COMPETITION LAW
ALERT

4 MAY 2022

CDH
CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

FOR MORE INSIGHT INTO OUR EXPERTISE AND SERVICES

IN THIS ISSUE

Not in the public interest: Competition Appeal Court dismisses appeal to vary settlement agreement by removing admission of guilt

The Competition Appeal Court (CAC) recently confirmed the Competition Tribunal's (Tribunal) decision (discussed here) to dismiss the request by Life Wise (Pty) Ltd t/a Elan Auto Body (Eldan) to remove its admission of liability from the approved consent agreement that it had entered into with the Competition Commission (Commission).

A tender reform: The Competition Commission's Guide on Promoting Competition in Public Procurement

The Competition Commission (Commission) recently published a Guide on Promoting Competition in Public Procurement (Guide) (accessible here) that aims to support South Africa's public procurement procedures and authorities and address common anticompetitive concerns. The Guide intends to promote competition, advance small, medium and micro enterprise (SMME) development and benefit public sector institutions as well as customers.

Not in the public interest: Competition Appeal Court dismisses appeal to vary settlement agreement by removing admission of guilt

The Competition Appeal Court (CAC) recently confirmed the Competition Tribunal's (Tribunal) decision (discussed here) to dismiss the request by Life Wise (Pty) Ltd t/a Elan Auto Body (Eldan) to remove its admission of liability from the approved consent agreement that it had entered into with the Competition Commission (Commission).

The CAC confirmed that once the Tribunal has approved a consent agreement, even if both the Commission and the respondent firm seek to amend it, they cannot do so without the Tribunal approving the amendment. The CAC also affirmed that the Competition Act 89 of 1998, as amended (Act) affords the Tribunal an express but limited power to amend its own orders (curtailed to instances where the order contains errors or ambiguities).

On the other hand, while the CAC noted the Tribunal's assertion that the Act also affords it an additional general power to amend its own orders if a respondent firm is suffering hardship due to changed circumstances or where there are exceptional circumstances, it did not decide the point since there was no argument that the Tribunal did not have this power, nor did the Tribunal exercise this power to amend its order. Similarly, while not pronouncing on the issue, the CAC also noted the Tribunal's finding that it could grant a consent order if the respondent firm had not made an admission that it had contravened the Act.

The question before the CAC was therefore limited to whether the Tribunal erred in its finding that Eldan had not made out a case for an amendment to the consent order based on exceptional circumstances. In response to the three grounds Eldan raised in support of its variation, the CAC reaffirmed the Tribunal's findings and held as follows:

1. Cancellation of customer contracts: The CAC confirmed that cancellation of customer contracts did not amount to exceptional circumstances. The fact that customers would decide to terminate the services of a firm involved in collusion was held to be wholly predictable and, further, contravention(s) of the Act leading to private consequences in addition to public enforcement by the competition authorities was not considered novel. The CAC noted its difficulty in understanding how the excision of the admission of guilt would affect customer attitudes.
2. Small, medium or micro enterprise (SMME) owned by historically disadvantaged persons (HDI): On this score, the CAC confirmed that even if Eldan were to exit the market, it did not mean that it would not be replaced by another SMME or HDI-owned firm. To this end, the CAC also made the following notable distinction:

> *"The public policy in the Act to promote small and HDI businesses is aimed at preventing such firms from being excluded by anticompetitive behaviour. It is entirely a different matter to argue that this policy of inclusiveness justifies ameliorating the consequences of anticompetitive behaviour of firms that fall into this class."*

Not in the public interest: Competition Appeal Court dismisses appeal to vary settlement agreement by removing admission of guilt

CONTINUED

3. No legal representation: Based on the facts, Eldan could not be regarded as an indigent litigant.

With regard to consent orders more generally, the CAC added that:

> *"The decision to sign a consent order with an admission has certain advantages to a firm. It may result in a lower administrative penalty and more favourable terms to the firm than if it refused to make the admission. It is thus by no means conclusive that lack of legal representation at the moment of signing led to a sub-optimal legal decision."*

Based on the competition authorities' approach to variation, the decision to enter into a consent agreement with or without an admission of guilt should be properly considered (balancing the costs and benefits of each approach) prior to having it confirmed by the Tribunal. Respondents would be well advised to obtain legal advice timeously on this score.

