



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: CR209Feb17

In the complaint referral between:

The Competition Commission

Applicant

and

Tourvest Holdings (Pty) Ltd

First Respondent

Trigon Travel (Pty) Ltd

Second Respondent

Panel	: Norman Manoim (Presiding Member) Yasmin Carrim (Tribunal Member) Mondo Mazwai (Tribunal Member)
Heard on	: 6 – 7, 23 May 2019
Order issued on	: 15 January 2020
Reasons issued on	: 15 January 2020

NON-CONFIDENTIAL REASONS FOR DECISION

Introduction

- [1] On 14 February 2017, the Competition Commission ("Commission") referred a complaint against two travel management service providers, Tourvest Holdings (Pty) Ltd ("Tourvest") and Trigon Travel (Pty) Ltd ("Trigon"), collectively referred to as 'the respondents'.
- [2] Specifically, the Commission alleges that the respondents entered into an agreement or concerted practice to fix prices and tender collusively when bidding for a government tender (tender bid number: B4/2015) for the supply of certain administrative and management services in respect of domestic flight tickets and accommodation for members of the Parliament of South Africa ("Parliament"). Such conduct, according to the Commission, is in contravention

of section 4(1)(b)(i) and (iii) of the Competition Act,¹ as amended ("the Act").² The Commission seeks the imposition of an administrative penalty equal to 10% of each of the respondent's annual turnover.³ The Commission conceded that it had no direct evidence of collusion between the two respondents. Instead its case is based on drawing inferences from a similarity in the bids and the existing commercial relationship between them.⁴

- [3] The respondents refuted the Commission's allegations arguing that they each compiled their respective bids independently of one another and that the Commission failed to put up sufficient facts and evidence to sustain an allegation of price fixing or collusive tendering. In these circumstances, the referral ought to be dismissed.
- [4] Having considered the evidence before us, we are of the view that the Commission's referral falls to be dismissed. Before dealing with the merits, it is necessary to set out the background to this complaint.

The parties to the complaint

- [5] Tourvest and Trigon provide travel management services to corporate, government and leisure travellers. These services consist of booking, cancelling, rearranging flights, car, rail, bus services and hotel accommodation. Tourvest is one of the largest travel service providers in the country and is the incumbent service provider for travel services to Members of Parliament.
- [6] The respondents have an indirect commercial relationship with one another through the Travel Assignment Group ("TAG Group") which owns Trigon. The TAG Group is a franchisee of the Tourvest Group in terms of which it uses the brand name of the Tourvest Group to market its services. Tourvest however has no shareholding in the TAG Group.⁵

¹ Act 89 of 1998.

² Commission's complaint referral, Record ("R") page ("pg.") 11, paragraph ("para") 12.

³ Commission's complaint referral, R pg. 13, para 22.

⁴ Commission's Heads of Argument ("HoA"), para 4.

⁵ Commission's Founding Affidavit ("FA"), R pg. 12, para 19; Commission's Supplementary Founding Affidavit ("SFA"), R pg. 43, para 6.

- [7] The TAG Group and Tourvest are party to a services and participation agreement ("PSA") in which Tourvest is tasked to negotiate discounts with suppliers of travel services, such as airlines, hotels, car rental agencies and the like on behalf of the TAG Group and all other firms that have signed similar arrangements with it (the "Tourvest Buyers Group"). The discounts secured by Tourvest are passed on to the members of the Tourvest Buyers Group which includes the TAG Group and therefore Trigon.⁶

Complaint background

- [8] On 25 April 2015, Parliament issued a tender for the supply and management of travel services to members and former members of Parliament. The tender would fulfil Parliament's in-house travel policy which allocates to members or constituencies several journeys annually in order to travel to and from their homes and Cape Town. Parliament utilises CZEasyBuy, an electronic travel procurement system through which all travel is procured and controlled. There are currently 2150 registered travellers, with a total of approximately 2400 tickets per month booked for travellers. The Invitation to Bid set out a number of requirements and functions the successful bidder would have to satisfy.
- [9] First, the successful bidder would be required to staff, maintain and operate the Parliament in-house travel centre on the premises of Parliament during normal business hours and provide after-hours services.⁷
- [10] Secondly, all bookings would have to be made at Parliament's prescribed corporate rates as provided for in Parliament's agreements with airlines and the successful bidder would be entitled to issue tickets at a price negotiated with airlines.⁸
- [11] Thirdly, each bidder was required to submit a single bundled transaction fee for the tender.⁹ The successful bidder would have to process an estimated number of 28 800 transactions for an annual spend of R100 million in the contracting

⁶ Trigon's HoA pg. 5, para 7.5; Commission's SFA, R pg. 44, para 10.

⁷ Request for Bid, R pg. 574.

⁸ Request for Bid R, pg. 582.

⁹ Request for Bid R, pg. 581.

period. Furthermore, Parliament reserved the right to require bidders to provide additional pricing information during evaluations, and the right to negotiate prices at the contracting stage.¹⁰

- [12] The bid invitation spoke of a single bidder that would be awarded the tender however, it included a proviso which reserved Parliament's rights to award the bid to more than one bidder.¹¹
- [13] All prospective bidders to the tender were required to attend a compulsory briefing session on 7 May 2015.¹²
- [14] The closing date for all bid submissions to Parliament was on 15 May 2015 at 12h00.¹³
- [15] Once all bids were received by Parliament, they would be evaluated by two committees, being the Bid Evaluation Committee ("BEC") and the Bid Adjudication Committee ("BAC"). Each bid would be evaluated in three stages:¹⁴ i) evaluation for compliance with administrative requirements; ii) evaluation for compliance for functionality and iii) preference point evaluation.¹⁵ If bidders scored identical scores in the third stage, they would be assessed in terms of their functionality score in terms of stage two as required by the Public Finance Management and Preferential Procurement Policy Act.¹⁶
- [16] A total of 16 bids were received by Parliament, including the bids of the respondents. The single bundled transaction fees from the submitted bids ranged from R 75 to R1700.50 per transaction.¹⁷ The BEC screened the bids and made a request to the BAC to consider its recommendation to award the bid to Trigon. Upon evaluating the BEC's report, the BAC observed that Tourvest and Trigon : (i) had submitted identical prices; (ii) had the same Broad-

¹⁰ Request for Bid, R pg, 582.

¹¹ Request for Bid, R pg, 566.

¹² Request for Bid, R pg, 559.

¹³ Ibid.

¹⁴ Request for Bid, R pg, 578.

¹⁵ A 90/10 preference point system will be used where 90 points represents the maximum points for the cheapest flights and 10 points represents the B-BBEE status level. See R, pg. 578.

¹⁶ Act 5 of 2000.

¹⁷ Commission's complaint referral, R pg. 12, para 16.

Based Economic Empowerment (“B-BBEE”) scores and; (iii) noted that the respondents were affiliated to one another through TAG.¹⁸ The BAC then requested the Supply Chain Management secretariat to seek clarity from Trigon regarding the business relations between the respondents and TAG. Trigon explained to the BAC that it is 100% owned by the TAG Group and operated as a standalone subsidiary. Tourvest had no shareholding in the TAG Group. The relationship between it and Tourvest increases their bargaining power in order to secure preferential deals from major airlines.¹⁹

[17] Shortly thereafter, Supply Chain Management requested parliament’s legal services to advise if there was any potential collusion between the respondents. Legal services recommended that an advisory opinion be sought from the Commission whether the respondents collusively collaborated in submitting their respective bids. In response to this advisory opinion, the Commission advised that it had initiated a complaint in terms of section 49B(1) of the Act to conduct a full investigation of this matter.²⁰ The tender was then put on hold.

[18] The Commission’s complaint was initiated on 26 November 2015 and the complaint was referred to the Tribunal on 14 February 2017.

Procedural background

[19] Prior to hearing the merits of this matter, the respondents, on separate occasions, filed three interlocutory applications, comprising two exceptions to the Commission’s referral²¹ and an application for further particulars.²² The respondents were successful in the first exception and the Commission was ordered to file a supplementary affidavit to disclose more facts underpinning its referral. It was in these exception proceedings that the Commission stated that its case was based on an inference.

¹⁸ Ms. Ruby November (“November”) witness statement (“WS”), R pg. 1158, para 5.

¹⁹ November WS, R pg. 1159, para 6.

²⁰ November WS, R pg. 1159, paras 7-8.

²¹ *Tourvest Holdings (Pty) Ltd and Trigon Travel (Pty) Ltd v Competition Commission* (CR209Feb17/EXC055May17, CR209Feb17/EXC236Mar17)

²² *Tourvest Holdings (Pty) Ltd and Trigon Travel (Pty) Ltd v Competition Commission* (CR209Feb17/DSC154Aug18).

- [20] Dissatisfied with the sufficiency of the supplementary affidavit, the respondents filed their second exception. According to the respondents, the supplementary affidavit failed to remedy the shortcomings of the complaint referral and did not comply with the Tribunal's order.
- [21] On 10 January 2018, the Tribunal dismissed the exceptions ruling that it was clear that the Commission's case is based on an inference and the allegations contained in the supplementary affidavit had been sufficiently established to make out such a case. Tourvest and Trigon were ordered to file their answering affidavits.²³
- [22] On 8 August 2018 the respondents filed a third interlocutory application, this time for further and better particulars as they remained dissatisfied with the Commission's case as pleaded. The Tribunal dismissed this application on the basis that the Commission was yet to file its witness statements which could further clarify its case therefore fully appraising the respondents with the case it must meet. If the respondents were still dissatisfied, they could then approach the Tribunal for further relief.²⁴ Following this decision, the respondents elected not to do so.
- [23] The hearing commenced on 6 – 7 May 2019 and final argument was heard on 23 May 2019.

The witnesses

- [24] We heard oral evidence from three witnesses. The Commission initially intended to lead two witnesses, Ms Ruby November ("Ms November"), the Section Manager in the Supply Chain Management Unit of Parliament and Ms Noluthando Jokazi ("Ms Jokazi"), an investigator in the Commission's Cartels Division.

²³ *Tourvest Holdings (Pty) Ltd and Trigon Travel (Pty) Ltd v Competition Commission* (CR209Feb17/EXC134Aug17, CR209Feb17/EXC132Aug17).

²⁴ See footnote 22 above.

- [25] Ms November's unit in Parliament is responsible for all the procurement of goods and services, assets, contracts and travel related services of Parliament. She had been the head of this unit for 14 years.
- [26] During the hearing, the Commission advised that it would no longer be calling Ms Jokazi.
- [27] Tourvest called two witness – Mr Morné Du Preez ("Mr Du Preez") and Ms Shereen Morolo ("Ms Morolo").
- [28] Mr Du Preez is the Chief Executive Officer of Tourvest Travel Services, a division of Tourvest. Mr Du Preez's has been employed at Tourvest since 1999 and was appointed CEO of Tourvest Travel Services in February 2008. In his capacity as CEO, his role in tender pricing arises if there is going to a reduction or deviation in standard pricing.²⁵ Mr Du Preez has had oversight of Tourvest's account with Parliament for the provision of travel fulfilment services since its inception in 2005.²⁶
- [29] Ms Morolo is the Chief Executive of the Public Services Division of Tourvest Travel Services, also a division of Tourvest. Ms Morolo was recruited and has been employed at Tourvest since 2013 in order to assist Tourvest with expanding its business operations in the public sector.²⁷ In her current role, Ms Morolo is responsible for winning new business from the public sector and does so by looking out for new tenders issued by municipalities, national and provincial government departments and state-owned entities. When a new tender is issued, she has oversight of the bid preparation, the collation process and signs off on tenders submitted to the public sector.²⁸
- [30] Trigon called its only witness, Mr Gavin Stevens ("Mr Stevens"), the Financial Director of the TAG Group. At the time the tender was issued, Mr Mustapha Solomons ("Mr Solomons") the Managing Director of Trigon at the time, was

²⁵ Mr Morné Du Preez ("Du Preez") WS, R pg. 1167, paras 2.3 and 2.4.

²⁶ Du Preez WS, R 1167 para 2.5

²⁷ Ms Shereen Morolo's ("Morolo") WS, R pg. 1211-1212, paras 2.1-2.3.

²⁸ Morolo WS, R pg. 1212, para 2.4.

mandated to prepare the tender on Trigon's behalf.²⁹ Mr Solomons is no longer employed at Trigon.

The Commission's complaint

[31] As mentioned, the Commission relies on an inference to prove the alleged agreement. This inference is drawn from the following features of the respondents' bids that were identical:

[31.1] A single bundle transaction fee of R150;

[31.2] B-BBEE status level 2 contribution and a procurement level of 125% and;

[31.3] Both bids were submitted on the same day.³⁰

[32] To further bolster its case, the Commission averred that the collusive nature of the relationship between the respondents and TAG could be garnered from the PSA between Tourvest and TAG, specifically paragraph 13.2.3 which states:

*"...notwithstanding the provisions of clause 13.1, both parties shall during the currency of this agreement, and for six months after the termination of this agreement, for any reasons whatsoever...not solicit, interfere with, or entice or endeavour to entice away from the other party, any person, firm, or company who is a customer of the other party or is accustomed to dealing with the other party."*³¹

[33] The Commission also argued that the Tourvest Group had, as the incumbent service provider, an interest to retain Parliament's business within the group either by winning the tender or assisting its affiliates such as Trigon to win the bid.³² Since there was a possibility that the tender could be awarded to more than one bidder, Tourvest was in a sense hedging its bets. Ultimately, the Commission held the view that either Tourvest, TAG or Trigon could mutually

²⁹ Mr Gavin Stevens' ("Stevens") WS, R pg. 1254, para 5.

³⁰ Commission's FA, R pg. 12, paras 17-18.

³¹ Commission's HoA para 16.

³² Commission's SFA, R pg. 43-44, para 9.

benefit from the tender, no matter the outcome of Parliament's decision and therefore this created the incentive for the respondents to collude.³³

The respondents' case

[34] Both respondents deny that they contravened the Act. They contended that the Commission's case is illogical and baseless as it sets to draw an inference on facts that do not support its case.

[35] They each explained how they independently arrived at the transaction fees in the tender and led evidence to show that they had no economic incentives to collude on the tender.

[36] They argued that the purpose of the PSA is to increase the bargaining power of its members against suppliers such as airlines, hotels and car rental agencies and put up calculations in support of their contention that the PSA could not incentivise collusion and that both the respondents stood to gain much more by winning the tender on their own.

Issues to be decided

[37] It is common cause that the respondents are competitors in so far as the impugned tender is concerned. What we must determine is whether on the balance of probabilities the evidence before us is sufficient to infer an agreement by the respondents to tender collusively in respect of Parliament's travel services bid.

The law on inference

[38] The law on inference is well established in the civil jurisprudence. An inference may be drawn in favour of a party who bears the onus if it is the most probable inference to be drawn. The Supreme Court of Appeal ("SCA") in *Cooper and Another v Merchant Trade Finance*³⁴ expressed that:

³³ Commission's HoA para 10.

³⁴ 2000 (3) SA 1009 (SCA) para 7.

"The court, in drawing inferences from the proved facts, acts on a preponderance of probability. The inference of an intention to prefer is one which is, on balance of probabilities, the most probable, although not the only inference to be drawn."

[39] The Competition Appeal Court ("CAC"), applying the law on inference in *Competition Commission of South Africa v Gralio (Pty) Ltd*³⁵ held:

"...even in Tribunal hearings, inferences and probabilities must be distinguished from conjecture and speculation. There can be no proper inferences drawn unless there are objective facts from which to infer the facts sought to be established. If there are no positively proved facts from which the inference can be drawn, the method of inference fails and what is left is mere speculation."

[40] We now turn to consider the evidence against the above test.

The Evidence

B-BBEE status level and procurement recognition level

[41] It is common cause that the respondents have a B-BBEE status level 2 and a procurement recognition level of 125% and this was explicitly provided for in the respondents' bids for the tender. The Commission only made specific mention of this in its founding affidavit as "*similarities*", suggesting that the respondents colluded in this respect.

[42] In the hearing, the Commission did not advance this issue any further and it did not explore this issue with its own witness or the respondents witnesses. In fact, it did not pursue this in final argument.

[43] In its heads of argument, Tourvest submitted that there was nothing unusual or curious about two bidders having the same B-BBEE status and procurement recognition level.³⁶ A firm's procurement recognition level is determined by its B-BBEE rating which is confirmed by independent verification agencies that

³⁵ (107/CAC/Dec10) para 53.

³⁶ Tourvest's HoA para 71.

conduct an evaluation of firms' B-BBEE ratings and procurement recognition levels. Tourvest makes use of the National Empowerment Rating Agency's services and Trigon makes use of the Express Verification Services. There would be no way that a bidder would be able to control their status or coach two independent agencies to fraudulently produce the same score card. In addition out of the ten bidders that were considered in the final stage of bid adjudication, six of them scored at level 2.

[44] Trigon made a similar argument.³⁷

[45] On the evidence before us, there was no indication from the Commission that the respondents obtained their B-BBEE status through fraudulent means. Even if there were such an indication, it would constitute fraud and not collusion as contemplated in the Act. We accordingly find no reason to infer a collusive agreement on the basis of the respondents individual B-BBEE status.

Submission of bids for tender on 14 May 2015

[46] Akin to the B-BBEE issue above, this aspect of the Commission's case was only raised in its founding affidavit and was not explored any further with its witness or the respondents' witnesses. The respondents pointed out in fact that their bids were submitted on the official due date (15 May 2015) and that this does not take the Commission's case any further.

[47] We agree with the respondents. No additional evidence, documentary or *viva voce*, indicated that some collusive action took place. There was nothing to suggest that the respondents perhaps convened a meeting on 15 May 2015 to agree on the single bundled transaction fee or some other collusive strategy to ensure that either one of them would win the tender. Ms Morolo explained that it was general practice to submit a bid on the last day due to the volume of documents required and the time it takes to compile tender documents. In

³⁷ Trigon HoA paras 41.1.

addition the tender had to be transported to Cape Town in time for its submission and it was only signed on 14 May 2015.³⁸

- [48] The submission of the bids on the same day takes the core issues in this matter no further. We therefore find that even if the bids were submitted on different days or on the same day, without any further evidence indicating some element of collusion, this coincidence tells us nothing. We therefore do not consider this aspect of the case any further.

Identical transaction fees

- [49] The Commission's contention is that it is no coincidence that the respondents submitted identical fees. According to the Commission, the pricing explanations by the respondents amount to a convenient *ex post facto* construction to match the already existent facts.³⁹ Considering all evidence put before the Tribunal, no other conclusion can be reached that excludes the possibility of the respondents having colluded on the single bundle transaction fee.⁴⁰
- [50] The respondents averred that they determined their respective bid prices independently of each other.
- [51] According to Ms Morolo, she was responsible for the tender in her capacity as Head of Public Sector Procurement. She became aware of the tender through a tender notification service provided by Tradeworld which grants subscribers such as Tourvest daily notifications on new tenders that have been issued.⁴¹
- [52] Since Parliament is based in Cape Town (and Ms Morolo is based in Johannesburg), the tender briefing was attended by Ms Anisah Buffkins ("Ms Buffkins") on behalf of Tourvest as it was held in Cape Town on 7 May 2015. Ms Buffkins is responsible for overseeing all Tourvest's key accounts in the Western Cape, including the parliamentary account.⁴²

³⁸ Morolo WS, R pg.1224, para 3.28.

³⁹ T pg. 4, line 1- 9.

⁴⁰ T pg 4, line 15-17.

⁴¹ Morolo WS, R pg 124, para 3.4.

⁴² Du Preez WS, R pgs. 1172 – 1173, para 3.3; Morolo WS, R pg. 1215, para 3.6.

- [53] After the briefing Ms Buffkins completed a standard feedback questionnaire used by Tourvest to address important matters arising out of the tender briefing.⁴³ She provided the questionnaire to Ms Morolo and Ms Kerry Sossen ("Ms Sossen"), who was at the time the Financial Manager of the Coastal region who was required to calculate the necessary financial input on the cost structure of the tender and make recommendations for submission.
- [54] Ms Morolo testified that generally Tourvest has standard terms for public tenders. However since Tourvest was the incumbent provider of the travel services in question, when preparing the tender documents she first needed to understand the current pricing model used by Tourvest. She sought guidance from Mr Du Preez on what fee should be quoted by Tourvest given that the Parliament had requested that a single bundled fee be quoted; and that she was recommending a downward deviation from existing fee.⁴⁴
- [55] Mr Du Preez confirmed in oral evidence that as CEO his role in pricing usually kicks-in when there is a deviation from standard terms for lower rates.
- [56] In correspondence from Ms Morolo to Mr Du Preez she advocated for a lower fee because of (i) the level of competition Tourvest would be facing for the tender (this she garnered from the list of attended at the briefing session attended by Ms Buffkins) and that (ii) Tourvest did not want to lose this tender as a result of quoting a higher price as Tourvest had previously lost a tender to Transnet.⁴⁵ In the Transnet tender, Tourvest in essence did not price low enough and therefore lost the tender based on price.⁴⁶
- [57] Mr Du Preez then called on Ms Sossen to consider the new current financial model and propose a new fee based on the information provided by the Invitation to Bid and from the tender briefing.⁴⁷

⁴³ Morolo WS, R pg. 1215 – 1216, para 3.7. See questionnaire on R pg. 1230.

⁴⁴ Du Preez WS, R pg. 1173, para 3.4; Morolo WS, R pg. 1218, para 3.11.

⁴⁵ Du Preez WS, R pgs. 1173 – 1174, para 3.5; Morolo WS, R pg. 1218, para 3.12 – 3.13.

⁴⁶ T, pg. 110, line 17-20.

⁴⁷ Ibid.

- [58] Two days before the tender due date, on 13 May 2015, Ms Sossen provided her calculations to Mr Du Preez and Ms Morolo and copied all other members of Tourvest's Executive Committee recommending a reduction from the prevailing [REDACTED] (VAT excl.) to a single bundled fee of [REDACTED] (VAT excl.).⁴⁸
- [59] A number of reasons for the reduced fee were provided by Ms Sossen. Firstly, Tourvest no longer had to pay a [REDACTED]% of turnover on the account to CommerceZone. When Tourvest first began servicing the account it had subcontracted CommerceZone's technological platform for an amount equal to [REDACTED]% of the turnover generated by Tourvest. However, since Tourvest contracted directly with Parliament from 2014, the need to pay CommerceZone [REDACTED]% no longer existed.⁴⁹ Secondly Tourvest would be processing a high number of transactions that it had previously – the number of transactions would have been [REDACTED]% higher which justified at least a [REDACTED]% reduction in the fee per transaction.⁵⁰ Ms Sossen also noted that there was scope for the price to be further reduced but she did not indicate an amount beyond the [REDACTED] she was recommending.
- [60] Following Ms Sossen's recommendation, Mr Du Preez and Ms Morolo discussed this in a meeting on either 13 or 14 May 2015 where Ms Aneldia Du Plooy (Ms Morolo's assistant) and Ms Sossen were present.⁵¹
- [61] Both Ms Morolo and Mr Du Preez testified that pricing for this tender was hotly debated between them. As Head of Public Procurement and given her experience with public tenders; and for the reasons explained above, Ms Morolo was of the view that [REDACTED] was high and there was a risk that Tourvest would lose the tender. Mr Du Preez on the other hand was of the view, as CEO and a qualified accountant, that Ms Morolo's proposed pricing would be unprofitable for the business.

⁴⁸ Du Preez WS, R pg. 1174, para 3.8; Morolo WS, R pg. 1219, para 3.16. It is noted that the other members of EXCO Ms Folli and Ms Shearer whom were copied in the correspondence did not comment on the calculations or participate in determining the tender price. See further Morolo WS, R pg. 1220, para 3.17.

⁴⁹ Du Preez WS, R pg.1175, para 3.8.1 -3.8.1.3

⁵⁰ Du Preez WS, R pgs. 1175 – 1176, para 3.8.2. – 3.8.2.3.

⁵¹ Du Preez WS, R pgs. 1178 – 1179, para 3.10.

- [62] Ms Morolo advocated for a further reduction of the bid price from Ms Sossen's recommendation of [REDACTED] to between [REDACTED] and [REDACTED]. Her reasoning was that Parliament was likely seeking to rotate suppliers since Tourvest was the incumbent for 10 years; and if Tourvest were to lose the tender, it would result in job losses for six consultants servicing the account at the time.⁵²
- [63] A further concern in Ms Morolo's view was the 90/10 score principle in public procurement where a score out of 90 is awarded to bidders for a particular tender based on their price and the remaining score out of 10 is based on the B-BBEE rating.
- [64] After much deliberation, it was agreed that a price of R150 would be submitted.⁵³ What is a matter of dispute which becomes relevant to the Commission's case and which we discuss later, is whether the R150 was inclusive or exclusive of VAT. According to Ms Morolo, she believed that at R150 including VAT, Tourvest stood a good chance of winning the tender and could potentially get onto a short list for consideration.⁵⁴
- [65] When probed on why she believed this, she said the number was not scientific and it was a number that felt reasonable in her experience.⁵⁵
- [66] Having agreed on the R150 fee, the tender bid was finalised and submitted on 15 May 2015.⁵⁶
- [67] As mentioned, whether the price was inclusive or exclusive of VAT is not clear. According to both Mr Du Preez and Ms Morolo, the issue of VAT was not discussed.⁵⁷
- [68] On 28 May 2015, once the tender had been submitted, it came to Ms Sossen's attention that Ms Morolo had submitted the tender documents with a proposed

⁵² Du Preez WS, R pg. 1179, para 3.11-3.13; Morolo WS, R pg. 1215, para 3.5.

⁵³ Du Preez WS, R pg. 1179, para 3.13.

⁵⁴ Morolo WS, R pg. 1222, para 3.24.

⁵⁵ T, pg. 258-259.

⁵⁶ Morolo WS, R pgs. 1223 – 1224, para 3.27.

⁵⁷ Du Preez WS, R pg. 1180, para 3.15; Morolo WS, R pg. 1227, para 3.35

single bundle transaction fee of R150 (VAT incl.).⁵⁸ Ms Sossen indicated to Mr Du Preez, in an e-mail dated 28 May 2015⁵⁹ that this would result in a large variance of Tourvest's revenue.⁶⁰ Since this error was discovered after the tender submission date, it could not be rectified.

- [69] Accordingly to Ms Morolo, the R150 fee was inclusive of VAT since in public sector tenders, the fees set out are required to be inclusive of VAT.⁶¹ The Bid document requires the bidder to indicate the total bid price which would be the ceiling price incl. VAT.⁶²
- [70] In the answering affidavit, Mr Du Preez indicated that the R150 included VAT whereas in his witness statement he stated that it did not.
- [71] During the proceedings, the Commission made much of this inconsistency between Ms Morolo and Mr Du Preez regarding VAT (including the inconsistency between Mr Du Preez's answering affidavit and his witness statement). In defence of this "mix-up" Tourvest argued that the aforementioned statement in the answering affidavit was made in error. The affidavit was supposed to read '*exclusive of VAT*'.
- [72] In oral evidence, Mr Du Preez explained that generally when calculating price, the amounts are VAT *exclusive* because from an accounting perspective, *"that's not necessarily a cost or an income to us you know you claim it off the record so from a profitability perspective VAT gets [dis]counted out of the calculations"*.⁶³
- [73] Furthermore, Tourvest submitted that this mix-up was clearly an error and it was not concocted after the fact as there are e-mails on 28 May 2015 between employees of Tourvest regarding this issue, long before the Commission initiated its complaint. These exchanges occurred after the submission due date of the impugned tender but before the Commission's complaint.

⁵⁸ Du Preez WS, R pg. 1180 – 1181, para 3.16; Morolo WS, R pg. 1227, para 3.34.

⁵⁹ See R pg. 1205.

⁶⁰ Du Preez WS, R pg. 1180, para 3.16.

⁶¹ Morolo WS, R pg. 1227, para 3.35.

⁶² See R, pg 601.

⁶³ T, pg. 136, line 11 -14.

- [74] Tourvest argued that no negative inferences can be drawn against Ms Morolo for failing to raise the VAT discrepancy at the time of the Commission's investigation as the Commission did not pose any questions to Ms Morolo on the VAT issue or to Mr Du Preez.⁶⁴
- [75] Given that the VAT mix-up was something of significance and not an everyday error considering the acrimonious debate within Tourvest on pricing as discussed, it is surprising that during the Commission's investigation, Tourvest did not mention these internal debates as supported by the contemporaneous correspondence at the time.
- [76] Whatever the reasons for Tourvest not disclosing this information at the time, the authenticity of the supporting correspondence has not been contested.
- [77] According to Mr Du Preez, once the Commission had investigated the matter, Ms Sossen replicated the calculations however erroneously using the figure of R136 in stead of the R150 (deleting R14 from R150 instead of 14%).⁶⁵ The documents provide a sufficiently plausible explanation for how Tourvest arrived at its price. The inference the Commission wishes us to draw is not supported by this evidence.
- [78] As we discuss below, Trigon has provided its own pricing explanation which does not support the inference sought to be drawn by the Commission.
- [79] Trigon's bid was submitted by Mr Solomons who as mentioned was no longer employed by Trigon at the time of the hearing. However, Mr Stevens gave the green-light to Mr Solomons to submit the tender at R150 (including VAT).
- [80] According to Stevens, from as far back as 2013, Trigon used [REDACTED]
[REDACTED]
[REDACTED] However, this pricing method started working against Trigon as in April 2014, it lost its first tender and others subsequently in

⁶⁴ Tourvest's HoA para 33.2.

⁶⁵ Du Preez WS, R pg. 1180, para 3.16.

⁶⁶ Stevens WS, R pg. 1254, para 7; Trigon's HoA para 16.

bidding for a number of travel services tenders for government/ public institutions in Cape Town between the period May 2014 and May 2015.⁶⁷

- [81] In terms of this tender, as Mr Stevens states, Mr Solomons wanted to prepare and submit a more competitive tender given the volumes of transactions contemplated, the significant revenues to be generated by Trigon if it won the tender and the previous instances of lost tenders by Trigon as a result of its proposed price. The fees quoted in the tender were cost based and Trigon had

[REDACTED]

- [82] According to Mr Stevens, it was Mr Solomons who determined Trigon's bid price of R150 (VAT incl.) after he sought confirmation from Mr Stevens that such price would be financially viable for Trigon to provide travel services to Parliament.⁶⁹ Mr Stevens had to confirm whether the proposed bid price would allow Tourvest to operate profitably. He had satisfied himself and gave Mr Solomons the green light.

- [83]

[REDACTED]

- [84] Furthermore, Trigon argued that even if it did submit the same tender price as Tourvest, it does not understand why the Commission only prosecuted it for contravening the Act as other bidders to the impugned tender also submitted the same price. This argument rested on Exhibit 'B'⁷¹ which illustrated four pairs of identical bids out of all 16 bidders that ultimately submitted a bid. These bidders submitted bids at the same price as another firm. On this document, there are no grounds why only the two respondents are being investigated much less why an inference must be drawn that the respondents colluded on price.⁷² The only plausible inference, according to Trigon is that the

⁶⁷ Exhibit C.

⁶⁸ Stevens WS, R pgs. 1254 – 1255, para 8.

⁶⁹ Stevens WS, R pg. 1255, para 10.

⁷⁰ Trigon's HoA para 19; See also R pg. 1144.

⁷¹ Exhibit B.

⁷² Trigon's HoA, para 10-11.

respondents arrived at their respective bid prices independently and rationally.⁷³

- [85] As mentioned the Commission distinguishes the respondents from the other bidders who submitted the same price on the basis of the relationship between them. This appears to be the distinguishing factor upon which the Commission seeks us to draw the inference that the two respondents colluded with each other. We deal with the relationship between the respondents later when we consider the Commission's theory of harm under the possibility of a shared tender.

Our conclusion regarding identical pricing

- [86] In view of the evidence, documentary and *viva voce*, we find in the respondents favour. The Commission was not able to discredit the explanations given by Mr Du Preez and Ms Morolo of how each firm independently determined its price. As shown by the evidence, Tourvest undertook to conduct detailed calculations to determine its tender price which is more so supported by the exchange of correspondence between the relevant members of that team. There is no evidence to support the conclusion that Tourvest and Trigon arrived at the figure of R150 (VAT incl.) by colluding with each other.
- [87] The person of interest in so far as Trigon is concerned is Mr Solomons who had prepared and submitted the bid, however he was not a witness in these proceedings. Ms Morolo testified that she had never heard of Trigon before the current complaint. She had also never met Mr Solomons.
- [88] It certainly would have been valuable to test the veracity of his evidence against that of Tourvest to determine whether collusion between the respondents had taken place. There is certainly no other evidence that would lead us to believe that some sort of interaction occurred between members of the Tourvest team and Mr Solomons of Trigon directly or indirectly through the TAG affiliation.

⁷³ Trigon's HoA, para 12.

- [89] We do note that Mr Stevens once was employed at Tourvest from 1999 to 2008. His affiliation with Tourvest in this regard was probed by the Commission however this did not materialise in any evidence to suggest collusion between the respondents in relation to the impugned tender.⁷⁴
- [90] All that the Commission relies on are the bid documents submitted and the similarities contained therein. This is the high watermark of the Commission's case. In the absence of any direct evidence, we have not found sufficient facts or evidence of collusion from the identical bid prices.
- [91] As mentioned, during the hearing the Commission sought to rely on the incentives for the respondents to collude on the tender. The incentives arose from two sources. Firstly, the PSA between Tourvest and Trigon which as explained pools together the buying power of the participating members in order to get better terms from providers such as airlines. Certain rebates are also given to the participating members.
- [92] Secondly, since the tender provided that it may be awarded to more than one bidder, Tourvest and Trigon had an incentive to both submit tenders in case the tender is awarded as a shared tender.
- [93] We turn to consider each of these briefly.

The possibility of a shared tender

- [94] Much evidence was led on this. As mentioned, the tender stipulated that Parliament reserved the right to issue the tender to more than one bidder. There was a dispute between the Commission and the respondents regarding whether the possibility of splitting the tender was realistic. Ms November explained that in an effort to accommodate smaller firms, Parliament could have split the tender. However, historically this had never happened, and November was unable to shed light on how this would be done.⁷⁵

⁷⁴ See T, pg 273-274; 295-297.

⁷⁵ T, pg 79, line 5 – 10.

- [95] The respondents testified that although Parliament reserved its right to award the tender to more than one bidder, it would have been impossible to split as the tender was clear that the services had to be provided in-house on Parliament's premises as was currently the case. Since there was no capacity for two providers on the premises it was unlikely that the tender would be split. Moreover having regard to the entirety of the document, the respondents submitted, it was clear that the tender did not contemplate a split bid. Mr Stevens added that there was no indication at the tender briefing that Parliament wished to depart from past practices.⁷⁶
- [96] Quite what the Commission's theory of collusion in regard to a split bid is not entirely clear. The Commission submitted that because of the affiliation between Tourvest and Trigon, Tourvest as the incumbent provider had an incentive to collude with Trigon in case Trigon won the tender. This does not explain how tendering at the same price improved the respondents' chances when for equal money each could win the tender on their own. The Commission did not support its theory with any economic basis for how the split tender would benefit the respondents. The objective evidence before us militates against the Commission's theory.
- [97] Firstly, both Tourvest and Trigon testified that their pricing for the tender was based on the 28 000 transactions annually as stipulated in the tender. Had they known that the tender would be split, their pricing would have been different. Secondly, Ms November conceded that had the tender been split, it would have been necessary for the process to start anew.⁷⁷ Thirdly, the meeting memorandum of the BEC did not highlight any prospects or give consideration to a split bid⁷⁸ and the tender was in fact awarded to one firm which is consistent with the suggestion that a split bid was contemplated only in theory.
- [98] We now turn to the Commission's theory that the PSA provided an incentive to collude.

⁷⁶ Stevens WS, R pg. 1258, paras 14.1-14.3

⁷⁷ T pg, 5.

⁷⁸ See Exhibit "A".

PSA as an incentive to collude

- [99] Recall that the benefits of the PSA are favourable terms negotiated by Tourvest through the TAG group with suppliers (including airlines) arising from the bargaining power of the members. Mr Du Preez testified that the benefits are either in the form of an upfront discount based on volumes; or in addition to the upfront discount, a rebate at the end of the contract period if certain targets are met.⁷⁹ The rebate is calculated at a ratio of ■■■ where a member of the group retains ■■■% of the rebate attributable to its volume of sales and pays ■■■% to Tourvest.
- [100] The Commission submitted that the respondents stood to benefit from colluding because of the gains they would make through the PSA. This was however not substantiated with any economic evidence.
- [101] In his witness statement Mr Du Preez attested that the benefit that Tourvest could gain as a result of Trigon winning the tender would have been minimal and would be largely outweighed by the financial benefit Tourvest would accrue if it had won the tender.⁸⁰
- [102] This is firstly because there is no evidence to show how the respondents would benefit from the upfront discounts in the PSA. The tender required that rates negotiated directly between the airlines and government be applied to Parliamentary bookings. In other words, Parliament already had its own supply agreements directly with airlines, including SAA, BA, SA Express and Airlink.⁸¹ Therefore, whatever preferred rates the winning bidder may have had with any airline, those rates would not apply. It was not entirely clear from the evidence whether any margin could be made between the winning bidder's negotiated rate with airline suppliers and the rate charged to Parliament. Without evidence in this regard, this cannot be taken any further.

⁷⁹ Tourvest also receives a monthly 'franchise' fee from its affiliate members for the use inter alia of Tourvest's shared infrastructure and intellectual property.

⁸⁰ Du Preez WS, R pg. 1188, para 6.4

⁸¹ Du Preez WS, R pg 1189.

- [103] Secondly, regarding rebates - what rebates, if any would have accrued to the respondents through the PSA is speculative. According to the PSA, a member of the buying group is entitled to a portion of the total rebate generated from the group's overall ticket sales. As mentioned, the rebate is calculated at a ratio of [REDACTED] where a member of the group retains [REDACTED]% of the rebate attributable to its volume of sales and pays [REDACTED]% to Tourvest.
- [104] Mr Du Preez testified that at the time of the tender, the majority of ticket sales by the TAG affiliates were through SAA.⁸² At the time of the tender, the preferred partner agreement between Tourvest and SAA had expired, therefore Tourvest made its calculations for the tender without a deal with SAA.
- [105] He testified further that assuming Tourvest had an agreement with SAA the benefit to Tourvest, if it had won the tender, would have been all the profits from ticket sales ([REDACTED]) and the entire rebate of [REDACTED]. In this scenario, Trigon stood to gain nothing either in rebate or profits.⁸³
- [106] On the other hand, if Trigon had won the tender, it would potentially have [REDACTED]
- In this scenario, the rebate to Tourvest would have been [REDACTED], being the [REDACTED]% of the rebate ratio discussed above.⁸⁵ Mr Stevens also testified that Trigon had much to gain by winning the tender, and everything to lose if Tourvest won the tender.
- [107] The simple calculations above undermine any economic incentives to collude. The Commission did not provide any evidence to counter this, relying rather on an inference from, *inter alia*, the identical fee and relationship between the respondents.
- [108] Ms Morolo also testified that at the time of the tender she had no knowledge of the relationship between Trigon and the TAG group or the PSA and its potential benefits.

⁸² T pg. 153 lines 23-25.

⁸³ T pg 155, line 7 – 8.

⁸⁴ T pg. 304.

⁸⁵ Du Preez WS, R pg. 1191;

[109] On the objective facts before us, the Commission has not discharged the onus to enable us to draw an inference of an agreement or concerted practice by the respondents.

Conclusion

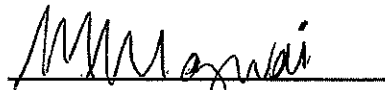
[110] In light of the above, we are unable to find that the respondents have entered into an agreement to collude in respect of travel services tender issued by Parliament. We have not been presented with sufficient evidence that would allow us to infer otherwise.

[111] The complaint referral against the respondents must therefore be dismissed.

Order

The Tribunal hereby orders as follows:

- [1] The Competition Commission's complaint referral under case number CR209Feb17 is dismissed.
- [2] There is no order as to costs.


Ms Mondo Mazwai

15 January 2020
Date

Mr Norman Manoim and Ms Yasmin Carrim concurring.

Tribunal Case Manager	: Mr Ndumiso Ndlovu
For the Commission	: Mr Khotso Modise, Mr Mfundo Ngobese, Mr Katlego Monareng
For Tourvest Holdings (Pty) Ltd	: Adv. P Ngcongo instructed by Cliffe Dekker Hofmeyr
For Trigon Travel (Pty) Ltd	: Adv. G Marriott instructed by Nortons Inc.