



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CR030Jun15

In the matter between:

THE COMPETITION COMMISSION

Applicant

and

STANLEY'S REMOVALS CC

First Respondent

CAPE EXPRESS REMOVALS (PTY) LTD

Second Respondent

Panel	: Norman Manoim (Presiding Member)
	: Anton Roskam (Tribunal Member)
	: Mondo Mazwai (Tribunal Member)
Heard on	: 29 September 2016
Order and Reasons issued	: 07 December 2016
Public version issued:	: 12 December 2016

Reasons for Decision (Public)

Introduction

1. This matter concerns a complaint referral by the Competition Commission ("the Commission") against Stanley's Removals CC ("Stanley's") and Cape Express (Pty) Ltd ("Cape Express") in terms of section 50(1)(a) of the Competition Act, 89 of 1998 as amended ("the Act"). The Commission alleges that Stanley's and Cape Express, being competitors in the market for the provision of furniture removal services, agreed to tender collusively in that market.

2. At the time of hearing the complaint, Cape Express had admitted its involvement in the alleged collusive tendering and concluded a settlement agreement with the Commission, which has since been confirmed as an order of the Competition Tribunal ("the Tribunal"). In these reasons, we shall refer to collusive tendering and bid-rigging interchangeably.
3. Stanley's also admitted involvement in eight of ten instances of bid-rigging alleged by the Commission, and sought to settle with the Commission. However, the settlement negotiations reached a deadlock over the quantum of the penalty. The hearing before us was concerned only with the appropriate penalty to be levied against Stanley's. These are our reasons and order in that regard.

Background

4. On 3 November 2010, the Commission initiated an investigation into possible collusion in the furniture removal industry. The initiation was against several firms in the furniture removal industry, including Cape Express, the second respondent in this matter.
5. On 1 June 2011, in view of further information that came to light, the Commission amended the above complaint initiation to include 24 other firms that were implicated in the conduct. Stanley's was one of the 24 firms.
6. On 1 June 2015, the Commission filed a complaint referral with the Tribunal against Stanley's and Cape Express, alleging that Stanley's and Cape Express, as competitors of each other, had engaged in bid-rigging in contravention of section 4(1)(b)(iii) of the Act.
7. In the referral affidavit, the Commission alleges that its investigation of the complaints initiated in 2010 and 2011 revealed pervasive anti-competitive conduct in the furniture removal market and that the industry was characterised by entrenched and ubiquitous co-operation and endemic practices of collusive conduct.
8. The collusive conduct took the form of cover pricing which the Commission defines generally as a price provided by a firm that wishes to win a tender to a firm that does not wish to win the tender, so that the firm that does not wish to win the tender, submits a higher price to enable the lower bidder to win the tender. The cover price could also be provided by a firm that does not wish to win the tender to a firm that does wish to win it.
9. According to the Commission, there is a general practice by customers in the furniture removal industry to require three quotes for removal services. To assist a customer,

furniture removal firms seek quotes from competitors on behalf of customers. Cover prices are accordingly provided by competitors, depending on which firm the parties agree should win the tender. This conduct, according to the Commission, deprived customers from obtaining prices that would have been the outcome of independent competition between competitors.

10. Following its investigation, the Commission invited the firms in the industry to settle instances of collusive conduct in which they were involved. The Commission has since settled with approximately 16 firms and is in the process of negotiations or prosecutions of the remainder.
11. Insofar as Stanley's is concerned, the Commission's investigation revealed ten instances of cover pricing between Stanley's and Cape Express that took place between November 2008 and October 2012. In its answering affidavit, Stanley's admitted involvement in seven of the alleged instances. Following a pre-hearing in April 2016, Stanley's admitted its involvement in one more instance of bid-rigging, bringing the total number of admitted instances to eight of the ten instances. Following a further pre-hearing, the Commission decided not to pursue the other two instances.
12. This means that for the purpose of considering a penalty it is common cause that Stanley's was involved in eight instances of cover pricing.

Hearing

13. The Commission sought a 10% administrative penalty against Stanley's for the 2015 financial year¹ in its referral affidavit.
14. In oral argument at the hearing, the Commission submitted that we should find that each instance of the admitted contraventions constituted a separate and independent contravention and, as such, impose an administrative penalty for each admitted contravention.
15. Mr Boule, who appeared for Stanley's, submitted that if each incident were to be regarded as separate and distinct, as contended for by the Commission, then the Commission's guidelines for the determination of administrative penalties ("the Commission's guidelines") would apply. The Commission itself concedes this in its heads of argument².

¹ According to Stanley's, this would have amounted to approximately R [...] for all ten incidents, as the Commission required each incident to be fined for separately.

² See paragraphs 26 and 27 of the Commission's heads of argument.

16. In essence, the Commission's guidelines provide that, in instances of once-off bid-rigging, the Commission will consider the affected turnover to be the greater of: the value of the tender; the contract value concluded pursuant to the tender; or the actual amount ultimately paid for the tender. This applies equally to the firm that wins the tender and the one that loses it.
17. In his witness statement, Mr Geoffrey Paul Henebrey ("Mr Henebrey"), the managing director of Stanley's, stated that the total bid amount of the tenders where cover prices were procured was R129 425.00 (this included the five bids it won and the three it lost, as per the Commission's guideline). He submitted further that Stanley's earned approximately R80 000.00 in turnover from five of the eight instances of the cover pricing where it received the tender (the other three tenders were lost). According to him, Stanley's profit arising from the contraventions was approximately R8 000.00.
18. Applying both the Commission's guideline and the six-step approach developed by the Tribunal in the *Aveng* matter, Mr Boulle submitted that a penalty amount of R62 641.88³ would be appropriate. On the day of the hearing, Stanley's made a 'with prejudice' offer to the Commission, to increase this amount to R350 000.00⁴. Mr Boulle accepted that applying the Commission's guidelines, the penalty amount (of R62 641.88) seemed low, therefore in good faith, Stanley's increased the offer (to R350 000.00). The Commission declined the offer.
19. In response, the Commission contended that its guidelines were not applicable in the present case as it submitted that they only apply to parties that settle early with the Commission. Those who do not, must face the full might of the law and pay the maximum penalty imposed by law. Instead of using the bid amount (of R129 450.00) as contended for by Stanley's, the Commission submitted that Stanley's total turnover in 2015 (that being the turnover derived from Stanley's line of business) should be used. Stanley's turnover in 2015 was R [...]⁵.

³ See Stanley's heads of argument, Annexure "X". Whereby Stanley's used the amount of the tenders in question as the affected turnover (R129 425.00) and the *Aveng* six-step approach; of which the base amount was calculated as 30% of the affected turnover; with no duration multiplier; no adjustment as the 10% cap was not exceeded; no mitigating/aggravating factors taken into account when adjusting the fine amount; and finally no further adjustments so as to not exceed the 10% cap. Stanley's came to an amount of R38 827.50 which it increased to the R62 641.88, when interest was taken into account.

⁴ Stanley's had previously made three substantially higher 'without prejudice' offers which it withdrew, and made the first 'with prejudice' offer of R150 000.00.

⁵ Confidential information.

20. On the day of the hearing, the Commission submitted its calculation of the penalty amount for the first time, based on the six-step approach adopted in the *Averg* matter. The amount sought by the Commission was R1 575 715.20⁶ in respect of each of the eight instances, which totals R12 605 721.60. However in reply the Commission suggested that the penalty be set at R1 700 000.00⁷ for all eight instances presumably because it realized that the original suggestion was unsustainable.

Our Assessment

21. It is trite law that the powers of the Tribunal to impose administrative penalties are set out in section 59(3) of the Act.
22. We have previously held that there is no scientific approach to the determination of an administrative penalty, the overriding principle is fairness and proportionality.⁸ The Competition Appeal Court has also confirmed, in the *Southern Pipeline*⁹ matter, that: “A penalty should be proportional in severity to the degree of blameworthiness of the offending party, the nature of the offence and its effect on the South African economy in general and consumers in particular. [It] should not only promote the objective of deterrence but sight should not be lost of fairness to the offending party. In particular, a penalty should not be imposed in order to destroy the business of the offending party.”
23. Stanley's submitted that it would be grossly disproportional to impose a fine of 10% of its turnover 2015 turnover (which was R [...] ¹⁰), let alone for each bid-rigging instance, given the low value (R129 450.00) of the tenders concerned. Stanley's further submitted that, in the period 2008-2012, it engaged in only eight instances of bid-rigging, when, by way of example, in March to May 2012 it provided approximately 647 quotations, at an average of 212 per month.
24. If the fine proposed by the Commission were to be imposed, Mr Henebrey stated in his witness statement, he would be forced to shut down the business, which has been in operation for 90 years and employs 36 people.

⁶ In reaching this amount the Commission utilised the *Averg* six-step approach and took 10% of the [...] for Stanley's which amounted to R1 575 715.20 and requested the Tribunal to fine Stanley's this amount in respect of each of the eight instances of bid-rigging. Thus the final amount equalled to R12 605 721.60.

⁷ See Transcript, page 33, line 8.

⁸ See *Competition Commission vs Isipani Construction (Pty) Ltd and Neil Muller Construction (Pty) Ltd* CR128Nov14 at par [20].

⁹ *Southern Pipeline and Another v The Competition Commission* 105/CAC/Dec10 at par [9].

¹⁰ Confidential information.

25. He also provided an account of the steps it had taken to settle with the Commission and submitted that it had co-operated with the Commission. The Commission conceded that Stanley's had been co-operative. It acknowledged that there were no aggravating factors against Stanley's¹¹, save that it did not settle early like some of the respondents.
26. While we have no difficulty with the carrot and stick principle applied by the Commission in settlement negotiations, it cannot be without regard to fairness and proportionality. Where firms settle early, they should be incentivised through lenient fines. Where they do not, appropriate consequences should follow.
27. However, we have not been provided with any evidence that the failure to settle was due to a lack of co-operation on Stanley's part. Its concern was that of being overreached through what appeared to be a dogmatic approach to setting the fine. While we cannot comment on the "*without prejudice*" negotiations, the fact that the Commission departed from its original suggestion of an appropriate fine in opening argument (approximately R12 600 000.00) to an amount of R1 700 000.00¹² in closing argument seems to vindicate the contention of Stanley's that the Commission had adopted an unreasonable approach to the settlement of the quantum.
28. In our view, neither the Commission's guidelines nor the *Aveng* methodology serve as an appropriate template to come to an appropriate and proportional penalty, on the facts of this case. The latter is appropriate in circumstances of a long standing and on-going overarching agreement over an extended period of time. While the Commission's guidelines deal with once-off bid-rigging, Stanley's conduct does not entirely fit this category either. This is because the bid-rigging was not once-off but recurred over a period of four years (with no evidence, however, that it formed part of a broader single, overarching conspiracy).
29. For that reason, we have decided the penalty on the facts of this case, taking into account proportionality and fairness. Mr Boule submitted that the Commission's proposed penalty was out of kilter with amounts paid by other respondents who had settled with the Commission. By way of example, Cape Express, with whom Stanley's has admitted to have agreed cover pricing, paid R645 710.00 for 1 774 incidents. The highest amount paid was R4 273 060.80 for 3 487 incidents.

¹¹ See Transcript, page 5-9.

¹² See Transcript, page 33, line 8.

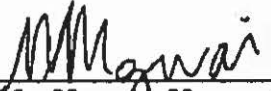
30. Joel Transport (Pty) Ltd paid R150 582.45 (5% of its turnover in 2013) for 12 offences, Reliable Removals CC paid R90 563.00 (4% of its 2013 turnover) for six offences, and Del Transport CC paid R210 415.45 (5% of its 2013 turnover).
31. Settlements in similar cases by way of consent orders do not create precedents that bind the Tribunal in opposed matters. This is because the discretion in approving a consent order is different to one exercised in an opposed case. In the former, the case law suggests that the Tribunal will only interfere if the penalty is "*shockingly inappropriate*",¹³ in the latter the Tribunal determines "*an appropriate penalty*".¹⁴ However, they may be useful in determining a yardstick for setting the level of a penalty and we have in this case had regard to them.
32. The first issue we have to decide is which financial year to use for the purpose of calculating the penalty. We have decided to use the 2012 financial year. This is because both the Commission's and Stanley's counsel accepted that 2012 would be the most representative year as the contraventions concerned occurred in the period 2008-2012, with six of the eight contraventions taking place in 2012. Having weighed all of the above factors, we have decided to impose a penalty in the amount of R450 000.00 of Stanley's 2012 financial year. The amount represents approximately 3.5% of Stanley's turnover.

¹³ See *Network Healthcare Holdings Ltd, Community Hospital Group (Pty) Ltd vs The Competition Commission 75/CAC/Apr08* at par [29] where, in the context of consent orders, the court held: "*It seems to me that the true inquiry before the Tribunal in this context is whether the agreement is a rational one, whether it meets the objectives set out above and is not so shockingly inappropriate that it will bring the Competition authorities into disrepute.*"

¹⁴ See section 59(3).

Order

1. Stanley's has contravened section 4(1)(b)(iii) of the Act.
2. Stanley's is ordered to pay R450 000.00. This amount must be paid in two equal instalments. The first within four months of the date of this order and the second four months thereafter.
3. No order as to costs is made.


Ms Mondo Mazwai

07 December 2016
DATE

Mr Norman Manoim and Mr Anton Roskam concurring

Case Manager	: Kameel Pancham
Tribunal Researcher	: Lulama Mtanga
For the Commission	: Adv. T Ngcukaltobi instructed by Ndzabandzaba Attorneys
For Stanley's Removals	: Adv. A J Boule instructed by Barkers Attorneys