REPUBLIC OF SOUTH AFRICA

IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

HELD IN CAPE TOWN

Reportable

CASE NO: 145/CAC/Sep16

In the matter between:-

POWER CONSTRUCTION (WEST CAPE) (PTY) LTD	First Appellant
POWER CONSTRUCTION (PTY) LTD	Second Appellant

And

THE COMPETITION COMMISSION OF SOUTH AFRICA	Respondent

JUDGMENT: 02 May 2017

DAVIS JP

Introduction

[1] This is an appeal against an order of the Competition Tribunal ("Tribunal") of 25 August 2016 in which the Tribunal dismissed a series of *in limine* objections raised by the appellants. The background to this appeal requires an examination of the material facts which underpin the substantive issues between the parties.

The factual matrix

[2] During April 2006 SANRAL called for bids in an open tender for the periodic maintenance of National Route N1 Section 4 from Touws River to Laingsburg.

[3] Following a site inspection, Mr Kevin Konkol of Haw and Inglis (Pty) Ltd ("H & I") considered H & I, Group Five Limited and first appellant to be the only possible bidders as these firms met the required grading in terms of the Construction Industry Development Board Register. While preparing the bid, Konkol was informed by suppliers of certain input materials that they had not been approached by any other firms for quotations relating to the N1 contract. He was concerned that H & I would be the only viable bidder for the N1 contract and SANRAL would then cancel the tender.

[4] He contacted Mr John Beddingham, who at the time was employed as a Chief Estimator with the first appellant, to request that it submit a cover price for the N1 contract. Beddingham agreed to this arrangement and Konkol indicated that the cover price should be priced at above R 99 000 000,00. He also provided a Bill of Quantities document to assist Beddingham in compiling a bid.

[5] On 5 May 2006 first appellant bid a price of R 99 980 000,00 for the contract while H & I bid R 98 500 000,00. Group Five also submitted a bid of which the first appellant and H & I were not aware. On 28 July 2006 H & I was awarded the contract. It completed the project on 23 January 2008 and the final payment to it was made on 17 February 2009.

[6] On 30 June 2007 the first appellant sold its business to Power Construction (Pty) Ltd, the second appellant, as a going concern, the sale of which formed part of an internal corporate restructuring.

[7] On 1 September 2009 the respondent, initiated a complaint against several identified firms in the construction industry as well as "*other firms, including joint ventures in the construction industry*" for allegedly engaging in prohibited practices, including collusive tendering in the form of cover pricing. Neither of the appellants was identified in the complaint.

[8] Following upon this complaint, the respondent conducted an investigation, in the course of which it received information of widespread, pervasive anti-competitive conduct in the industry. The conduct consisted of "*entrenched and ubiquitous co-operation*" resulting in "*bid rigging*" or "*collusive tendering*", which mostly took the form of cover pricing. The firms that engaged in this conduct tendered for bids but colluded with each other to ensure that the successful bidder paid a price which was unaffected by competition. . Essentially, two or more firms would collude by ensuring that only one of them would be the true bidder. The true bidder would make a comprehensive and detailed bid. To ensure that this bid was successful one or more of the other firms who were not really interested in being successful would place (a) bid(s) that would be priced much higher than the one placed by the true bidder. This would assist that the true bidder to be successful in securing the contract at the price stated in its bid. The true bidder would reveal the price, also referred to as

the "*cover price*", and other confidential information about its bid to the other firm(s). The other firm(s) would then place its/their bid(s) at a price which was much higher than the cover price. Manifestly this practice was in contravention, of s 4 of the Competition Act 89 of 1998 ('the Act').

[9] On 1 February 2011 respondent published an Invitation to Firms in the Construction Industry to Engage in Settlement of Contraventions of the. The second appellant, acting through its chairman Mr Graham Power, responded to this initiative by way of a letter addressed to the respondent. The response was meant, and understood, to be from both appellants. This is understandable, as by this stage, the first appellant had become a wholly-owned subsidiary of the second appellant. In fact, in all dealings between the appellants and the respondent the parties approached the matter in a way that accepted that the second appellant spoke for and on behalf of the first appellant. For this reason, this judgment will refer to both appellants when considering or dealing with correspondence sent or received by the second appellant to the respondent.

[10] In his letter Mr Power said the following:

> "2 <u>Our experience of the industry</u>
>
> 2.1 It has been our experience that the construction industry is certainly not a "clean" industry and that anti-competitive behaviour does occur. Anti-competitive behaviour takes many forms and we have come across the following in our years in the industry:
>
> 2.1.1 bid-rigging (which took various forms, but usually entailed an agreement between two or more firms as to which one should win the tender):

> 2.1.2 collusive tendering (mostly in the form of the provision of a cover price/cover bid by one firm in agreement with another)."

[11] The letter listed five contracts in which the first appellant was involved where it engaged in anti-competitive conduct. All five contracts were completed between the period 2002 and 2004 and therefore fell outside the scope of the complaint and the investigation. Mr Power concluded the letter with the following statement:

> "In conclusion, we wish to state that we are pleased that the Competition Commission is focusing on the construction industry and providing the opportunity for the serious matter of anti-competitive behaviour in our industry to be brought in the light. Whilst it is indeed a sad day for the construction industry, we believe that it is a very necessary process, given the need for our country to rule (sic) out corruption in all spheres. It is our hope that our industry will serve as an example of clean and ethical practices in South Africa in future.
>
> Please be assured of our full co-operation and support for the tremendous work being done by the Competition Commission. Should you require any further information, please do not hesitate to contact us."

[12] Notwithstanding these two paragraphs, the appellants informed the respondent that the information supplied was not an application for settlement, as they viewed the matter as having been prescribed. Appellants adopted the attitude that, out of courtesy they were merely informing the respondent of the transgressions.

[13] On 15 April 2011 the appellants provided information with regard to the N1 contract. The information was furnished in a letter to which the FTP1 form, which spelt out the details of the N1 contract, was annexed. A relevant part of the letter reads:

> "We have found one contract which we are not certain whether we should have submitted with our submission (i.e. of 31 March 2011), as a competitive tender was submitted and no benefit discussed or received."

[14] It is clear from the contents of this letter that the appellants pleaded ignorance as to whether the conduct of the first appellant was unlawful.

[15] On 23 November 2011 the respondent wrote to the appellants informing them that its (the respondent's) investigation revealed details of unlawful conduct regarding the N1 contract for which they were to be held accountable. The contents and import of this letter is dealt with later in the judgment. For the moment it bears recording that the letter invited the appellants to engage in settlement discussions with the respondent over the contravention that occurred. It should be remembered that the appellants had confessed to the contravention of the Act on 15 April 2011. Nevertheless, they elected not to settle the matter with the respondent, despite confessing to engaging in anti-competitive conduct,

[16] On 17 December 2014 respondent referred the dispute to the Tribunal. On 12 February 2015, the appellants filed a single answering affidavit thereto and the respondent replied on 24 April 2015, all of which was a precursor to a hearing and which eventually resulted in the decision by the Tribunal on 25 August 2016. It is this decision which is the subject of this appeal.

[17] The answering affidavit was deposed to by a Mr Andries Jacobus, the Chief Executive Officer of the first appellant, who made the following concession:

> "The first and second respondents (appellants herein) admit that the first respondent participated in a tender in which its employee, Beddingham represented that the first respondent was a genuine bidder when truth be told it was not."

[18] However, at the hearing before the Tribunal, appellant pleaded four points *in limine* being:

1. the absence of a complaint initiation in respect of the conduct referred to the Tribunal for adjudication;
2. prescription of the complaint, in the event that the respondent was able to prove a valid initiation;
3. the characterisation of the conduct fell outside of the scope of the prohibition contained in s 4 of the Act; and,
4. the Tribunal could not impose a penalty on a firm which does not contravene the Act, in this case by imposing a penalty on the second appellant, which had bought the business of the first appellant as a going concern.

The decision of the Tribunal

[19] The Tribunal's decision, concluded that the September 2009 initiation had met the requirements for a valid initiation. It, accordingly, dismissed the point *in limine* that the referral against the appellant was jurisdictionally invalid. Similarly, it held, on the basis of its approach to the evidence, that the effect of the first appellant's actions continued until 17 February 2009 when H & I received the final payment for a tender

which had been the subject of collusion. Accordingly, the impugned conduct had not ceased three years prior to the initiation of the compliant by respondent on 1 September 2009. It followed that the matter had not prescribed in terms of s 67 (1) of the Act.

[20] Turning to the question of whether administrative penalties could be imposed after the acquisition of the first appellant's business by the second appellant, the Tribunal held that this was an issue that was better addressed in the main hearing wherein it would enjoy the benefit of seeing and hearing witnesses and receiving any other evidence the parties deemed necessary or appropriate. It thus dismissed this point *in limine*. A similar approach was adopted to the characterisation point which was raised *in limine* by the appellants.

The appellants approach on appeal

[21] When the matter came before this court, Mr Brassey, who appeared together with Ms Engelbrecht on behalf of the appellants, informed the Court that appellants' appeal was focussed exclusively on the prescription point and the related question as to when the initiation had actually taken place. For this reason, it was not required that this Court deal with any of the other points *in limine* referred to in [18].

