learnings from case law, including the current case, have shown us that due to the serious implications of an adverse finding against parties in terms of section 4(1)(b), it is not sufficient to simply allege that parties are in a horizontal relationship without applying a thorough economic analysis to establish the true nature of the relationship and conduct complained of. An adverse finding in terms section 4(1)(b) requires horizontality between the parties in question, which we now know cannot be derived from the actual conduct itself. The parties must have been actual or potential competitors at the time of the alleged contravention, and more importantly, absent the alleged contravening act.

ANDRIES LE GRANGE,
NELISIWE KHUMALO AND
SHANDRÉ SMITH

OUR TEAM

For more information about our Competition Law practice and services in South Africa and Kenya, please contact:

Chris Charter
Practice Head & Director:
Competition Law
T +27 (0)11 562 1053
E chris.charter@cdhlegal.com

Sammy Ndolo
Managing Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E sammy.ndolo@cdhlegal.com

Albert Aukema
Director:
Competition Law
T +27 (0)11 562 1205
E albert.aukema@cdhlegal.com

Lara Granville
Director:
Competition Law
T +27 (0)11 562 1720
E lara.granville@cdhlegal.com

Andries le Grange
Director:
Competition Law
T +27 (0)11 562 1092
E andries.legrange@cdhlegal.com

Susan Meyer
Sector Head: Healthcare & Pharmaceuticals
Director: Competition Law
T +27 (0)21 481 6469
E susan.meyer@cdhlegal.com

Njeri Wagacha
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E njeri.wagacha@cdhlegal.com

Leago Mathabathe
Senior Associate:
Competition Law
T +27 (0)11 562 1927
E leago.mathabathe@cdhlegal.com

Reece May
Senior Associate:
Competition Law
T +27 (0)11 562 1071
E reece.may@cdhlegal.com

Nelisiwe Khumalo
Associate:
Competition Law
T +27 (0)11 562 1116
E nelisiwe.khumalo@cdhlegal.com

Mmakgabo Makgabo
Associate:
Competition Law
T +27 (0)11 562 1723
E mmakgabo.makgabo@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE
This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.
Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI
Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114
E cdhkenya@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

CLIFFE DEKKER HOFMEYR | cliffedekkerhofmeyr.com

CDH
CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA