CONFIDENTIAL VERSION

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CR210Feb17

In the matter between:

THE COMPETITION COMMISSION **Applicant**

And

WASTEMAN HOLDINGS (PTY) LTD **First Respondent**

ENVIROSERV WASTE MANAGEMENT (PTY) LTD **Second Respondent**

Panel	: Norman Manoim (Presiding Member) Yasmin Carrim (Tribunal Member) Enver Daniels (Tribunal Member)
Heard on	: 14, 16, 21, 22, 23 May and 14 June 2018
Order issued on	: 17 September 2018
Reasons issued on	: 17 September 2018

Reasons for Decision and order

BACKGROUND

[1] This case concerns whether the two respondents, Wasteman Holdings (Pty) Ltd ("Wasteman") and Enviroserv Waste Management (Pty) Ltd ("Enviroserv"), engaged in price fixing and market division over a period of several years. The case has been brought by the Competition Commission ("Commission") and is opposed by Enviroserv. The two respondents in this case are firms who compete with one another in performing waste transportation services. Waste transportation companies like the respondents, collect waste from their customers (typically industrial firms which generate waste) and transport it in trucks to a landfill site, where the waste is disposed of. The two respondents also, through a joint venture ("JV"), own a landfill site.

[2] Landfill sites perform different services to waste transportation companies. A landfill site receives waste delivered by waste transportation companies and then disposes of the waste at the site. Landfill services thus exist in a vertical relationship with waste transportation services. We will in this decision refer to the landfill service market as the upstream market and the waste transportation service as the downstream market. This is because the waste transportation firms have the relationship with the final customer, i.e. the firm that generates the waste, but otherwise nothing much turns on this classification.[1] At some time prior to the Competition Act, no 89 of 1998 ("the Act") coming into force in 1999, the respondents, via predecessor companies, had formed a JV company called Vissershok Waste Management Facility (Pty) Ltd ("Vissershok") which owns a landfill site in Milnerton in Cape Town.

[3] Vissershok thus operates in the upstream market performing landfill services. It is not involved in the downstream market for waste transportation. Waste transportation firms are Vissershok's customers. They include not only the two respondents, but also third parties who compete with the respondents. Vissershok's landfill services include the disposal of both hazardous and non-hazardous waste. In the non-hazardous waste market, it competes with a site operated by the City of Cape Town, which is adjacent to its site in Milnerton. In the hazardous waste disposal business it has a local monopoly.

[4] Up until at least March 2010, the Vissershok board agreed annually on a list of tariffs. The tariff list contained differentiations in price depending; (i) on the type of waste [2] and (ii) the type of customer. Firstly, different prices were charged for the different classes of waste; broadly this was between hazardous and non-hazardous waste. Although within the category of hazardous waste, there was further differentiation depending on the type of waste. What is of importance in this case is the second differentiation between prices charged for different types of customers. These prices were listed in the tariff in three different columns.

[1] Indeed one of the witnesses in this case reversed this terminology referring to landfill as the downstream and waste transportation as the upstream.
[2] The differentiation between types of waste is not material in the context of this case.

[5] One column on the far right hand side or third column of the tariff list headed *"Other"*, set out the price it charged to third party waste transporters for its landfill services. Presumably because this was a price for waste transportation firms other than the two shareholders.

[6] Vissershok also determined the price it would charge the shareholders to the JV for its landfill services. Since Vissershok refers to its shareholders as the 'partners' this column was headed the *"Partners' cost price"* on the tariff list appearing in the first or far left column. But there was a third price that Vissershok provided for on the tariff list referred to as the *'Partners' selling price' ("PSP")*. This price was set out in the middle column of the tariff list – between the *other* and the *partners' cost price* columns.[3]

The PSP was the price that the partners would charge for their services in the downstream market i.e. the price they charged for their waste transportation services to their customers. The partners' cost price was the price that the partners paid to Vissershok for its landfill services – it was thus an input cost to the partners.

[7] There was a reason the three customer classes were set out in the tariff list in this left to right order. This relates to how the respective customer charges were calculated.

[8] Vissershok would first calculate the '*Other*' price. It would do this by following the prices announced by the Cape Town Municipality annually for landfill services for non-hazardous waste. Vissershok would charge this same price for non-hazardous waste to both the partners and the third parties.[4] However it then added a premium to this amount for the various hazardous waste services.

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[3] There were thus three columns in the tariff list for the customer class and several rows which set out the different services.

[4] Presumably Vissershok had to charge at least the same price for non-hazardous waste otherwise it would lose this business to the Cape Town municipality located next door and not to our knowledge subject to any capacity constraints.

Although there were different types of hazardous waste services for which different prices were charged, they were always expressed as a percentage premium above a base rate which was the Cape Town Municipality non-hazardous rate. However unlike for non-hazardous waste, the tariff list distinguished between the prices charged to the *partners* and the "*other*" in respect of hazardous waste. Here the left to right layout of the tariff list becomes instructive. Vissershok first calculated the *other rate*. It then calculated the PSP (recall this was set out in the middle column). The PSP was always 25% less than the '*other price*'. The final column was for the partners' cost price. The partners' cost price was 25% less than the PSP. This meant that Vissershok effectively charged the partners 43% less for its landfill services than it did third parties.[5]

[9] During the complaint period, the tariff for all three services was increased annually in June. However, the differential between the three prices remained constant throughout; the *PSP* was always 25% less than the "*other* price" and the "*partners' cost* price" was always 25% less than the *PSP*. It is important to note that Vissershok did not set the third parties distribution price. Third parties were thus free to set their own price for their transportation services. Thus the equivalent of the *other* price is not the *PSP*, but the *partners' cost* price; i.e. the cost to the downstream firms of the upstream landfill services. The Commission has no issue with Vissershok setting the *other* price or the *partners' cost* price. These, it appears to acknowledge, are upstream prices from Vissershok to its customers to pay for landfill services. But the Commission argues Vissershok had no business setting the PSP. It didn't and in fact couldn't do so for third parties so why did it do so for them. The Commission answers this by saying that the PSP was set at Vissershok board level for only one reason. It was in reality a collusive price in the downstream market, a result of a horizontal agreement between two competing firms and is thus a contravention of section 4(1)(b)(i) of the Act. The Commission also alleges that the respondents engaged in market division, again effected at Vissershok board level, in

[5] This is arrived at by taking 25% of the 'other' price and reducing it by a further 25%.

contravention of section 4(1)(b)(ii), alleging that the partners, had in certain instances, agreed not to target the other firm's 'customers.

[10] One of the JV partners, Wasteman, received leniency from the Commission. The case therefore only concerns the actions of Enviroserv. Enviroserv denies liability and has raised various defences which we go on to consider.

Procedural Background

[11] The Commission commenced investigating the case after receiving a leniency application from the second respondent Wasteman on 29 November 2012.[6] Nothing turns on this. On 14 February 2017, the Commission referred this case to the Tribunal. The case was heard over five days and final argument was presented on 14 June 2018. The following witnesses testified for the Commission; Mr Craig Mitchell, Mr Keith Rowland and Ms Katherine Niemand (all employees or former employees of Wasteman). Witnesses for Enviroserv were; Ms Esme Gombault, Mr Alan Oosthuizen (employees of Enviroserv) and Mr Patrick Smith of RBB, an economic expert.

Factual Background

[12] Sometime before the present Act came into operation in September 1999, three firms, Waste-Tech (Pty) Ltd, Wasteman (Pty) Ltd and Wasteman Cape (Pty) Ltd entered into a JV to create a waste disposal site in Milnerton in the Western Cape known as Vissershok. Although three firms were mentioned the one is a subsidiary of the other so effectively there were two partners.[7] The JV partners entered into a shareholders agreement. The material terms of this agreement were that:

12.1 The shareholders would hold equal shares;

12.2 The shareholders would each be entitled to appoint two directors to the board of Vissershok;

[6] Wasteman has since had a change of ownership and is now known as Averda South Africa ("Averda").
[7] The subsidiary was Wasteman, a subsidiary of Wasteman Cape. See page 135 of the trial bundle.

12.3 Decisions of the company would require the agreement of both sets of shareholders at general meeting levels and both sets of directors at board level; and

12.4 The partners were each obliged to bring all their waste collected within 450 kilometres of Vissershok to the site.

[13] Although we know the date of the signing of the shareholders agreement, we do not know when the JV commenced operations. Nevertheless, it is common cause that it has been operative at least since the date of commencement of the Act in 1999. Neither of the original JV partners exists as its present shareholders. The respondents in this case are the present shareholders, but they acquired their shares from predecessor entities that were subsidiary companies in the same family of companies. We understand that the rationale for having two competitors establish a landfill site jointly was the extent of the investment. This, despite the fact that both partners conduct business elsewhere in the country and are large concerns. Tariffs were set annually by the Vissershok board in the form of a three column price list, typically coming into effect from the beginning of July of each year and lasting until the end of June the following year. This practice was followed, as far as the record reveals, from at least 1998 until March 2010. We will explain what happened thereafter. The tariff list was sent in that form to the respective partners. In the record are some examples of how this was communicated to the staff of the partners responsible for sales.[8]

[14] We do not have all the letters during the period but the communication was inconsistent in its use of terminology. In some, the tariff is referred to as 'recommended' in others the tariff is simply sent out without this qualification. Enviroserv makes something of this use of the term 'recommended'; the Commission considers nothing turns on this use of language. It does not appear that the tariff list was sent in this form to third party customers of Vissershok –

[8] See price increase letter dated 1 June 2006 addressed to Wasteman at page 1140 of the trial bundle, also see price increase letter dated 1 June 2009 addressed to Wasteman at page 1153 of the trial bundle, see also price increase letter dated 1 June 2007 addressed to Wasteman at page 1145 of the trial bundle.

the so called '*other*' category or to final customers of the partners. Rather, it would seem when quotes were sought from Vissershok its staff provided these without sending out the tariff form.[9] Given the 43 % discrepancy between the *other* tariff and the partners' cost price, this is not surprising.

[15] At some stage certain third party distributors began to complain to Vissershok about their prices. No doubt even if they were not specifically aware of the 43% price differential, they had figured out they were at a significant competitive disadvantage compared to the partners. The minutes show that one customer had threatened to report the matter to the Commission.[10] Later, from minutes it appears that other customers made a similar threat.[11] The timing of these complaints is significant for the Commission's theory of harm. The Commission alleges that through their representations on the board of directors at Vissershok, the respondents fixed a selling price to their customers. The Commission further alleges that the respondents colluded to fix the price at which they would sell the landfill disposal component of waste transportation services. This price is the one referred to as the PSP and is alleged to have been fixed at the level of the Vissershok board of directors.

[16] Nevertheless it does not appear from the record that any of these threats resulted in complaints being lodged with the Commission. Rather, as emerges from one reference in the minutes, the prospective complainants were offered discounts which pacified them. This is evident from the minutes of a Vissershok board meeting where one it is stated that one of its customers, Interwaste, was offered a 5% discount. [12]This followed after it was minuted in a previous meeting that Interwaste had lodged a complaint with the Commission.[13] It may well be that the prospect of this threat led to Vissershok taking legal advice. What we do know is that sometime in late 2009, the respondents began correspondence

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[9] See transcript pages 279 and 487. Gombault testified that only the annual increase had been published to customers.
[10] See page 1007 of the trial bundle in board minutes for Vissershok dated 26 august 2009.
[11] *Ibid*
[12] See page 1012 of the trial bundle, board minutes for Vissershok dated 20 January 2010.
[13] See page 1007 of the trial bundle, board minutes for Vissershok dated 26 August 2009.

about restructuring the tariff list. This resulted first in one column being dropped – the PSP - and thus the tariff list went from three to two columns.

[17] It is not clear how long this two column tariff list format lasted. However in March 2010 the board circulated a new tariff list with only one column. This tariff list now had only the *Other* or third party price column and nothing else. However the *Other* price was exactly the same as it had been for the earlier part of that year (recall that the tariff commenced each year in July and thus in March 2010 the price set from July 2009 till June 2010 was already in force.) The only difference in the tariff list format was that the *PSP* and the *partners' cost* price columns were no longer included. Thereafter for the remainder of the period of the alleged contravention, this single column formulation of the tariff list was in place. In addition, from July 2010, third party rivals i.e. the *other* category, were told that they were entitled to a 5% discount for waste above a certain amount i.e. this was a form of bulk discount.[14]

[18] The other change was in respect of the distribution of the tariff list. Gombault testified that once the new post March 2010 tariff list had been introduced, it was now provided to third parties.[15] However, the evidence was that despite the change in the tariff list format, Vissershok continued to give the partners a 43% discount on the *other* price i.e. in effect there had been no change to the *partners' cost* price. Less clear is what happened in respect of the *PSP*. Given that this is the price that is the subject of the price fixing allegation in the referral – unlike the *partners' cost* price, this fact is crucial for two aspects of the case. Firstly, if there was a collusive agreement, its duration is relevant to the issue of liability for the calculation of a penalty. Secondly, it is relevant to whether the conduct had ceased prior to the initiation of the Commission's complaint in May 2013. Complaints may only be initiated three years after the cessation of the prohibited practice to which they relate.[16]

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[14] See page 489 of the transcript.
[15] See pages 487-488 of the transcript.
[16] Section 67(1) of the Act.

[19] The Commission contends that the change in the tariff list format was cosmetic and did not change the understanding between the partners on the *PSP*. According to the Commission, the price fixing continued beyond this period until November 2013.

[20] Enviroserv contends that even if an agreement is found to have existed, it had ceased once the tariff list format changed in March 2010. A lot turns on the rationale for the change in the tariff list which is disputed. According to the Commission, the differential was continued in practice, so the understanding that the PSP was to be 25% less than the "*Other* price" remained. It did not require the existence of this column in the tariff list to retain the understanding which had existed for some 10 years. It was thus pragmatic for the partners to dispense with the need for it to be included in the tariff list at a time when the threat of Commission scrutiny was a real possibility. Enviroserv rejects this explanation and gives two of its own. The first, given by Ms Gombault in her oral testimony was that Vissershok wanted to incentivise other customers with more attractive pricing.[17] The second reason given by Gombault was that they wanted to have the price list in a format that could be distributed to the other customers and hence they needed to remove the other two columns (i.e. those containing the partners' cost price and the PSP).[18]

[21] The relationship between the two partner firms was never a happy one as the minutes of board meetings and the correspondence in the record shows. At some stage disputes became so acrimonious that the partners went to arbitration. We do not know from the record what the arbitration was about, but we do know it went against Wasteman. This appears to have precipitated a decision by Wasteman in late 2012 to inform the Commission of the pricing arrangements in the JV and to seek leniency. The Commission however only initiated the complaint in May 2013. This date is significant for one of the defences of Enviroserv, which is that the complaint has prescribed. Wasteman

[17] Transcript pages 279-280.
[18] Transcript page 487-488.

was given provisional immunity by the Commission which explains why it has not defended itself in the present proceedings and instead provided three witnesses to the Commission to testify against Enviroserv. While none of these witnesses could testify whether Enviroserv had implemented the PSP, it appears Wasteman did, although the witnesses differed on the period of implementation.

[22] Mr Mitchell, who is now with Wasteman, was employed by Vissershok at the time and so could not comment on whether either of the respondents had implemented the PSP. Mr Rowland who was the key accounts manager at Wasteman testified that the conduct had ceased in 2004 when the "French took over." But this date is clearly wrong – no other witness testified to any significant change occurring in that year and the documentary record shows that the tariffs were agreed and circulated in their tripartite form up until March 2010. Thus Rowland's recollection cannot be relied upon.

[23] A better witness was Ms Kathy Niemand, an administrative assistant at Wasteman, whose recollection of events was clear. According to her testimony she had been instructed by both her superiors at the relevant time, Rowland and Rodney Manicom to implement the PSP and this was her instruction to the sales representatives. If a sales representative wanted to quote a lower price to a final customer they would require permission from her or someone senior to her.[19]

[24] Ms Esme Gombault who was the main witness for Enviroserv, denied that the PSP was implemented by her firm. However she was chiefly involved with managing Vissershok and not sales of waste transportation services at Enviroserv.

[25] The witness who had the most knowledge of this aspect of Enviroserv's business was Mr Alan Oosthuizen, the General Manager for its Commercial

[19] Transcript at page 194.

division. He testified that the Vissershok tariff was used as a point of departure from which Enviroserv discounted its prices, typically up to 5%. We discuss later whether this is for competition law purposes evidence of the implementation of an agreement or evidence of a departure from the agreement.

[26] With this background to explain the context of the PSP we now consider the various defences raised by Enviroserv in relation to the price fixing complaint and the market allocation complaint. In what follows we deal with each of these separately.

Price fixing complaint

[27] These defences can be categorised as follows and we will deal with them in that order:

27.1 There is no proof of an agreement;

27.2 The conduct in question is of a vertical nature;

27.3 If there was a horizontal agreement, nevertheless, properly characterised it does not fall into the category proscribed by section 4(1)(b) of the Act;

27.4 If there was a proscribed agreement it is time barred; and

27.5 If there was a proscribed agreement still extant at the time of initiation, the second respondent is not liable for any period prior to the date of its incorporation.

First Defence: There is no proof of an agreement

[28] To succeed in terms of section 4(1)(b)(i), the Commission needs to prove the existence of an agreement between firms in a horizontal relationship to fix prices. The Commission relies on the existence of the PSP as contained in the Vissershok annual tariff lists as proof of the agreement between the partners. Since the partners are competitors in the downstream market and the PSP is a downstream price, and the tariff fixes that price as a discount off the *"other"* price this is proof of the contravention.

[29] Enviroserv did not deny the existence of this tariff or the fact that it was approved on an annual basis by the Vissershok board. Indeed the documentary proof in the record and the Vissershok board minutes put this beyond doubt.[20] However Enviroserv argued that this does not constitute proof of an agreement between the respondents in this case. It argued that none of the Commission's three witnesses gave evidence of proof of an agreement between the respondents. Rather, at best, their testimony went no further than proof of the existence of the Vissershok tariff. By way of contrast Enviroserv argued, its witness Ms Gombault, refuted the existence of an agreement, and it alleges, this version was not challenged by counsel for the Commission. Thus according to Enviroserv the Commission did not get out of the starting blocks.

[30] Finally, on this point Enviroserv argued that to the extent that there was any agreement, it is one between Vissershok and separately each of the respondents. Since Vissershok is upstream from the respondents, such an agreement is vertical in nature (between a supplier and its customers) and thus not susceptible to liability as a horizontal agreement- a prerequisite for section 4(1)(b) to have effect. We deal with these issues in turn.

[31] From a company law point of view Vissershok constitutes a separate corporate entity from the two respondents which are its shareholders. The agreement the Commission wishes to rely on is made at this level. The legal question is whether the respondents who would otherwise be liable if the PSP had been set at a meeting between themselves outside of, and independently of the Visserhok board room, can still be held liable because the agreement constitutes a decision made in the Vissershok boardroom? Jurisdictions with more experience of such cases than us, have recognised the danger of absolving competitor firms from liability merely because they label an entity as a JV. In *Timken* the United States ("US") Supreme Court held:

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[20] According to Gombault. *"I inherited the price list that way ... we kept on producing it that way."* Transcript page 273.

The fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws.[21]

[32] In *American Needle*, a case decided more recently, the court held as follows;

32.1 "*The courts have repeatedly found instances in which members of a legally single entity violated §1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity.*" The court went on to state after referring to other decisions : "*We nonetheless held that cooperation between legally separate entities was necessarily covered by §1 because an unreasonable restraint of trade "may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent.*"[22]

[33] The European Commission in its Guidelines on the applicability of Article 101 of the Treaty to horizontal co-operation agreements cautions that;

"*Joint purchasing arrangements restrict competition by object if they do not truly concern joint purchasing, but serve as a tool to engage in a disguised cartel, that is to say, otherwise prohibited practice price fixing, output limitation or market allocation.*"[23]

[34] This approach makes perfect sense. It is not difficult to imagine how liability for collusion could be avoided if competitors could sanitise what would otherwise be a collusive arrangement by changing hats. Whilst as a matter of

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[21] *Timken Roller Bearing Company v. United States (Supreme Court of the United States: June 4, 1951.* In a comment on this decision and subsequent case law in the US, the authors of a leading textbook on competition law have stated as follows; "*Timken remains sound authority for the proposition that firms cannot avoid summary condemnation for horizontal price-fixing or market allocation schemes simply by labelling their activities a "joint venture".* See Gellhorn, Kovacic and Calkins, *Antitrust Law and Economics,* Fifth edition page 300.

[22] *See American Needle, Inc. v. National Football League, 560 U.S. 183 (2010). See also United States v. Sealy, Inc., (1967) 388 U.S. 350, 352-356, wherein the court decided on this point.*

[23] See paragraph 205. See also paragraph 2000 which recognises the downstream danger of joint purchasing arrangements.

legal form, the director of the downstream competitor may sit in the boardroom as a director of the upstream supplier when the agreement is struck. But for the purpose of competition law this is fiction. The real economic relationship remains one of two competitors reaching an agreement. While the proverbial smoke filled room has been replaced by the sanitised atmosphere of the boardroom, the effect is the same- two competitors, sitting on an upstream JV, have reached an agreement on pricing in their respective downstream operations through the means of a corporate vehicle over which both exercise unfettered control.

[35] We thus find the fact that firms which are otherwise competitors may reach agreement in some other venture of separate legal form to their competing ventures does not, solely for that reason alone, constitute a bar to liability in terms of section 4(1)(b) of the Act.

[36] Both respondents and their respective predecessors, were throughout the complaint period, entitled to appoint two nominees each to the Vissershok board. Each nominee was entitled to one vote and thus agreement was required between both sets to reach a decision of Vissershok. The JV lacked any independent decision making capacity. It was only able to reach a decision on issues the two sets of directors could agree upon. There is nothing in the record to indicate that the directors ever saw themselves as independent of the interests of the shareholder that appointed them. What evidence we have points to the contrary. For example, as part of the record, in a letter dated 27 May 2009, from Enviroserv to Wasteman, there is discussion on whether the sudden surge in Wasteman's revenue, when Enviroserv is experiencing a decline in its revenue, is not as a result of Wasteman deviating from the Shareholders agreement.[24] Also, one of the minutes of the Vissershok board meeting, indicates that there was discussion on whether it would be profitable for one respondent to take up on a given client.[25]

[24] See page 681 of the trial bundle, also see pages 777-779 of the transcript.
[25] See page 1316 of the trial bundle, also see pages 293-295 of the transcript.

[37] Thus on the facts of this case, agreements reached between the respondents' nominee directors on the Vissershok board may constitute agreements between the two firms for the purpose the Act.

[38] The next question is whether the PSP as set out in the tariff list is proof of the existence of such an agreement.

[39] It is correct that no Commission witness testified expressly that the PSP is an agreement reached between the two respondents. It is also correct that Ms Gombault denied any knowledge of the existence of such an agreement. However neither proposition can detract from the common cause evidence. Each year the Vissershok board agreed a budget and published a tariff which set out the PSP. This resolution constitutes an agreement by the nominee directors. Those who agreed were the representatives of the partners who sat on the board. Vissershok lacked any independent identity from those of its constituent partners. Unless the representatives of the partners reached an agreement on an issue there was no agreement. If we lift the veil of the legal form of the company, what was taking place in the Vissershok boardroom was the meeting of the representatives of two competitor companies.

[40] The content of the agreement viz.to fix the PSP annually, was an agreement to fix prices in the market for downstream waste transportation services. Since Vissershok did not compete in this market it is unclear why, if it was a separate entity from its members, it agreed to include the PSP in its tariff list, a market it did not compete in. Notably it did not fix the downstream price for its third party customers. It only set their upstream or input price.

[41] No plausible explanation for this was given by any factual witness from Enviroserv. The only credible explanation is that Vissershok provided a forum for the partners to reach agreement on their downstream price.

[42] It is unclear then what Enviroserv meant when it argued that there was no proof of an agreement. If what it was arguing was that there is no proof of how the PSP originated, this may be correct. The real question is whether this is a necessary requirement to prove liability in terms of section 4(1)(b).

[43] We know from the evidence that the PSP had been in existence for many years and so it is not surprising that none of the witnesses who testified had been present when the JV started and were thus not able to testify as to the circumstances of its adoption. However, this does not prove fatal to the Commissions' case. What is relevant, is if there *was* an agreement andnot *when* it started and what they said on the day of its creation. Indeed some cartels are of such longstanding duration that they are frequently inherited by successive employees. These employees would not be able to explain the origin of the agreement - only that it was in existence. [26]

[44] Indeed the longer a cartel has existed the more egregious it is likely to have been. Whilst proof of the origins of an agreement might be useful circumstantial evidence it is not a prerequisite to proving the existence of an agreement.

[45] The next consideration is whether Gombault has denied the existence of the agreement. It was argued by Enviroserv that Gombault had denied the existence of an agreement and was not challenged on this.

[46] Undoubtedly her denials were not challenged. But it is important to consider the substance of what she denied before rushing to infer that this was proof of the absence of an agreement. For instance she is asked by her counsel:

46.1 MR COCKRELL: So when the Vissershok board approved the partner's selling price did the Vissershok board regard themselves as fixing a price

[26] If proof of the circumstances of the original agreement was a necessary requirement to prove the existence of the agreement, cartel enforcement would be seriously compromised.

that Wasteman and Enviroserv would charge their customers and neither could deviate from that price.

46.2 MS GOMBAULT: I would say definitely not.[27]

[47] Here, counsel is asking Ms Gombault to testify what she understood from a Vissershok perspective. But the relevant perspective here is what the two competitors understood, not Vissershok. The refutation abovetakes the matter no further.

[48] Other testimony clearly indicates that Ms Gombault has no knowledge of how the PSP came into being.

48.1 MS CARRIM: Oh it doesn't matter some 10 years later you're saying that since you were at Vissershok you saw this partners' selling price and you don't know what it meant is that still what you're saying?

48.2 MS GOMBAULT: If I can expand on this I wasn't involved in Vissershok right from the start if you look at my career2...(intervention).[28]

[49] She also states about the origins the PSP that she *"inherited the price list that way..."*[29]

[50] A proper reading of these passages is required. Ms Gombault's testimony cannot be read to support the proposition that there was no agreement. Rather at best it is that she has no knowledge of how the PSP came into existence. Given that she was not there at the start of the JV. This evidence is hardly surprising but it does not amount, as Enviroserv attempts to argue, of a disavowal of the existence of an agreement.

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[27] Transcript page 274.
[28] See pages 523-524 of the transcript.
[29] Transcript page 273.

[51] Second she testifies from the perspective of Vissershok that the agreement was not considered to be fixing a price for the two shareholders. But this answer is made wearing her upstream hat not her downstream one. The answer needed to be coming from her *qua* Enviroserv not Vissershok.

[52] Given that this was the extent of her evidence, the fact that counsel for the Commission did not challenge her on this point is of no significance. Ms Gombault did not dispute the existence of the PSP, but she could not explain why it existed. If this was not an agreement to fix a downstream price by the partners what was its purpose? On this aspect she was challenged.

52.1 CHAIRPERSON: Was there any justification for its existence?

52.2 MS GOMBAULT: Chair, I think just in that context, I can't say there was a justification for it, it was the price list that we've inherited and it was annually marked up, and it was tabled that way and approved.[30]

[53] Elsewhere in her testimony she stated:

53.1 *MS CARRIM: And where we sit today you still don't know what the partners' selling price was despite having approved it many times at the Vissershok board level.*

53.2 *MS GOMBAULT: From a Vissershok board level that rate was not used by Vissershok.*

53.3 *MS CARRIM: No I know that but as a director of Vissershok or management representative of a partner you still don't know what that partners' selling price meant and why it was there.*

53.4 *MS GOMBAULT: As I said that rate has always been on the price list we've inherited it and we've gone through a phase of mark-ups.*[31]

[30] See transcript at page 459-460.
[31] See transcript at pages 523-525.

[54] She also stated:

54.1 *Now what I said earlier on or in my statement yesterday is the partners' selling price had no if I can use the word relevance to Vissershok. It was always on the price list and from a Vissershok perspective the important rates were the third party column and the partners' cost price. Sorry I'm not sure if I'm answering your question*[32]

[55] Her explanation here was unsatisfactory. She had never enquired into the PSP's existence despite the fact that on her version it did not serve any purpose.

[56] It is improbable that the partners would every year have agreed to a downstream selling price at the Vissershok board level unless it served a purpose. On the Commission's version there is a rational explanation for its existence- the partners were fixing their downstream price. Enviroserv's factual witness is not able to give one.

[57] From a competition law perspective we look at what inferences we can draw from conduct. We assume firms behave rationally in their self-interest. Where two explanations are posited- one collusive and the other non-collusive, we ask which outcome is more consistent with firms behaving rationally. Here Enviroserv's answer cannot rationally explain the continued existence of the PSP. The Commission's theory that this was a collusive price can.

[58] We also know from the evidence of Mr Oosthuizen, Enviroserv's sales manager, that he was aware of the PSP. In his evidence he refers to a price list known as the EWM which was Enviroserv's price list. [33] This price list contained

[32] See transcript at page 524.
[33] Transcript at pages 539-540.

an Enviroserv recommended price. But he testified that this price was taken from the PSP.[34]

[59] Although he testified in response to questions from his counsel that this price was considered to be a guideline and not the product of an agreement between Wasteman and Enviroserv the fact that this price had travelled from the PSP into Enviroserv's own price guideline is highly probative of evidence that the PSP had moved from the Vissershok boardroom to the sales representatives of Enviroserv.

[60] He later testified that the salesmen used the Enviroserv price list (read the PSP transposed on to the EWM) but had a leeway to charge a discount of up to 5% below that. Anything more would require his permission.[35] This is similar to the evidence of Ms Niemand we referred to earlier, in which she also stated that Wasteman had in certain instances discounted slightly form the PSP.[36]

[61] Thus even if Enviroserv on his evidence did not always charge the PSP to customers (and it is by no means clear on his evidence how often it departed from the PSP) the PSP served as a point of departure to base its own prices. Collusion is established even if competitors do not implement the exact agreed cartel price, but use that price to charge a price higher than it might be under conditions of competitive equilibrium.[37]

[62] We thus find that the PSP constituted an agreement reached between the respondents or their predecessors and was in existence at least until March 2010. We deal with this time period issue later.

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[34] Transcript 552 and 574.
[35] Transcript 574-5.
[36] See paragraph 22 above, also see Transcript 194.
[37] *See Competition Commission v Pioneer Foods (Pty) Ltd; case number; 15/CR/Feb07 at paragraph 36. LVM v Commission (Joined cases T-305/94) [1999] ECR II-931 (known as PVC II) at paragraph 715.* Trefileurope v Commission *Case T- 141/89[1995]ECR II-791.*

Second Defence: The conduct in question is of a vertical nature

[63] Enviroserv also raised the defence that even if the PSP constituted some form of communication between the respondents, it did not amount to an agreement as the PSP was only a recommended price. Here, Enviroserv sought to rely on the language of section 5 of the Act which deals with vertical restrictive practices. In terms of section 5(2) the practice of minimum resale price maintenance is prohibited. However section 5(3) qualifies this prohibition by stating that a recommended price is lawful, provided that the supplier makes it clear to the reseller that the recommendation is not binding.

[64] The reason Enviroserv seeks to rely on this defence is that in certain of the letters in the record that emanate from Vissershok and which were sent to the partners, Mitchell who was the manager at Vissershok at the time uses the following language

"Please see attached two pages detailing guideline rates for hazardous waste."[38]

[65] These passages were put to Mitchell by counsel for Enviroserv during cross examination and elicited the following comment:

65.1 *MR COCKRELL: So in each of those letters, Mr Mitchell, you tell Wasteman but you also would have said the same to Enviroserv.*

65.2 *MR MITCHELL: To everybody, ja.*

65.3 *MR COCKRELL: Yes, you say the rates I'm attaching are guideline rates, correct?*

65.4 *MR MITCHELL: Yes, that's the (indistinct), ja.*

[38] See trial bundle pages 1145 and 1153.

65.5 *MR COCKRELL: And I want to put to you, a guideline is a recommendation, it's not binding, is it?*

65.6 *MR MITCHELL: No."*

[66] We do not know from the record whether this form of communication about the PSP was always there, but only present in certain letters in the record. Indeed other letters when the tariff was communicated to the partners do not contain this language, so it does not appear to be a consistent feature of Vissershok's practice to communicate in this way.

[67] However, even if the use of this term 'guideline" was a regular feature of the complaint period, the question is whether its usage constitutes a defence. Relying on the language of section 5 does not avail Enviroserv. The legal and economic considerations governing vertical agreements and horizontal agreements are very different. Vertical agreements are not considered per se unlawful as are those under section 4(1)(b), because they do not involve agreements between competitors, but between customers and suppliers. Certainly if the legislature had intended to extend to limit the ambit of section 4(1)(b) to exclude a recommended selling price between competitors it would have done so as it had done in section 5(3) with reference to the relationship between a supplier and its reseller.

[68] The concept of agreement in the Act is broadly defined. It states:

> *"'**agreement**', when used in relation to a prohibited practice, includes a contract, arrangement or understanding, whether or not legally enforceable."*

[69] Thus the mere fact that an agreement is not legally enforceable is not a defence open to a respondent under section 4. Indeed the Act's concept of an agreement goes as far as to include an '*understanding*'. The fact that two competitors through a JV reach an agreement on a price and then call it a *guideline*, does not detract from the significance of what they have done. They

have presumably for some rational reason agreed on a price for the downstream market, chosen to include it in the tariff list together with the other prices agreed upon, and then had this price communicated to the sales departments of the two partners. The use of the term ' guideline' in certain of the letters does not in any way diminish what is the essential feature of this communication – they have reached, at the very least, an '*understanding*' of what the downstream price the two partners should charge. That suffices legally for the purpose of section 4(1)(b).

[70] Nor does the supplier-reseller model fit the commercial reality of this arrangement. Vissershok, the supposed supplier, was not an arms-length firm, communicating the suggested value of its service to resellers of its service. Indeed they were not even reselling Vissershok's landfill services, an upstream service. That price was the partners' cost price. Rather they were fixing the downstream price for their own service of waste distribution.

[71] We thus find that the PSP was an agreement between competitors to fix a selling price for the distribution of services and hence a 'price' for the purposes of section 4(1)(b)(i).

Third Defence: If there was a horizontal agreement, nevertheless, properly characterised it does not fall into the category proscribed by section 4(1)(b) of the Act

[72] The contraventions of section 4(1)(b)(i) are treated as per se i.e. they do not permit the respondent to raise a defence of justification . Since sometimes agreements between competitors, prima facie appear to contravene section 4(1)(b), but are in substance pro-competitive because they are supply increasing, the Supreme Court of Appeal (S.C.A.) has in the *Ansac* case recognised, following US jurisprudence, that in appropriate cases, the conduct needs to be characterised.[39] We do not understand this case and its later

[39] *American Natural Soda Ash Corporation and another v Competition Commission of South Africa [2005] 3 All SA 1 (SCA) (13 May 2005).*

application in other decisions to mean that each and every case under section 4(1)(b) this exercise has to be undergone. Otherwise this would read out the *per se* prohibition in section 4(1)(b) that the legislature clearly intended be given effect to. Rather, it means that in cases where there is less experience of an arrangement and the respondent raises facts which suggest one is no longer dealing with a standard vanilla variety of collusion, the characterisation exercise should be invoked.

[73] Enviroserv raises characterisation as an additional defence in this case. This is raised not by factual witnesses, but solely through the testimony of its economic expert Patrick Smith.

[74] Smith analysed the PSP and concluded that it was functional to the JV. He described the PSP as being part of an efficient transfer pricing mechanism i.e. a mechanism that effectively allocates profits between the upstream JV and the downstream activities of the shareholders. By allowing for the transfer of some of the potential profit margins, Smith argued that this incentivised the JV parties to continue to compete in the downstream. As a hypothetical illustration of this, Smith surmised what might happen absent an agreement on the PSP, by considering different putative levels of the partner's cost price.

[75] Smith considered two extreme scenarios. In the first scenario the partner's cost price is set equal to the PSP and in the second scenario the partner's cost price is set equal to the third party rate. In both situations Smith concluded that that there would simply be no or limited incentive for the JV partners to continue to compete in the downstream given that they would achieve their entire profits in the upstream landfill site management activities. By establishing a profitable differential between the Partner's cost price and the PSP, this would ensure the firms continue to engage in costly downstream activities (waste transportation services) while still enhancing the profitability and efficiency of the upstream landfill site (Vissershok).

[76] Interesting as Smith's thought experiment is, it has no grounding in the facts of this case. None of the factual witnesses in this case has justified the PSP on this basis. They deny the existence of an agreement as we have earlier discussed. Moreover, when this was put to Ms Gombault the chief witness for Enviroserv she testified that the PSP was irrelevant. If she as a director of the JV and an executive of the respondent and its predecessor for ten years, considers the PSP irrelevant, it is difficult to accept the plausibility of Smith's theoretical model. An economist cannot advance a theoretical model not founded on the facts of the case. [40]

[77] But this is not simply the view of Gombault. There is nothing in the record to suggest this was the case, nor was this theory put to any of the Wasteman witnesses. Nor did Enviroserv raise this issue in its answering affidavit, which would have been the proper place to raise this defence. Moreover if the practice has now ceased (which is the alternative defence relied on by Enviroserv) then it can hardly have been regarded as necessary and functional to the JV which is still in existence. Finally if the downstream price was necessary to the functioning of the JV, it is not clear why the JV did not incorporate the downstream waste collection activity as part of its activities. Rather it is more likely that the PSP was designed to prevent the partners engaging in aggressive downstream competition where margins may have been competed below the 25%.

[78] The Commission has not alleged that the JV itself is collusive. It makes no case of either the partners' cost price or the third party price that have been set at the JV level. Presumably, although it does not say so, this is because the Commission recognises that the JV has created a new investment that the partners might not have invested in it on their own or in competition with one another. It also appears to recognise that once the JV exists it would have to agree on what to charge its customers for its services. Since the customers

[40] As a US court had held "... generally, an economist's role in an antitrust case is not to prove facts, but to opine on economic theory." Champagne Metals v Ken Mac Metals and others footnote 4." Expert testimony that fails to make clear that certain facts the expert describes as true are merely assumed for the purpose of an economic analysis may not assist the trier of fact at all and, instead, may simply result in confusion."

included both third parties (reflected in the "*other* price" on the tariff list) and the partners themselves (reflected in the *partners cost* price column) the Commission does not seek to impugn these either.

[79] Rather what the Commission seeks to impugn are the downstream activities of the JV where the two partners compete in the waste transportation services market. This is not an irrational approach for a regulator to take with respect to JVs between competitors. The Commission's approach thus allows the respondents to have preserved the efficiency gains of the joint venture in the upstream market where a case is made out for this. However no case is made out for efficiency gains in the downstream market.

[80] While courts in the US have likewise recognised the pro-competitive nature of JVs, they have been reluctant to absolve competitors who form them, to evade liability for activity that occurs outside of the JV or downstream from it.

[81] For example in the *General Motors* case, wherein the court approved a consent order which concerned a joint venture between General Motors ("GM") and Toyota. Toyota, GM and the Joint Venture were permitted to exchange information necessary to produce the Sprinter-derived vehicles, however they were prohibited from transferring or communicating any information concerning current or future prices of new automobiles or component parts produced by either automaker; sales or production forecasts or plans for any product not produced by the Joint Venture. They were also prohibited from the communication of any marketing plans for any product, including products produced by the Joint Venture and development and engineering activities relating to the product of the Joint Venture.[41]

[41] *General Motors Corp., 103 F.T.C. 374 (1984),*

[82] In any event the characterisation defence finds no support in the record of the hearing and is contradicted by the evidence of the factual witnesses from Enviroserv.

Fourth Defence: If there was a proscribed agreement it is time barred

[83] The time bar defence as we indicated earlier is raised as an alternative defence by Enviroserv. It argues that even if it is found that the PSP was an agreement in contravention of section 4(1)(b)(i), the practice had ceased by the time the complaint had been initiated by the Commission in May 2013. The section in the Act Enviroserv relies on is section 67(1) of the Act which provides as follows;

> *A complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased.*

[84] Note the wording of the section refers to the cessation point as "... *when the practice had ceased*".

[85] In previous decisions we have held that where a respondent relies on this section it bears an evidential onus to show the practice has ceased, unless it would be unfair for it do so.[42]

[86] In this case, the matter of the evidential onus is more complicated. Certainly on these facts it would be fair for Enviroserv to bear the onus to prove that its adherence to the PSP had ceased after March 2010. The same cannot be said in respect of the question of Wasteman's continued adherence after March 2010. It would be unfair for Enviroserv to assume this evidential onus as well, as this would require it to pry into the activities of its competitor downstream – evidence to which on these facts it did not have access to. The evidential onus

[42] *See most recently our decision in Pickfords Removal SA (Pty) Ltd vs The Competition Commission; case number; CR129Sep15/PIL162Sep17. See also the Competition Commission vs Pioneer Foods (Pty) Ltd; case number; 15/CR/Feb07.*

as to Wasteman's possible adherence post March 2010 should remain that of the Commission.

[87] It is common cause that from March 2010, Vissershok stopped sending out a three column tariff list to the partners and only used a one column tariff list that contained the "*other*" price i.e. the third party price. There was thus no inclusion of columns for the *partners' cost* price or the *PSP*. Enviroserv argued that once the PSP no longer appeared on the tariff list the practice had ceased. There is no dispute of fact that the tariff list was changed to this form from March 2010. There is also no dispute that this tariff list, which had previously been sent only to the partners and not to third party customers, was now sent to them as well.

[88] However the Commission contends that the alteration in the tariff list did not end the agreement between the partners about the PSP; rather it sought to disguise it. Recall that the practice of Vissershok was to issue a new tariff list annually which would take effect from 1 July of each year until the end of June the following year. Prior to the March 2010 tariff list coming out, there was in existence a price list for the period July 2009/10. This tariff list, in accordance with past practice included three columns of prices; the third party price, the PSP and the partners cost price.

[89] The March 2010 one column price list contains exactly the same prices for third parties that its predecessor three column price list did. There is no dispute about this either. The question then is whether the change in composition in the tariff list equated to the end of the practice. The Commission disputes this. It argues that this was just a cosmetic change and that the understanding of what the PSP was continued. It points to an exchange of emails between the partners regarding the change in the tariff list format that took place in late 2009. In one email Gombault explains as follows:

"Hi there,

Keith and Craig had a follow up discussion regarding the Vissershok pricelist, see note below. It's seems like a very practical suggestion Keith made. I'd like to recommend that:

We have only one rate.
We offer the two partners a bulk and settlement discount of 43.75% (rounded off) on Hazardous waste and
We offer the 2 partners a bulk and settlement discount of 25% on Non Hazardous waste including Sludge's and Asbestos
This would have no impact on Vissershok as it equates to the existing pricing mechanism but just simplifies it."[43]

[90] What the Commission argues is that the understanding regarding the PSP remained despite the move from a three to a one column list. For the 2009/10 financial year given that the third party price remained unaltered in March 2010, it was still easy to calculate the PSP without needing the relevant column.[44] The arithmetic was the same as it had been for the past decade – this price was 25% less than the third party or "*other* price". This was put to the witnesses in the case who confirmed this.[45] Thus, the Commission argued that the mere fact that the tariff list had been changed is not conclusive evidence that the practice had ceased.

[91] What is important in assessing whether the March 2010 tariff list change led to the cessation of the conduct is its rationale. The Commission and Enviroserv offer different rationales.

[92] The Commission argued that the change in the tariff list format was an attempt to disguise the existence of the tariff as the partners' feared Commission scrutiny of their activities. The Commission argued that the partners appreciated the fact that there was no need for the PSP or the partners cost

[43] Trial bundle at page 743.
[44] Gombault confirmed it was not altered in March 2010. *"So the same rate was still applying as was before for all our other customers."*(Transcript 494.)
[45] See transcript at pages 93, 158 -161.

price to appear in the tariff list; for the past 10 years the differentials between the latter two prices and the *other* had remained constant – there was thus no need to include these items in the tariff list in case this ever fell into the hands of the Commission.

[93] Enviroserv offered two reasons for this. The first appeared in the witness statement of Gombault and is as follows;

93.1 *Mr Raymond Rocher who was appointed to the Vissershok board on 29 August 2009 and the risk and strategy director of Enviroserv. He advised that the PSP was a potential issue and proposed that it be done away with on the Vissershok pricelist.*[46]

[94] The second emerged in Gombault's oral testimony during the hearing. Here, she suggested that the reason for the tariff list format change was that Vissershok was experiencing low demand and needed to encourage third party distributors. As we understand this, what she meant is that the tariff was now in a form that could be sent out to third parties – the pre March 2010 was not, as it contained the partners' two prices.

[95] However there is nothing in the record that indicates that this was the intention. The record contains all the board minutes of Vissershok at the relevant time and several emails exchanged between the parties in late 2009 that relate to the change in format. None suggests that this was the rationale. The minutes do not explain the change while the emails discuss the format of the change but not its rationale. This silence in the internal documents is more consistent with the Commission's theory of the rationale than Gombault's. This evidence of the rationale is on its own insufficient for Enviroserv to discharge the onus that the conduct had ended. The mere change in the tariff list format is insufficient. The Commission correctly indicates that the prior understanding of how to calculate the PSP was left unaltered. Gombault's email

[46] See page 1208 of the trial bundle.

referred to above puts this beyond doubt. Put differently, while the format of the price list may have changed in March 2010, the understanding by the partners of how to calculate the PSP, which is the impugned price in this case, remained.

[96] The only factual witness from Enviroserv who could give direct testimony about whether it departed from the PSP after March 2010 was Oosthuizen its manager responsible for sales during the complaint period. In answer to a question from the Commission's counsel as to whether the new March 2010 tariff list had any impact on its operational price list his answer was no.

> *MS SELLO: So it had no impact at all on your operational price list at the time.*
> *OOSTHUIZEN: Correct.*[47]

[97] But Enviroserv also relied on economic evidence from its economist Patrick Smith to prove the practice had ceased by March 2010. Smith explained that he encountered several logistical difficulties in performing this task. In the first place the primary source of evidence – the invoices Enviroserv charged to its customers were not available to him. He had to rely on spread sheets on the firm's computer system where the invoice items had been entered.

[98] He was given access to spread sheets which were over the period 2008 to 2016, which set out the fees that Enviroserv had charged its customers for the downstream services it performed.

[99] Although this fee included the cost of the upstream landfill services this was not set out as a separate item in the spread sheet. According to Smith, Enviroserv charged its customers a globular amount for both services. He could not therefore look to any invoice to see what had been charged for the downstream services to see if that accorded with the PSP. He therefore took the approach that if the combined fee included both downstream and upstream

[47] Transcript page 559.

costs, the way to test the proposition, was to deduct 25% from this combined fee and to see if it accorded with the PSP tariff in force at that time.

[100] Not all fees entered into in the spread sheets were easy to understand. This was because some were as a result of tenders and thus less likely to have been in accordance with the PSP, whilst in respect of others the service offering was less intelligible. His sample of prices for work done which he derived from the spread sheets was thus very small representing only 2% of the total number of invoices during this period. Nevertheless he maintained that the sample was an unbiased one. His conclusion, based on those he could perform this exercise on, was that matched revenues for customers with the 25% margin fell for both tender and non-tender customers between 2009 and March 2010.

[101] We consider Smith's evidence that the practice had been concluded by sometime in March 2010 as inconclusive. At best it suggests that to the extent that Enviroserv was adhering to the PSP, this practice may have become less prevalent after this period, a factor we look at later in the section on remedies. However even if Smith's evidence is accepted as proof that Enviroserv was no longer adhering to the agreement – a fact we don't consider proven- this is not evidence that the collusive practice had ceased.

[102] Enviroserv might well have been successful in proving that the practice had ceased if it had evidence that it had repudiated the agreement and communicated that repudiation to Wasteman. This, as we discuss later, is exactly what it did in relation to the market sharing arrangement and why we found for it on those facts. Here in relation to the price fixing allegation, Enviroserv, having chosen to defend itself on the basis there was no such agreement, could not then show later that it had repudiated the agreement. Having chosen one form of defence it was difficult to then credibly adopt another. Absent this evidence of repudiation there remains the evidence that on the Wasteman side, the PSP was being utilised. This emerged from the evidence of Ms Niemand who surprisingly testified that the PSP was still being applied at the time of the hearing.

[103] Thus whilst it is possible that Enviroserv was no longer adhering to the PSP, this had not been communicated to Wasteman, which on the evidence of Niemand, still was. The case law on when a practice can be regarded as having ceased is now clear. As the court held in *Power Construction* in relation to a cover bid offered in a bid rigging case the relevant date was not when the cover bid was exchanged but when the last payment ceased in respect of the rigged bid.[48] If Wasteman was still adhering to the agreement up until at least 2012, evidence that Enviroserv could not controvert, the practice had not ceased at the time of the initiation.

[104] Given that the initiation took place on May 2013, Enviroserv has not discharged its evidential onus to show it had ceased the practice by then, nor has it rebutted the evidence that Wasteman was continuing to implement the agreement. This defence is not successful and we find that the conduct had not ceased three years prior to the initiation of the complaint.

Fifth Defence: If there was a proscribed agreement still extant at the time of initiation, the second respondent is not liable for any period prior to the date of its incorporation.

[105] The JV commenced in 1994. At that stage the three partner firms were Waste-Tech (Pty), Wasteman (Pty) Ltd and Wasteman Cape (Pty) Ltd. Neither of these firms are the present shareholders in Vissershok. Over a period of time both have been replaced by successor firms, albeit they formed part of the same corporate groupings.

[106] Enviroserv was only incorporated in 2008. It argues that if there has been an infringement of the Act, it can only be held liable for the period subsequent to this. We accept that this argument is correct as a matter of law.

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[48] *Power Construction (West Cape) (Pty) Ltd & Another v The Competition Commission of South Africa; Case Number: 145/CAC/Sep16; paragraph 45.* The court held that the law to be applied regarding when conduct ceased in collusive tendering has been settled through several of its decisions and there is thus no reason to depart from it i.e. until its effects have ended.

[107] We have some sympathy with the Commission on this point as the ultimate control over the group has not changed over this period. Rather the controllers for their own purposes have moved around the furniture in the corporate structure over the complaint period. The transition from one company to another at Vissershok level was seamless. The same directors who represented Enviroserv's predecessor, a company known as Enviroserv Solutions[49], continued to represent it afterwards. Nor did this seem to disrupt any arrangements at the Vissershok board level; the issue was briefly mentioned in a minute of 19 November 2008– with apparently no comment.[50]

[108] This of course does not get the Commission out of its legal difficulty in having only joined Enviroserv as the respondent and not any other company in the group. The Commission was not without a remedy in this regard but it did not use it.

[109] We have previously held in *Delatoy*[51] that when faced with a similar situation where the firm that is part of a conspiracy has operated over the period through various different entities these may all be jointly and severally liable as the firm for the purposes of the Act. However in *Delatoy* these other firms were joined. The Commission has not done so in this case despite having been alerted to this point in Enviroserv's answering affidavit[52].

[110] We therefore find in favour of Enviroserv that the period of liability for it commences only on 3 September 2008, and not in 1998, which is the commencement of the Commission's complaint period. This has a profound impact on the liability of Enviroserv for the purpose of a penalty as we discuss later.

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[49] See page 1192 of the trial bundle.
[50] See page 987of the trial bundle.
[51] *Competition Commission v Delatoy Investments (Pty) Ltd & Others; case number; CR212Feb15/SA050Jun16.*
[52] See page 25-26 of Enviroserv's answering affidavit.

Market division complaint

[111] Here we go on to deal separately with the market division complaint. The defences are twofold;

111.1 there was no such agreement, or

111.2 even if there was such an agreement it is now time-barred because there is evidence that it was repudiated and thus ceased more than three years prior to the complaint having been initiated.

[112] The Commission's market division case relates to customer allocation. The period of this complaint is from 2005 to 29 September 2012. While the endpoint of the complaint period is the same as in the price fixing complaint, the commencement date is a later one. (The price fixing case complaint period commences in 1998).

[113] This difference in dates is presumably because the Commission does not have evidence of any prior customer allocation between the partners. The Commission relies for this count, on entries in the minutes of the board of directors of Vissershok.

[114] Prior to 2005, the Commission witnesses in their witness statements alleged that there had been instances of cover pricing between the partners. When a customer of the one partner had approached the other for a quote, it is alleged there was an agreement to provide this customer with a higher quote than the incumbent provider had given to that customer, so as to discourage the customer from moving. However these instances did not date beyond 2004, and so the Commission accepts that these are subject to the limitation on actions and has not pursued them. What remains is a customer allocation count that relates to the treatment of customers for whom the Vissershok tariff did not provide a rate for that service.

[115] This first surfaces in the Vissershok board minutes of 23 March 2005. Here Craig Mitchell who was then the manager of the Vissershok facility said he had been asked to quote for AECI which had asked WasteTech(despite the confusing name the predecessor of Enviroserv) to provide a quote for what was termed a *clean-up* service. This service provided for the engagement of landfill services as well but at the time there was no tariff provided for this type of service and hence Mitchell needed guidance from the board to issue a quote.

[116] The manner in which the board sought to resolve the issue was interesting. The Enviroserv director at the time, a Mr Gordon, suggested as he had a conflict of interest, the Wasteman nominees should suggest the price Vissershok should charge for a clean-up. Meyer, the Wasteman nominee, was willing to do so, but remarked that Wasteman would have to consider if it would be profitable (presumably he means for Vissershok) and secondly *"that the competitive edge of Wasteman would not be affected in the medium term."*[53]

[117] The issue of the respective customers of the partners arose again at a board meeting on 16 September 2005. [54] Meyer demanded to have a list of Enviroserv's customers and the amount of waste they were disposing. Mitchell responded by saying a list of all Vissershok customers was contained in the board pack. Meyer insisted that this was not sufficient and asked for a list of Enviroserv's clients. His view was as Enviroserv staff had been seconded to manage the JV, they had access to Wasteman's customers and he wanted the same information about Enviroserv. Gordon's response was that the staff seconded to Vissershok did not disclose this information to sales staff at Enviroserv.

[118] This 'Chinese wall' response does not seem to have satisfied Meyer and the issue was deferred to an already ongoing arbitration between the two firms regarding the management contract between Vissershok and Enviroserv. This

[53] See minutes of 28 January 2005 at pages 1315-1316 of the trial bundle.
[54] See trial bundle page 850-851.

tense relationship between the partners sets the context for the next board meeting on 23 November 2005 where the Commission alleges the customer allocation was made.[55]

[119] In the context of a board report back on the AECI waste, Mr Novella, the other Wasteman nominee on the Vissershok board, announced that Wasteman had a customer (he didn't name it) which wanted a quote for a clean-up. Since this would entail some interaction with the Vissershok staff (and hence the Enviroserv secondees) Novella was concerned that *"because the board is composed of competitors"* he was reluctant to discuss details but he still needed the help of the Vissershok staff. Novella mentions that *"Wasteman had respected the AECI deal with WasteTech* [Enviroserv]".[56]

[120] Gombault then proposes a solution. The partner seeking the quote must put the client and the potential work on the table and then *"... the other party* [partner] *must honour that and must not approach the same client regarding the same work."*[57]

[121] The board eventually agreed to resolve the matter in the following terms:

> *121.1 "It was agreed by all that once the details of the client are made known this would be respected and the other party would not pursue the same client regarding the same work."*[58]

[122] This item is significant for several reasons. First, it indicates, as we found earlier, that the partners to Vissershok had no difficulty making decisions regarding their downstream businesses at Vissershok board level. Were the directors acting independently of the partners that nominated them, such a resolution could not have been taken.

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[55] See trial bundle pages 862 to 863 for the minutes of this discussion.
[56] Trial bundle page 863.
[57] Trial bundle page 863.
[58] Trial bundle page 863.

[123] Second, the form of the recordal, indicates that this was a resolution removing any doubt of whether it was sufficient to constitute an agreement for the purposes of the Act. Here the language employed could not be clearer.

[124] Third, and most important for the Commission's case is an agreement to allocate customers. This is an undertaking by competitors not to compete for the business of the other's customer when such a disclosure is made to the board

[125] As noted earlier the entity which represented the Enviroserv interest at this meeting was not the second respondent (which had not yet been incorporated) but a sister company in the same group, which to avoid confusion we will refer to as Enviroserv ('P') (short for predecessor). The question then is whether the customer allocation agreement survived until (i) the second respondent stepped into the shoes of Enviroserv (P) and (ii) even if it did, whether this agreement still subsisted three years prior to the complaint initiation i.e. 27 May 2013.

[126] As it happens the answer to both questions is in the negative. We say this because of events at the very next board meeting of Vissershok which took place on 26 January 2006. The meeting starts with Gordon then representing Enviroserv (P), indicating his concerns with the phrasing of the resolution taken at the November 2005 meeting and which we quoted above.

[127] Although Enviroserv's counsel sought to portray this comment as a correction of the previous minute, and thus presumably to contest the notion that there had been a customer allocation agreement – this is not a correct reading of the January minute. Gordon is not asking for the earlier minute to be corrected and indeed it is approved and signed off by Gordon himself. Where in the past minutes of Vissershok have needed correction the board has minuted the correction.[59] Thus the intervention of Gordon does not amount to a correction,

[59] For example, at page 1032 of the trial bundle, Vissershok board meeting minutes dated 20 October 2010, see also pages 407-408 of the transcript.

but rather a restatement of his and thus Enviroserv (P)'s position. Gordon indicates that although he will respect the confidentiality of information presented at the Vissershok board he *"... could not commit himself to the wording"* of the November resolution. He stated clearly that if his sales team, (he is now wearing his Enviroserv (P) hat) were quoting the same customer, he would not be willing to instruct them not to.

[128] From the minute it is apparent that Meyer from Wasteman does not like this. He states, and his comment underlies the rationale for customer allocation:

127.1 "... they would regard it as acting in bad faith (and not in Vissershok's best interest) if, for example, Enviroserv (P) then approached the same client with a slightly reduced rate."[60]

[129] Gordon however does not change his mind in response to this. What Gordon has done is to repudiate the agreement that existed between the parties that had been reached at the November 2005 meeting. This was done in express terms and in the same forum and to the same representatives of the other partner with whom the original agreement had been struck. To the extent any understanding existed between the parties in respect of this market division this communication made it clear that Enviroserv (P) was no longer adhering to it.

[130] Later communications from Gordon at subsequent board meetings reiterate his approach to separate the issue of board confidentiality from what sales teams are instructed to do downstream.[61]

[131] Since this repudiation ended the market division agreement we find that (i) it was not in existence at the time that the second respondent became the shareholder and partner in Vissershok, and (ii) that it was not in existence more

[60] See page 869 of the trial bundle.
[61] See page 869 of the trial bundle, wherein minutes of the Vissershok board meeting reflect Mr Gordon submitting that he had no control of how his sales team performed their work when it came to which customers to work with.

than three years prior to the initiation of the complaint on 27 May 2013. The Commission's case in respect of this count is dismissed on both these grounds.

Conclusion

[132] We thus find that the Commission has succeeded in its case in respect of price fixing against the second respondent, but only for the period from September 2008 until late 2012. The complaint is not successful in respect of the count of market division.

REMEDY

[133] We asked both parties to prepare submissions on remedies which they did. The Commission's first prayer for relief is a declaratory order. There is no dispute about a declaratory order being competent and appropriate if we find a contravention. Hence our order in paragraph 1 below requires no further elaboration. There is also no dispute that the imposition of an administrative penalty is competent. Both parties provided their suggestions for an appropriate penalty, but they came to very different conclusions.

[134] The only party that provided figures was Enviroserv. This was done through an affidavit from its financial director Mr Croydon Coppings. In this affidavit he set out the annual turnover for Enviroserv over the period of the financial year ended June 2013. Since Enviroserv operates nationally in a number of markets the annual turnover figures do not equate to what we refer to in our case law as the 'affected' turnover – the turnover affected by the contravention. Mr Coppings was able to calculate the turnover that Enviroserv derived from its Vissershok operation and the Commission does not dispute these. We can therefore rely on the figures he has provided to calculate an appropriate penalty. Despite this the parties could not reach an agreement on a figure.

[135] The Commission suggested a penalty of – R 137 126 334.80 and Enviroserv a penalty of R5 156 323.00 – This outcome may seem surprising given that both made use of the same methodology (that was established in the *Aveng* case) and the same figures (those supplied by Mr Croydon Coppings,

including his calculation of the affected turnover.)[62] The reason for the discrepancy results from differences in the percentage of the base amount used, the time period and whether the final figure should be discounted because of mitigating factors or increased because of the presence of aggravating factors.

[136] We will accept that the affected turnover should only comprise of hazardous waste turnover as the PSP for non-hazardous waste was the same as the third party rate and equated to that set by the City of Cape Town. We will assume for the purpose of this case that the affected turnover should be assessed on the basis of the 2008/9 financial year as this is the most representative one in terms of the contravention period.[63] This figure comes to R 24 730 567.[64]

The base amount

[137] In *Aveng* we stated that a base amount, once the affected turnover had been arrived at, could be a percentage of this affected turnover amount, ranging from 0 to 30%. In this case the Commission applied a base percentage of 20% whilst Enviroserv suggested 10%.

[138] In this step we look at factors such as the nature, gravity and extent of the conduct.

[139] As far as the factor of extent is concerned there is evidence that the practice effected a wide share of the relevant market. This can be seen in the high market shares enjoyed by the respondents over this period. These market shares were highest in 2008 and 2009 before the change in the price list and were 86% and 84% respectively. Following the change in the price list market shares remained relatively high for these respondents, limiting the size of the market available to competitors. In other words, not only did Vissershok enjoy a near monopoly in the upstream, but the partners also ensured that they were

[62] *Competition Commission v Aveng (Africa) Ltd t/a Steeldale and Others (84/CR/Dec09) [2012] ZACT 32 (7 May 2012).*
[63] The Commission's period of contravention was 1998-29 November 2012.
[64] Enviroserv heads paragraph 8.7

able to achieve significant profits in the downstream by capturing a substantial portion of the market share over this period.

[140] Although the effects of the practice were extensive the anticompetitive effects of the agreement were slight, as this was a market, where absent an agreement, conscious parallelism (which is not unlawful) was likely. This is a market where given the firms were competing for the same customer base and the very high number of interactions with the same customer base both firms with knowledge of each other's input price (the partners cost price) could easily have monitored each other's prices. The evidence shows ten thousand transactions were performed on average per year on the Enviroserv side and given the similarities in market share, one can assume a similar level on the Wasteman side. Second the fluctuation in market shares in the table provided by Ms Gombault suggests that market shares were not constant over the 2002-2016 period.[65] This is consistent with the fact that despite the PSP, there was customer churn between the partner firms. There is also evidence in the record of the identities of customers who the respective partners lost to the other which similarly is indicative of churn.

[141] The evidence of Mr Smith, and which we discussed earlier, is the only economic evidence of the effects of the agreement on Enviroserv's pricing. This evidence, despite its limitations, suggests that after March 2010, adherence to the 25% discount level was less marked. The PSP thus may not have been either a wholly effective constraint on competition in a non-collusive environment or this is a market conducive to conscious parallelism which whilst reducing competition is not unlawful. The more serious effect on competition was the premium of 43.75% the respondents charged their downstream rivals, but this was not the case that Enviroserv came to meet and so this aspect cannot contribute to a consideration of an appropriate penalty.

[65] See table 1 of Ms Gombault's witness statement at page 1206 of the trial bundle.

[142] Thus Enviroserv's submission that we should adopt a 10% base turnover is more reasonable than the Commission's suggestion of 20%. Adopting this percentage we arrive at a figure of R 2 473 056.[66]

Duration

[143] On the *Aveng* methodology the base level of the penalty is multiplied by the number of years of the contravention. The Commission considered the contravention had lasted 13 years, Enviroserv only 4 years and 2 months and thus a multiplier of 4.17. (Enviroserv for the purpose of the penalty calculation contends that the period starts from when Enviroserv was incorporated in 2008, but accepts that the period ended at end of November 2012.)

[144] We have found that the contravention period commences with the incorporation of Enviroserv and its purchase of the business from Enviroserv (P). This date we agree with Enviroserv should be September 2008.

[145] The end date is more difficult to determine given the number of candidates for this. The Commission's choice of end date is 29 November 2012.
This is the date on which the leniency application was received. However there is no evidence that the agreement ended with this event and not after it, or long before it. The Commission may be relying on a legal presumption that a leniency applicant must state that the contravention has ended.[67]

[146] Nevertheless surprisingly its own witness Ms Niemand testified that Wasteman was still applying the PSP. Nor was she swayed from this position when counsel for Enviroserv had put to her in cross examination that her firm would not qualify for leniency if it was still implementing the prohibited practice for which it had applied for leniency.

[66] The Commission's figure was R7 534 414.
[67] This is in terms of section 10.1(d) of the Commission's Corporate Leniency Policy.

[147] Enviroserv contended that the period ended in March 2010 and relied on the evidence of Mr Smith in the alternative, to argue that even if the agreement was still in force at some later stage, it had been substantially diluted by this time.

[148] It may well be that the truth lies somewhere in between. Enviroserv may have been discounting from the PSP from sometime in 2010 when the scare raised by the spectre of the Commission investigation began to trouble its executives. Wasteman may also have adhered to the agreement for a longer period unaware of what its partner was doing in the market place until closer to the time it decided to seek leniency. Unlike with the market division agreement Enviroserv never repudiated the PSP, but agreed rather to camouflage its existence in 2010.

[149] This is also supported by the fact that Mr Oosthuizen testified as follows;

149.1 CHAIRPERSON: And is that because the sales manager compiled it, copied that out and put it on this list?

MR OOSTHUIZEN: This list would be similar, yes, that's quite correct.

CHAIRPERSON: Well, it's as I understand not just similar, it's the same.

MR OOSTHUIZEN: Correct, correct.

CHAIRPERSON: And that's because the person copied out that list onto here.

MR OOSTHUIZEN: Correct.[68]

[150] We therefore conclude that it is not possible to determine precisely when the agreement ended although it lasted beyond the date of March 2010. In any event based on the decision in *Power* construction the agreement lasts until the last date of implementation. Even if Enviroserv had stopped adhering to the

[68] Transcript at page 574.

agreement sometime in 2010, the evidence is that Wasteman continued to observe it – either till the date of its leniency application or sometime later.

[151] We will therefore follow Enviroserv's suggestion that the best evidence is that the period lasted 4 years and two months i.e. from September 2008 to end November 2012. Applying this multiplier of 4.17 to the figure of R 2 473 056 we arrive at a figure of R 10 312 646.[69] This figure is still below the 10 % cap and does not need to be rounded off.

Aggravating and mitigating factors

[152] As aggravation the Commission advanced the following factors;

152.1 Instead of discontinuing with the price fixing conduct, the respondents cloaked it by changing the structure of the price list;

152.2 The prohibited conduct had an on-going and lasting effect as a result of this disguise;

152.3 The respondents gained significant profits as a result of their conduct;

152.4 The combined revenue of the other competitors in the industry was extremely poor, meaning the conduct had a negative result on competition in the relevant market; and

152.5 The conduct lasted for 13 years, during which Enviroserve participated in the cartel under the facade of Vissershok.

[153] The Commission suggested that an amount of 40% should be added for aggravation.

[69] The Commission's figure of R7 534 414 to a multiplier of 13 years gave a figure of R97 947 382.

[154] Enviroserv argued that there was significant mitigation and the amount arrived at viz. R 10 312 646 should be discounted by 50%.

[155] As mitigation Enviroserve advanced the following arguments. First, that it has not previously been found to have contravened the Act. Second that it co-operated with the Commission. However this form of co-operation amounted to no more than providing lengthy witness statements. Since these were self-serving, their length and detail is not a mitigating feature we should recognise. We might have taken into account the actions of Mr Gordon to end the market division agreement. However since we have not made a finding against Enviroserv on this count and it was done whilst Mr Gordon represented Enviroserv (P) not the second respondent, this cannot redound to Enviroserv's benefit as mitigating evidence.

[156] The only mitigating factor that we have not already taken into account in step one (where we assessed a base turnover of only 10% and not 20% as suggested by the Commission) was that Enviroserv has not previously been found in contravention of the Act. However it has not been in the market for a long period and so this factor whilst relevant is not on these facts compelling. We will allow a 1% discount for this, leaving a final figure of R 10 209 519.[70]

[70] The Commission was of the view that they were no mitigating factors warranting for a discount.

ORDER

1. For the reasons discussed above, we conclude that Enviroserve contravened section 4(1)(b)(i) of the Act in the period 2008-2012.

2. Enviroserve must pay an administrative penalty of R 10 209 519.

3. There is no order as to costs.

17 September 2018

Mr Norman Manoim **Date**

Ms Yasmin Carrim and Mr Enver Daniels concurring

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