The prescription argument

[22] Section 67 of the Act provides that "*a complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased*". Based on this wording, the complaint can only be competently initiated if the prohibited practice concerned has not ceased more than three years prior to the moment of initiation.

[23] The appellants developed two arguments in this regard. In their view, there was no initiation of the complaint concerning conduct involving the second appellant in September 2009, and there could not have been an initiation of the complaint by November 2011 when respondent questioned why the appellants had failed to report its participation in the N1 project. Further, as the respondent had not initiated the complaint as at April 2011, there was no basis by which, on the record, it could be concluded that an initiation had taken place before 5 December 2012.

[24] On this argument it meant that, on any of these factual bases, prescription had taken place. In explication of this submission, the appellants contended that the agreement between the second appellant and H & I concerned the submission of a tender which was concluded on 3 May 2006. The tender was awarded to H & I on 28 July 2006. Thus, they contended that the collusive tendering ceased with the award of the tender on 28 July 2006. But even on the argument raised by the respondent that the final payment date of 17 February 2009 could be considered to be the cessation of the prohibited practice, the appellants contend that given that the

initiation statement had taken place by no earlier than 5 December 2012, s 67 (1) of the Act remained applicable. It is to these submissions that I now turn.

The date of initiation

[25] It is common cause that the respondent initiated a complaint in respect of various participants in the construction industry on 1 September 2009. At that time the respondent was not aware of the prohibited practice which is now the subject matter of the present dispute.

[26] As noted in [9], on 1 February 2011 the respondent issued a general invitation to firms in the construction industry to come forward with information with regard to prohibited practices in the construction industry. In response thereto, the appellants then reported the second appellant's participation in the N1 project which was in contravention of the Act. This information was received by respondent on 15 April 2011.

[27] The respondent contends, however, that the nature of the information received concerned conduct other than that which is the subject matter of this referral. The respondent then decided to investigate all firms that had come forward with information following its fast track invitation. Nonetheless, the appellants contend that no initiation took place by respondent in April 2011 nor did the respondent investigate the conduct at that time.

[28] In this connection much emphasis was placed by Mr Brassey on a letter of the respondent dated 23 November 2011:

> 1. 'The Competition Commission's ("Commission") investigation of bid rigging conduct regarding Construction projects has revealed that your firm, Power Construction, is implicated in a project which was not disclosed in their application for settlement dated 31 March 2011. The details of this project are set out in Table 1 below:
>
> Table 1: Construction projects
>
Maintenance of National route N1 from Touws to Laingsburg	N001-040-2004/1	Cover price	01 September 2008	CE
>
> 2. The Commission is thus inviting your firm to consider settling this project in accordance with principles contained in the invitation to Firms in the Construction Industry to Settle Bid Rigging Conduct.
> 3. Should your firm decide to settle this project, the Commission will incorporate it into your settlement application, which is currently under evaluation.
> 4. Your client is required to advise the Commission, before close of business on 30 November 2011, whether it will settle this project.
> 5. Should your client decide not to settle, the Commission will initiate prosecution proceedings against your firm at the Competition Tribunal for this project."

[29] Mr Brassey submitted that, if the respondent had indeed turned its attention to the information contained in the appellants' submission of 15 April 2011, that is on the date respondent received the letter, it could not, by the end of November 2011, have been under the impression that the appellants had failed to report the prohibited conduct. Accordingly, the respondent's letter of November 2011 was inconsistent with any allegation that it had made a decision to pursue a complaint against the appellants from the date of appellants' submission of the information contained in the letter of 15 April 2011.

Evaluation

[30] In order to evaluate these submissions, it is important to keep in mind two key sections of the Act, namely s 49 B entitled "I*nitiating a complaint*" and s 50 headed "*Outcome of complaint*". Section 49 B, insofar as it is relevant, provides that "*the Commissioner may initiate a complaint against an alleged prohibited practice*". Section 49 B (3) provides that, upon initiating or receiving a complaint in terms of the section, "*the Commissioner must direct an inspector to investigate the complaint as quickly as practicable*".

[31] In terms of s 50 of the Act, at any time after initiating a complaint, "*the Commission may refer the complaint to the Tribunal*". These sections and, in particular s 49 B, have been the subject of significant litigation. In *Woodlands Dairy (Pty) Ltd v Milkwood Dairy (Pty) v The Competition Commission* 2010 (6) SA 108 (SCA) the court dealt with the requirements of a valid complaint initiation and referral. In *Woodlands,* it appears that the Competition Commissioner initiated, without any qualification, a full investigation into the milk industry. He did not initiate a specific complaint against an alleged prohibited practice of specified firms which would then have led to a direction to an inspector to investigate.

[32] The SCA held, with regard to the initiation statement, that it must be based on a reasonable suspicion that a prohibited practice had taken place. Harms JA, who penned the judgment, went on to say the following at [35] –[36:

> "'There is in any event no reason to assume that an initiation requires less particularity or clarity than a summons. It must survive the test of legality and intelligibly. There are reasons for this. The first is that any interrogation or discovery summons depends on the terms of the initiation statement. The scope of a summons may not be wider

> than the initiation. Furthermore, the Act presupposes that the complaint (subject to possible amendment and fleshing out) as initiated will be referred to the Tribunal. It could hardly be argued that the Commission could have referred an investigation into anti-competitive behaviour in the milk industry at all levels to the Tribunal.
>
> Members of the supposed cartel were in fact mentioned in the initiating statement. It was therefore not a case where no cartel member had been identified. The problem is that there were not facts that could have given rise to any suspicion that others were involved. A suspicion against some cannot be used as a springboard to investigate all and sundry. This does not mean that the Commission may not, during the course of a properly initiated investigation, obtain information about others or about other transgressions. If it does, it is fully entitled to use the information so obtained for amending the complaint or the initiation of another complaint and fuller investigation."

[33] On the basis of these *dicta*, if an investigation by respondent takes place and during the course of, or as a result thereof, it learns of further parties which may have committed the prohibited practice, the complaint, from which these firms were initially excluded, can be amended to so include them, triggering further consequences as set out in s 50 of the Act.

[34] In *Competition Commission v Yara* 2013 (6) SA 404 (SCA) the court at [21], said the following about the requirement to so act:

> "Since no formalities are required, s 49 B (1) seems to demand no more than a decision by the Commission to open a case. That decision can be informal. It can also be tacit. In argument, counsel for Omnia informed us that, in practice, the initiation usually takes the form of a memorandum. I have no doubt that for the sake of good order and certainty, that would be so. But it is not a requirement of the Act."

[35] Applying *Woodlands* and *Yara* together to the facts of the present dispute, the following conclusion is reached: the respondent initiated a complaint against 19 construction companies. It included the following sentence: "*other firms including joint ventures in the construction industry*". At the very least, the complaint highlighted the possibility that other firms could be included in the complaint. Pursuant

to this initiation, on 1 February 2011, the respondent issued its "*Invitation to Firms in the Construction Industry to Engage in Settlement of Contravention of the Competition Act*" in which it invited firms which had committed infringements under the Act to provide particulars of any contravention and to engage in settlements in respect of such conduct; thereby circumventing the need for the more formal and intricate legal procedures to be followed.

[36] It was in response to this invitation, on 31 March 2011, that the first appellant submitted details pertaining to five of its projects in which prohibited practices had taken place. Four days later, further details were provided with respect to second appellant's involvement in the N1 tender. Indeed, at this point Mr Callum, on behalf of the appellants, wrote to the respondent explaining that the appellants were uncertain as to whether they should have included this information with the previous submission, owing to the alleged fact that the second appellant had received no benefit from the unlawful conduct in which it engaged.

[37] As a result of this letter, the respondent generated a further letter on 23 November 2011 inviting the appellants to settle in accordance with the February invitation. Significantly, in this letter, respondent made it clear that, were the appellants to eschew its invitation, "*the Commission will initiate prosecution proceedings against your firm at the Competition Tribunal for this project.*" This passage was a clear reference to s 50 of the Act which provides that the respondent may refer a complaint to the Tribunal.

[38] Manifestly, in either April or in November 2011 the appellants had been added to the initial complaint in this case, not as a result of an investigation which had taken

place but, in this case, as a result of the appellants' own response to the February invitation. This act is significant because the *dicta* in *Woodlands* upon which appellant seeks to rely was based on a finding of illegality of an action by the Commissioner, pursuant to a process of investigation by the respondent which had resulted in the interrogation of various parties which had not, in any way, been made party to the initiation. Further, the complaints in *Woodlands* were the direct consequence of an initially invalid complaint procedure. By contrast, in this case, it was the appellants which volunteered the relevant information to the respondent, as a consequence of which they were added as parties to a valid complaint, admittedly informally. Viewed accordingly, this addition falls within the framework set out in the *dicta* in *Woodlands* and *Yara* read together.

[39] The appellants sought to take advantage of an *obiter dictum* in *Yara* which is open to an interpretation that it sought to rewrite portions of *Woodlands*, at least by implication (see [26] of *Yara*). There the dispute focussed on the degree of correlation between an initiating complaint on the one hand and the ultimate referral on the other. But this is not the nature of the dispute which confronts this Court in the present case.

[40] In summary, the dispute which confronts this Court is whether, having received information from the appellants pursuant to its February invitation, which in itself flowed from the initiation of a complaint against 19 specified entities together with others that could be added, the respondent included the appellants as part of the entities specified in the complaint of September 2009. Given that the judgment in *Woodlands* accepts that it is permissible to add a firm to an existing complaint

subsequent to an investigation and that the judgment in *Yara* recognises that the initiation does not require any level of formality, the evidence clearly indicates that the appellants were made the subject of a referral in April 2011. Even if this is not correct, at best for the appellants this addition then took place pursuant to the letter of the respondent to the appellants dated 23 November 2011.

Cessation of Practice

[41] The only question which is then left for determination is whether the prohibited practice ceased three years prior to November 2011, at the latest. Appellant's main contention is that the practice ceased when the tender was awarded to H & I on 28 July 2006. If this submission is correct, it follows that the appellants must succeed in terms of its plea based on s 67 (1) of the Act. Hence, the issue now to be decided is the meaning of the term "*cessation of the practice*" within the context of the facts of this case.

[42] In its decision, the Tribunal held that the practice, for the purpose of s 67 (1) of the Act ceases when its effect has ceased. It held that the effects of the actions of appellant continued at least until 17 February 2009, when H & I received a final payment pursuant to the contract. On this basis, the conduct had not ceased for three years prior to the initiation statement and consequently no prescription had taken place.

[43] The key question is what is meant by "*cessation of the practice*". In *Paramount Mills (Pty) Ltd v The Competition Commission* [2012] ZACAC 4 one of the issues raised by the appellant was that it was alleged to have contravened the Act for

the first time when an initiation statement was issued on 02 October 2009. It argued that this was more than three years from the latest date, September 2006, on which the respondent actually alleged that the appellant engaged in conduct that constituted a contravention of the Act. The argument raised by the appellant in this case was that the prohibited practice in which the appellant was alleged to have engaged was the conclusion of an agreement either at a meeting or by telephone, which activity had ceased in 2006. Admittedly, the case turned on a number of questions, including whether the appellant had placed sufficient evidence in its answering affidavit before the Tribunal to show that the conduct had ceased in 2006. However, critical to the present case is the following passage at [44]:

> "The prohibited conduct does not end or cease with the conclusion of the agreement fixing the selling price. It continues to exist and its effect continues to be felt when the future prices, agreed upon pursuant thereto are implemented."

[44] A similar approach was adopted by this court in *Videx Wire Products (Pty) Ltd v Competition Commission of South Africa* (CAC Case Number 124/CAC/Oct12) at [80]:

> "A prohibited practice is generally constituted by initiating conduct followed (if the initiating conduct is successful) by the anti-competitive effects intended by the colluding parties. Section 67(1) envisages that a prohibited act will be one which continues over a period of time and is thus capable of ceasing. The prohibited act is thus not constituted only by initiating conduct but also, within appropriate bounds, by its intended ongoing effects. To take a simple example, if two firms collude with each other to fix prices, and if each of them then concludes a three-year supply contract with separate customers at the fixed prices, the prohibited price-fixing is constituted by the initiating act (where the suppliers strike their secret illicit deal) and by the conclusion and performance of the resultant contracts with the customers."

[45] The law to be applied in this case is thus settled and there is no reason to depart therefrom. In this case, the prohibited practice was that of collusive tendering, in terms of s 4 (1)(b) (ii) of the Act, as a result of which the second appellant agreed to submit a tender to SANRAL with the express purpose of keeping alive a tender process for the maintenance of a stretch of the N1 project. This action was to the ultimate benefit of H & I. Appellant was thus a party to a prohibited practice of collusive tendering. The contract that flowed from this practice and was inextricably linked to the prohibited practice ended when the last act relating thereto was performed, namely the receipt of the final payment to H & I: this payment was the completion of obligations in terms of a contract which was the product of a prohibited practice that occurred on 17 February 2009. It follows that the prohibited practice ceased on 17 February 2009.

[46] For this reason, as the initiation, on the finding of this Court, took place in 2011, the provisions of s 67 (1) of the Act are of no assistance to the appellants. . The *in limine* point raised in respect of prescription was correctly dismissed by the Tribunal.

For all of these reasons therefore, the appeal is dismissed with costs.

DAVIS JP

VALLY and MAKGOBA AJJA concurred