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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: CR073Aug16/CR074Aug16

In the matter between:

The Competition Commission	**Complainant**
And	
Eye Way Trading (Pty) Ltd	**First Respondent**
Seardel Group Trading (Pty) Ltd T/A Berg River Textiles	**Second Respondent**

Panel	:	Norman Manoim (Presiding Member) Mondo Mazwai (Tribunal Member) Medi Mokuena (Tribunal Member)
Heard on	:	13 September 2017
Decided on	:	22 February 2018

REASONS FOR DECISION AND ORDER

INTRODUCTION

[1] This matter concerns two bid-rigging complaint referrals brought by the Competition Commission ("Commission") against Eye Way Trading (Pty) Ltd ("**Eye Way**") and Seardel Group Trading (Pty) Ltd t/a Berg River Textiles ("**Berg River**"), collectively "the respondents".

[2] The Commission has alleged that Eye Way and Berg River agreed to tender collusively in respect of two separate tenders, in contravention of section 4(1)(b) of the Act. It has brought two separate complaints in respect of each tender. We have assessed the complaints together as the conduct of the respondents in both tenders was substantially the same. Furthermore, this was also the approach followed by all the parties at the hearing.

BACKGROUND

[3] On 18 October 2010 and 14 October 2011, the National Treasury ("**National Treasury**") advertised two tenders for the supply and delivery of fabrics used to manufacture uniforms for the Department of Correctional Services, the South African Air Force and the South African Military Health Services under tender numbers RT60-2011T and RT60-2012T. The tenders are referred to as the "2011 tender" and "2012 tender" respectively.

[4] Treasury received bids from twelve different firms, including Eye Way and Berg River, for both the 2011 and 2012 tenders. The bids were adjudicated using a point system, where the bidder obtaining the highest number of points would be awarded the contract. The assessment followed a 90/10 preference point system where a maximum of 90 points was allocated for price and a maximum of 10 points for empowerment credentials.[1]

[5] In respect of the 2011 tender, Eye Way was awarded two-thirds of the tender.[2] In respect of the 2012 tender, Eye Way was awarded 78% of the tender.[3] Berg River was not awarded any portion of the tender for either year.

[6] In both the 2011 and 2012 tenders, Eye Way had outsourced the manufacture of the textiles to Berg River. The tenders required the manufacturing of the fabrics to be done by a South African firm, which firm was required to produce a certificate to that effect. Eye Way disclosed in both tenders that Berg River would be the manufacturer, and accordingly furnished the necessary certificates.

[7] According to Eye Way, its bid included Berg River because Eye Way itself was not a manufacturer of textiles but was involved in the tender management business for various State departments. This business essentially entailed procuring the products required, administering, and managing the tender from beginning to completion. In terms of the agreement between them, Berg River

[1] Page 155 of the Record for CR074Aug16 and page 335 of the Record for CR073Aug16.
[2] Page 13 of the Record CR074Aug16.
[3] Page 13 of the Record CR073Aug16.

would invoice Eye Way directly for the fabrics sourced and Eye Way would in turn invoice the State for payment.[4]

[8] During its evaluation of the 2012 bid the Contract Management division of Treasury became suspicious that certain of the bidding firms may have been involved in collusive bidding practices due to the appearance of identical handwriting on the bidding documents.

[9] Treasury then sent a letter to the Commission requesting it to investigate possible collusion. Treasury's suspicions were about the behaviour of the other bidders, not Eye Way and Berg River. It was only during that investigation that the Commission became suspicious of Eye Way and Berg River's tenders and initiated a complaint against them on 29 April 2014. Following its investigation, the Commission referred the present complaints to the Tribunal on 10 August 2016.

[10] The Commission alleged that Eye Way and Berg River reached an agreement on price when bidding for each respective tender and that this constituted price fixing, specifically collusive tendering.[5]

[11] In November 2014, Berg River applied for corporate leniency. In its leniency application, certain information and documents were disclosed by Berg River. However, Berg River subsequently withdrew its corporate leniency application.

[12] A dispute arose between the Commission and Berg River on the admissibility of the corporate leniency application. Berg River submitted that the application should be excluded from the record, whereas the Commission argued for its inclusion. What was, however, not in dispute was that the annexures to the leniency applications were themselves admissible and formed part of the record. In particular, an e-mail dated 15 October 2010 from Mr Chris Mckie of Berg River ("Mckie") to Ms Madeleine Vorster ("**Vorster**") of Eye Way, which

[4] Eye Way had operated this tender management business since 2010 but is no longer active in this business, having exited it in 2014.
[5] Paragraph 5 page 3 of the Commission's Heads of Argument.

we will discuss later, was included in the record, by agreement between the parties.[6]

[13] In our view, nothing turns on whether the leniency application is allowed into the record or not since the Tribunal is required in any event to assess on the facts and evidence before it, whether the respondents have contravened the Act or not. We therefore do not rely on the leniency application for purposes of this decision.

[14] The matter was originally set down for four days for the hearing of oral evidence but the Tribunal was advised on the first day of the hearing that the parties no longer intended to call any witnesses; instead they would argue the matter on the papers before us, which they then did.

[15] The record contained the affidavits from the parties, one witness statement by Eye Way; deposed to by its Chief Executive Officer, Mr Sipho Dhladhla who was not personally involved in the relevant tender submissions; and the discovered documents, save for the leniency application as discussed. Berg River did not file any witness statement. The matter was then heard in a single day of hearing argument on the papers.

THE RESPONDENTS' SUBMISSIONS

[16] The respondents do not dispute that there was an agreement between them.[7] They raise two primary defences. They say, firstly that they were not competitors since Eye Way was not a manufacturer of fabrics; and secondly that, even if they were found to be competitors, their pricing conduct, properly characterised, falls outside the scope of section 4(1)(b) of the Act.

[17] We elaborate on the parties' submissions under our analysis below.

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[6] Record at page 333 CR074Aug16.
[7] Transcripts 13 September 2017 at page 41.

OUR ANALYSIS

Were Berg River and Eye Way in a horizontal relationship?,

[18] As mentioned a key dispute between the parties is whether Eye Way and Berg River were competitors for purposes of section 4 of the Act, even though they operated in different markets.

[19] Section 4(1)(b)(i) and 4(1)(b)(iii) provide that:

> (1) *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 –*
>
> *(a) 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.*[8]

[20] The Commission represented by Mr Mpofu, submitted that Eye Way and Berg River should be considered competitors because by bidding against each other, they were competing for the award of the tenders in question.[9] Therefore it did not matter that *ex ante* Berg River and Eye Way operated in different markets. According to the respondents, they operated in distinct markets since Eye Way's business was tender management; whereas Berg River was a textiles manufacturer.

[21] Berg River, represented by Mr Unterhalter and Eye Way by Ms Turner, contended that since Eye Way and Berg River operated in wholly different markets, they were not competitors, nor could they be seen as potential competitors since Eye Way did not have the necessary manufacturing capacity

[8] emphasis added by underlining
[9] Competition Commission's Heads of Argument at para 36, page 16.

for fabrics, and therefore had no ability to impose a competitive constraint on Berg River.

[22] We disagree with the respondents.

[23] Firstly, the tender issued by Treasury was for the supply of fabrics not their manufacture. Therefore, the lack of manufacturing capacity by Eye Way did not preclude it from becoming a competitor for the tenders in question. The tender, being the supply not the manufacture of fabrics allowed for any intermediary that wished to respond to this tender to do so provided it could ultimately supply the necessary fabrics that comply with the tender requirements. Therefore, by virtue of submitting a bid in its name (even though it disclosed its source for the fabrics), Eye Way held itself out as a competitor with any other bidder that would submit a bid, whether that bidder was itself a manufacturer of fabrics or an intermediary like Eye Way.

[24] Up until Berg River submitted its own separate bid, the Eye Way bid could have been regarded as a joint bid by firms providing complementary, not competitive services. However, this ceased to be the case the moment Berg River submitted its own bid.

[25] Secondly, the respondents' argument that because Eye Way could not have fulfilled the requirements of the tender by itself absent the agreement, even though it had submitted a bid, does not find support in competition jurisprudence. The respondents have given no authority in support of their proposition. The US courts have considered this question in the case of *U.S. v. REICHER*[10] ("the *Reicher* case").

[26] The *Reicher* case involved a bid for a contract issued by the Los Alamos National Laboratory ("the National Lab") for the building of a specialized structure for laser testing. The National Lab procurement procedure required submission of at least two bids. Reicher submitted a bid. As the deadline for submission of the bids approached, Reicher became aware that his company's bid was likely to be the only bid. To ensure the project would not be cancelled,

[10] 983 F .2d 168 (1992).

Reicher convinced Giolas of Giolas Sales Company, another potential bidder on the National Lab's bid list, to sign a blank bid form and send it to Reicher. Reicher subsequently filled in the quotation on Giolas's form and submitted Giolas's bid to the National Lab. The contract was awarded to B.D. Reicher & Son as the lowest bidder.

[27] The State brought charges against Reicher for bid-rigging. The district court found that since Giolas' company could not have performed the contract had it won the bid, the two firms could not be considered to have rigged the bid in violation of anti-trust law. Reicher was acquitted.

[28] In the United States Court of Appeals, Tenth Circuit ("the US Appeals Court") Reicher relied on US case law which held that an agreement between firms who were not actual or potential competitors in the relevant market posed no threat to competition and therefore did not contravene the Sherman Act.

[29] The US Appeals' Court overturned the district court's decision, finding that the district court had "*placed particular emphasis on the word "competitors"*. It held the following:

> "*Here the decisive circumstance 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 the 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.*"

[30] In conclusion the US Appeals Court held that:

> "*In a bid rigging conspiracy, the determination of a per se antitrust violation depends on whether there was an agreement to subvert the competition, not on whether each party to the scam could perform.*"[11]

[11] The Supreme Court denied a Writ of Certiorari (refused to grant an appeal to the Tenth Circuit decision).

[31] It cannot, therefore, be a valid defence for the respondents to state that Eye Way could not have performed under the tender without Berg River.

[32] Thirdly, and in any event, there is nothing to suggest that Eye Way could not have tendered without Berg River for the supply of fabrics since there was no requirement for Eye Way itself to manufacture the fabrics.

[33] Of the twelve bids received by Treasury in both tenders, there were at least four manufacturers in addition to Berg River that Eye Way could have approached in order to source the textiles.[12] Eye Way could have approached all four of these manufacturers so as to obtain a variety of quotations and from these it could have selected the best source of the fabrics for its tender. That is the essence of competition. Instead the arrangement between the respondents secured Eye Way to do Berg River's bidding while Berg River separately also did its own. By doing so what was supposed to be a competitive bidding process was rigged. Berg River submitted that the effect on competition of submitting the two bids was similar since whether the Eye Way or Berg River tender won the bid, only Berg River could manufacture the fabrics. We will return to this argument under 'characterisation'.

[34] Fourthly, even if it was the case that Eye Way could not have tendered absent its relationship with Berg River, Berg River's submission of a separate tender begs the question why Berg River would tender separately against the Eye Way tender if it did not consider the Eye Way bid to pose a competitive threat to it. As mentioned earlier the respondents have chosen not to testify to explain this bizarre behaviour but asked us to decide this on the papers.

[35] Their explanations, on the papers before us, are inherently in conflict. In the first instance Eye Way, rather than explain why two bids were submitted, claimed to have no knowledge that Berg River submitted a separate bid. During its investigation, the Commission interrogated Ms Vorster of Eye Way. When the Commission interrogated her, it was not aware of the Mckie e-mail discussed below; and seemingly Ms Vorster knew that the Commission did not have it. Hence, she could deny knowledge of Berg River's tender without fear

[12] Page 1210 of the record.

of contradiction.[13] Eye Way continued to deny knowledge of Berg River's tenders in its answering affidavit and in Mr Dhladhla's witness statement, filed subsequent to the interrogation of Ms Voster.[14]

[36] However, the e-mail in relation to the 2011 tender referred to earlier from Mr McKie of Berg River to Ms Vorster of Eye Way puts paid to Eye Way's denial. It states:

> *"As per our discussion, attached please find attached the amended price pages for insertion/replacement of the Berg River Tender bid documents that you have with you. To clarify, you will kindly submit our [Berg River] bid with these changed prices included. These prices already include VAT. Additionally, you will submit the Eye Way bid separately at the prices reflected on the original [Berg River] docs. For your records, these Eye Way prices are reflected below and are prices which, if you are awarded, which will be invoiced to yourselves by BRT. As agreed, a 2.5% settlement discount will apply for 30 days."*[15]

[37] Eye Way's denial is hardly consistent with that of a party who believes its arrangement to be legitimate. Worse than that, the e-mail suggests that it was in fact Eye Way that submitted Berg River's bid. Eye Way chose not to testify to explain its attempt to conceal knowledge about the Berg River tender.

[38] Berg River for its part did not deny knowledge of the two bid submissions. Instead, it chose not to file a witness statement or to testify. It stated in its answering affidavit that its arrangement with Eye Way, properly characterised, was not conduct designed to restrict competition and therefore did not fall foul of section 4(1)(b). Eye Way made the same argument.

[39] We consider the characterisation argument below.

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[13] Transcript of the Commission's interrogation of Vorster, dated 11 September 2014 at page 555 of the record.
[14] Para 55 of Eye Way's answering affidavit, page 38 of the record.
[15] emphasis added by underlining.

Characterisation

[40] It is trite that following the *Ansac*[16] decision by the SCA, 'characterisation' is a part of our law. The notion of characterisation seeks to ensure that pro-competitive or efficiency-enhancing arrangements between competitors are not caught as *per se* unlawful under section 4(1)(b).

[41] The respondents have argued that, properly characterised, the arrangement between them represents legitimate commercial conduct that falls outside the scope of section 4(1)(b). This is because the arrangement was not designed to restrict competition but was "a *bona fide* attempt by BRT to increase its chances of manufacturing and supplying product in respect of an important government contract..."[17]

[42] They submitted that since Eye Way had no ability to impose any competitive constraint on Berg River because it did not itself manufacture fabrics, the effect on competition of submitting two bids was similar whether the Eye Way or Berg River tender was successful because Berg River was the only entity between them that could manufacture textiles.

[43] The respondents cited no authority in any jurisdiction in which a bid rigging case was decided as lawful because of characterisation, and in fact conceded during the hearing that they were not aware of any bid rigging case that had been salvaged by characterising it.[18]

[44] Secondly and in any event, characterisation does not assist the respondents on the papers before us.

[45] From the tender documentation, and by the respondents own admission,[19] Eye Way had an empowerment advantage.[20] It scored 9.4 out of the 10 possible points which could be awarded for empowerment in both tenders.[21] Since it

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[16] American Natural Soda Ash Corporation and Another v Competition Commission of South Africa [2005] 3 All SA 1 (SCA).
[17] Paragraph 36 of Berg River's answering affidavit.
[18] Transcript 13 September 2017 at page 45.
[19] Berg River's Heads of Argument at page 31.
[20] Berg River's Heads of Argument at page 31.
[21] Record at page 159 CR074Aug16; Record at page 339 CR073Aug16. It claimed 6 out of 6 of the 6 points allocated for equity ownership by a person who had no franchise in the national elections as it

itself was not a manufacturer of textiles, it had the most to lose compared to Berg River. It would therefore have had an incentive firstly to obtain quotes from other manufacturers and to choose the lowest priced manufacturer to bid with; and secondly, it would have had an incentive to also discount its management fee to make its bid more competitive.

[46] This was not the case, however, because Berg River set the output price for both its and Eye Way's one as shown by the McKie e-mail referred to earlier. We repeat it this time to emphasise the pricing aspects of it.

> "*As per our discussion, attached please find attached the amended price pages for insertion/replacement of the Berg River Tender bid documents that you have with you. To clarify, you will kindly submit our bid with these changed prices included. These prices already include VAT. Additionally, you will submit the Eye Way bid separately at the prices reflected on the original [Berg River] docs. For your records, these Eye Way prices are reflected below and are prices which, if you are awarded, which will be invoiced to yourselves by BRT. As agreed, a 2.5% settlement discount will apply for 30 days*"[22].

[47] The e-mail shows that in respect of its 2011 tender, Berg River decided on its price for the fabrics to Treasury and asked Eye Way to submit that price. In its answering affidavit, Berg River stated that its price (for its stand-alone bid) was 2-3% lower than the price it quoted Eye Way in its joint bid with Eye Way.[23]

[48] In respect of the Eye Way tender, Berg River provided its price to Eye Way for supplying the fabrics, and stipulated a cap on Eye Way's management fee. Eye Way's tender documents, reveal that the prices submitted by Eye Way in its own tender were exactly as set out by Berg River in the above e-mail.[24]

[49] During her interrogation by the Commission, Ms Vorster tried to deny this, stating that Eye Way was free to price as it wished for its management fee.[25]

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is 100% owned by such persons; and it claimed 0.4 out of the 1 point allocated for ownership by a female as it is 40% owned by a female.

[22] Emphasis added by underlining.

[23] Record CR073Aug16 at para 48.5 at page 138.

[24] Record CR074Aug16 at pages 145 – 253.

[25] Record CR073 page 525.

However, Berg River conceded, at the hearing, that Eye Way submitted prices as agreed with Berg River, without adjusting them in any way.[26] The same occurred in respect of the 2012 tender. This is evident from the e-mail sent from Mr Kenneth Schmulow of Eye Way to Mr Juan Laubscher of Berg River on 14 November 2011 in which Mr Schmulow undertook the following:

> *"I have committed the company to this arrangement, with the assurance that we will submit [Berg River's] pricing as is... We will not add any margin in the hope that we can secure as much of the business as possible."*[27]

[50] This e-mail and as confirmed by the Eye Way 2012 tender documents again shows that Eye Way's prices were determined and set by Berg River and simply passed through by Eye Way.[28]

[51] Berg River, on the other hand, received lower empowerment points, scoring 0 out of the possible 10 points.[29] To make up for its empowerment disadvantage, Berg River would have had an incentive to offer a lower price, thereby gaining a price advantage.

[52] Indeed in its bid, Berg River quoted a price that was below the price it determined for Eye Way to include in its (Eye Way's) bid. Eye Way complied with this price. As Treasury's documents show, had the bid been solely on price, Berg River would have won. However, what Berg River and Eye Way could not predict, was how many points Treasury would allocate to the 10 points allocated for BEE and small business.

[53] Here, with this advantage, Eye Way was awarded all the bids in the categories both firms tendered for. However, Berg River, by fixing Eye Way's input price, could ensure that it (Berg River) did not have to lower its own price any further; thus Berg River benefitted whoever won. Absent the bid rigging, neither firm was certain of the other's output price and would have had to make their price

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[26] Transcript 13 September 2017 at page 52.
[27] Emphasis added by underlining.
[28] Pages 291 – 327of the Record for CR073Aug16.
[29] It scored zero for both bids, however it had claimed 2.62 and 3.5 for the 2011 and the 2012 tender respectively.

as competitive as possible, given the unknown allocation of the 10 points. On the evidence before us, Eye Way had everything to lose if its bid was unsuccessful, and whilst Berg River would still benefit to some extent from Eye Way succeeding, it remained at risk if it did not know what Eye Way's output price was. If it did not know what Eye Way's output price was – for instance if it was too high relative to other bidders – both may have lost. The rigged bid removed the constraint that this unknown element would have put on the other's prices to the disadvantage of Treasury's attempt to get the best price.

[54] Note that we distinguish between Berg River, as a supplier, knowing Eye Way's cost price for the latter's tender management services; and Berg River knowing Eye Way's tender price. The former may be lawful as Berg River would be acting as a supplier, but the latter is unlawful because Berg River was acting as a competitor. Once both firms entered bids they became competitors and therefore had a duty to bid independently. This was not done. Instead the bids were rigged as a result of the firms fixing the output prices for the tenders. The respondents have therefore colluded with each other to unlawfully fix the prices submitted in their tender documents, in contravention of section 4(1)(b)(iii).

CONCLUSION

[55] We conclude that Berg River and Eye Way were competitors for purposes of the 2011 and 2012 tenders for the supply of fabrics to Treasury as they each submitted bids for the award of the respective tenders. Eye Way tried to deny that Berg River submitted a separate bid in competition with its (Eye Way) bid. This denial is not consistent with a party that believes its conduct to be legitimate, and as the evidence shows, it was in fact Eye Way that was tasked with submitting both bids, in 2011 and in 2012.

[56] Neither Eye Way nor Berg River took the opportunity to testify to clarify their arrangement or to explain the attempt to conceal Berg River's separate bid submissions. Their argument, that the arrangement between them should be characterised as falling outside section 4(1)(b), does not apply since once they each submitted a bid, they became competitors and were required to set their prices independently, which they did not do.

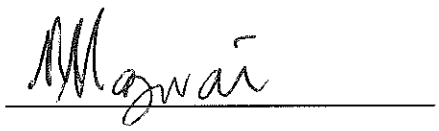
[57] At the request of the parties, we do not have to decide on remedies at this stage since the hearing was concerned only with the merits of the case. The Commission must approach the Tribunal's registrar in due course for dates for the hearing of remedies.

ORDER

We make the following order:

1) Eye Way and Berg River have contravened section 4(1)(b)(iii) of the Act.

2) There is no order as to costs.



22 February 2018

Ms Mondo Mazwai **DATE**

Mr Norman Manoim and Mrs Medi Mokuena concurring

Tribunal Researchers:	Aneesa Ravat, Hayley Lyle and Karissa Moothoo Padayachie
For the Competition Commission:	Adv. D. Mpofu SC and M. Moropa, instructed by Ndzabandzaba Attorneys
For the first respondent:	Adv. K Turner, instructed by PB Attorneys
For the second respondent:	Adv. D Unterhalter SC, and P. Ngcongo, instructed by Edward Nathan Sonnenberg