ALBERT AUKEMA, PREANKA GOUNDEN, AND THANDO HADEBE

A tender reform: The Competition Commission's Guide on Promoting Competition in Public Procurement

The Competition Commission (Commission) recently published a Guide on Promoting Competition in Public Procurement (Guide) (accessible here) that aims to support South Africa's public procurement procedures and authorities and address common anticompetitive concerns. The Guide intends to promote competition, advance small, medium and micro enterprise (SMME) development and benefit public sector institutions as well as customers.

THE GUIDE BROADLY ADDRESSES FIVE TOPICS:

1. The benefits of promoting competition in public procurement (e.g. bargaining power for the public sector institutions engaged in procurement; lower prices, higher quality and innovation in respect of the goods/services provided to the end consumer; and inclusivity through SMME participation).
2. An explanation of the competition issues that may arise in public procurement (e.g. collusive tendering/bid rigging; market allocation; cross directorships/shareholding; excessive pricing; and exclusionary bid specifications or contracting models).
3. How to identify anticompetitive conduct (e.g. analysing bid prices to determine patterns; assessing cross shareholdings/directorships; and identifying whether joint venture members have the requisite capacity to participate in a tender separately, whether they have done so or whether they have entered into a subcontracting relationship).
4. Principles for establishing competitive public procurement processes (e.g. inclusive bid specification requirements; flexible qualification criteria and transparency).
5. Guidance on what to do when foul play or anticompetitive conduct is suspected (e.g. discuss and clarify suspicions; record all suspicious behaviour; consult legal counsel on whether to proceed with the tender; and report detected conduct to the Commission).

SUMMARY OF DO'S AND DON'TS

The Guide also provides a useful summary of "*do's and don'ts*" for public sector institutions and procurement officials to be aware of when engaging in public procurement. This covers appropriate conduct vis-à-vis:

- Internal procedures to identify warning signs for detecting anticompetitive conduct: Persons involved in the procurement evaluation or decision-making process should sign a declaration of no conflict of interest and report suspected price fixing, market allocation, excessive pricing, predatory pricing, foreclosure, and exclusionary conduct.
- A competitive public procurement procedure: Bid specifications should be evaluated and updated or revised (where necessary) to ensure that they are sufficiently pro-competitive; contract award criteria and the system of awarding points to bidders should be transparent, and lengthy contract periods of more than five years should generally not be imposed.

A tender reform: The Competition Commission's Guide on Promoting Competition in Public Procurement

CONTINUED

- Transparency and collection of information: Public tenders should be published on public forums; information from past tenders should be systematically collected and stored; and commercially sensitive information should not be shared with/among potential bidders.
- Professional training of procurement officials: A regular training programme on bid rigging and cartel detection should be implemented.
- Complaint handling: Internal procedures and a complaint handling mechanism should be established to refer suspected anticompetitive conduct to the Commission.

Notably, any person may provide information concerning an allegation of anticompetitive conduct, including, for example, an authorised representative of the public sector institution involved in procurement, a bidding firm, or members of the public.

Considering that firms found to have contravened the Competition Act in this regard will face severe penalties such as fines or criminal sanctions, it will be interesting to observe how the principles espoused in the Guide (albeit non-binding) will be incorporated in the South African public procurement process going forward.

ANDRIES LE GRANGE,
PREANKA GOUNDEN AND
THANDO HADEBE

OUR TEAM

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

Chris Charter
Practice Head
Director
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
T +27 (0)11 562 1205
E albert.aukema@cdhlegal.com

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

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

Susan Meyer
Director
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

Naasha Loopoo
Senior Associate
T +27 (0)11 562 1010
E naasha.loopoo@cdhlegal.com

Preanka Gounden
Senior Associate
T +27 (0)21 481 6389
E preanka.gounden@cdhlegal.com

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

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

Mmakgabo Makgabo
Associate Designate
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

CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA