

SOUTH AFRICA / JUDGMENT

Competition Commission v Catha Silkscreen Printers CC and Others (CR086Jun17; CR088Jun17) [2020] ZACT 97 (30 April 2020) [2020] ZACT 97

COURT

Competition Tribunal

BEFORE

Andreas Wessels, Mondo Mazwai, Enver Daniels

CASE / FILE NUMBER

CR086Jun17; CR088Jun17

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CR086Jun17 and CR088Jun17

In the complaint referral between:

Competition Commission Applicant

And

Catha Silkscreen Printers CC First

Respondent

Melemo Trading CC Second

Respondent

Lounge 848 CC Third

Respondent

Nakanyane Business Solutions CC Fourth

Respondent

Litabe and Seema Trading CC Fifth

Respondent

Panel: Andreas

Wessels (Presiding Member)

Mondo Mazwai (Tribunal Member)

Enver Daniels (Tribunal Member)

Heard on: 11,

12 and 13 September 2018

Last submission received on: 13 December 2018

Order issued on: 30

April 2020

Reasons

issued on: 30

April 2020

REASONS

FOR DECISION

Introduction

[1] The Competition Commission (“the Commission”) referred a complaint of price fixing and collusive tendering against the respondents (“the respondents”). It contends that the respondents have contravened section 4(1)(b)(i) and (iii) of the Competition Act 89 of 1998 (“the Act”).

Relief Sought

[2] The Commission, in relation to the alleged conduct, sought the following relief:

[2.1] Declaring that the Respondents contravened section 4(1)(b)(i) and/or (iii) of the Act;

[2.2] Interdicting the Respondents from engaging in conduct in contravention of section 4(1)(b)(i) and/or (iii) of the Act;

[2.3] Ordering the Respondents to be liable for payment of an administrative penalty equal to 10% of their respective annual turnovers in terms of section 58(1)(a)(iii), read with section 59 of the Act; and

[2.4] Further and/or alternative relief.

Background

- [3] On or around 14 November 2014, the Treasury of the Free State Provincial Government (“Free State Provincial Treasury”) issued an invitation to bid for the supply and delivery of office stationery under tender number: FST005/14/15. The bid was described as a transversal contract for the supply and delivery of office stationery for the Free State Provincial Treasury and stipulated that the successful bidder would be required to complete and sign a written Contract Form (SBD7). The closing date for the tender was 5 December 2014.

The Tender

- [4] The bid document itself suggests that only a single bidder will be successful. However, the Free State Provincial Treasury intended to use the bids to appoint a number of service providers to supply stationery to various provincial departments. It would appear that this approach is consistent with the aim of the government to empower and to promote small businesses. Correctly construed, the bid was actually an invitation to businesses to indicate their willingness and ability to supply stationery to provincial government departments at a price which would ultimately be determined by the Free State Provincial Treasury.
- [5] Although the bidders were expected to quote prices at which they would supply stationery, those prices were not necessarily determinative of whether a bidder would be successful in its bid, as the final price would be determined by the Free State Provincial Treasury.
- [6] The Free State Provincial Treasury’s adjudication provisions for the tender are instructive as they suggest, as indicated above, that only one bidder would receive the award of the bid. These provisions state, amongst other things, that:
- [8.1] The bidder obtaining the highest number of total points will be awarded the contract;
- [8.2] If two or more bids have been equally scored, the successful bidder will be the one with the highest number of B-BBEE preference points unless they have scored equally in which event functionality will play a part in determining the successful bid; and
- [8.3] In the event of the bids being equal in every respect, the final award will be made by drawing lots.
- [7] The bid document also contained special conditions which provided additional information and clarity on the invitation to bid.
- [8] The various provincial departments in respect of which the bid applied were grouped into three clusters and bidders were advised that they would not necessarily be considered for all the clusters.
- [9] The evaluation process is explained in some detail in section 9 of the bid document.

- [10] Technically, the overall evaluation process entailed a 90/10 preferential point system whereby 90 points were allocated for the total competitive price of the bid and 10 points for B-BBEE.
- [11] Functionality was accorded 60 points but was separately adjudicated.
- [12] The 90/10 is important for our consideration of this matter, because despite this provision, the “government reserves the right to negotiate a flat rate with shortlisted bidders in order to arrive at an acceptable flat rate per item. The pre- determined market related prices will be used as a baseline during the evaluation process. Prices that are unreasonably lower or higher than the market related prices will not be considered.”[1]
- [13] Contracts were to be concluded with more than one service provider, for economy and convenience, in each district and all service providers were required to indicate unit prices. The intention was clearly to appoint a number of small businesses to supply stationery to the provincial departments and not only one supplier. This distinguishes a transversal contract from the usual type of invitation to tender where only a single bidder is awarded the tender.
- [14] The process, for this type of tender, is fairly elaborate and commences with a bid usually being advertised for a period of 21 days. When the bid closes the names of those who submitted bids are read out so that all the bidders will know who had submitted bids. The bids are checked for compliance and the bid evaluation committee will check each bid for functionality and then the 90/10 process will commence. That process was followed in this instance.

The Commission’s case

- [15] On 6 August 2015, the Commission received a complaint (“first complaint”) from Ms Linda Riddles of the Free State Provincial Treasury alleging that Catha Silkscreen Printers CC (“Catha”) and Melemo Trading CC (“Melemo”) may have entered into an agreement and/or engaged in a concerted practice, to fix prices and to tender collusively in response to the tender.

- [16] The Commission initiated a second complaint on 27 January 2016 against Catha, Melemo, Lounge 848 CC (“Lounge 848”),

Nakanyane Business Solutions CC (“NBS”) and Litabe and Seema Trading CC (“Litabe”) for allegedly colluding when bidding for the tender. The second initiation was based on information gathered during the investigation of the first complaint.

- [17] The first and second complaints were consolidated and investigated as one complaint in terms of Rule 17(2) of the Rules for the Conduct of Proceedings in the Competition Commission.

- [18] The Commission alleges that the respondents had submitted similar bids, including the same or similar prices for certain stationery items and similar letters from suppliers, in response to the tender for the supply and delivery of office stationery to the Free State Provincial Treasury. The Commission contends that this conduct was the result of an agreement and/or a concerted practice between the respondents
- [19] Catha and Melemo had obtained and submitted similar letters, from Avis, regarding vehicles which they intended to use to deliver the stationery. Lounge and Litabe obtained and submitted similar letters from Blue Line Office Supplies ("BLOS"), which had agreed to supply them with stationery.
- [20] According to the Commission, these similarities in the individual bids suggested collusion on the part of the respondents and constituted price fixing and collusive tendering in contravention of section 4(1)(b)(i) and/or (iii) of the Act.

Respondents' Defence to the Commission's case

- [21] The respondents deny that they colluded with each other when bidding for the tender.
- [22] On 27 November 2014, the respondents attended a compulsory briefing session convened by the Free State Provincial Treasury in respect of the Stationery Transversal Contract.
- [23] Ms Gloria Nakanyane, who was employed by BLOS at the time, explained that she had prepared quotes, in her personal capacity, for the first (Catha), fourth (Nakanyane) and fifth respondents (Litabe) without any one of them knowing that she was preparing quotes for the others. BLOS is the only/or largest stationery supplier in Bloemfontein.
- [24] Ms Gloria Nakanyane is married to Ms Mating Elizabeth Nakanyane's uncle and offered to prepare a quotation for the fourth respondent, NBS,[2] if it wished to participate in the tender. She gave NBS a USB drive which contained the tender documents and a pricing document, based on the BLOS prices. The pricing document included the mark-up on the stationery items, calculated by her, based on her experience as a sales representative.
- [25] Unknown to Ms Mating Elizabeth Nakanyane, Ms Gloria Nakanyane had also prepared pricing for Catha and Litabe (the first and fifth respondents) to include in their bids but had inadvertently given them the same prices for certain products. Hence, the pricing similarities. Ms Mating Elizabeth Nakanyane's husband assisted her to compile her bid documents.[3]
- [26] Mr Tumelo Perceverance Litabe (Mr Litabe), the member of Litabe, pleaded that he had not colluded with any other party. He had independently approached Ms Gloria Nakanyane to assist him with the preparation of prices to quote for the tender. According to him, only a few of his bid prices were the same as the prices of the other respondents.
- [27] On 30 November 2014, Ms Lilian Brophy ("Brophy"), the branch manager of BLOS, issued a letter to NBS, confirming that NBS had had a 30-day account with BLOS for a period of a year already. She also issued a letter to Catha, Melemo and Lounge 848 (first, second and third

respondents respectively) confirming that they too had had 30-day accounts with BLOS but for a period of 9 months.[4] Brophy also confirmed that Litabe had had a 30-day account with BLOS for the past three years. The respondents submitted that the letters may have been issued by BLOS on the same date.

- [28] The third respondent, Lounge 848 was the only respondent which was not assisted by Ms Gloria Nakanyane. Lounge 848 had an account with BLOS and went directly to them and did not use Ms Gloria Nakanyane's services at all. Lounge 848, in its bid, added a 20% mark-up to the prices given to them by BLOS.
- [29] According to the respondents, a complaint referral, based on section 4(1)(b)(i) and section 4(1)(b)(iii), can only be sustained if the Commission proves the necessary elements of the contravention. The Act provides in section 4(1)(b)(i) and (iii) that "an agreement, or concerted practice by firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if... it involves [price fixing] or ... collusive tendering".
- [30] The respondents argued that the Commission had to provide the Tribunal with evidence that an agreement existed or that there had been a concerted practice or that there had been a decision involving an association of firms or between parties in a horizontal relationship that involved collusive tendering or price fixing.
- [31] According to the respondents, it was common cause that they were in a horizontal relationship. They were competitors in the market for the supply of office stationery and had submitted bids for the same tender. They had quoted prices which were either the same or similar in respect of 15 line items. However, the respondents argued that the Commission had not discharged the onus of proving that an agreement, arrangement, understanding or concerted practice involving the respondents existed and constituted conduct amounting to price-fixing and/or collusive tendering.
- [32] The respondents also argued that the prices submitted as part of their bids were not actual selling or purchase prices because from the outset it was clearly understood that the final purchase price would be determined through negotiations between the Free State Provincial Treasury and those bidders who had met the bid requirements (and had scored sufficiently high regarding the functionality requirements).
- [33] The pricing schedule neither influenced the outcome of the bid nor the allocation of the departments to whom services would be rendered. It also did not affect the selection of the bidders by the Free State Provincial Treasury, since only administrative compliance and functionality were taken into account at that stage. Therefore, the sharing of pricing schedules would not fall within the meaning of "collusive tendering".

[34] The respondents also argued that the fact that a number of them had approached BLOS with whom they had a business relationship for quotes and confirmation of supply, cannot be construed as “collusive tendering”. The letters from BLOS merely confirmed the various business relationships.

Hearing

[35] The Commission which was represented by Mr Ngoako Maropene called Mr Tshepo Mthuli Mabilo (“Mr Mabilo”), the chief director responsible for assets and liabilities and transversal contracts in the Free State Provincial Treasury as a witness. Adv Engelbrecht represented the first, second, fourth and fifth respondents and Adv Watson represented the third respondent. Ms Gloria Nakanyane was called as a witness for Litabe. No further witnesses were called on behalf of the respondents.

[36] We wish to express our appreciation to Adv Engelbrecht and Adv Watson who kindly agreed to represent, on a pro bono basis, the unrepresented first and second Respondents, who would have been at a great disadvantage had they represented themselves as they had intended to do. Ultimately Adv Engelbrecht represented them.

Opening

[37] In his opening remarks, Mr Moropene, who appeared on behalf of the Commission, contended that the respondents’ conduct fell squarely within section 4(1)(b) of the Act, as there were similarities in both the bid prices and the way in which the respondents had bid. The respondents had also submitted similar letters, which they obtained from various service providers, in the tender process.

[38] According to Mr Moropene, the respondents had either entered into an agreement or had engaged in a concerted practice to fix prices and to tender collusively and that the Commission would seek a declaration that the Respondents have contravened section 4(1)(b) (i) and/or (iii) of the Act.

[39] The Commission rejected, according to Mr Moropene, the respondents’ defences that they charged similar prices because

- (i) they were given advice, at a workshop convened by the Free State Provincial Treasury, on an acceptable mark-up; and, (ii) because there are very few suppliers in Bloemfontein.

[40] The Commission, he said, would demonstrate that the witness statement by Ms Gloria Nakanyane and some of the allegations made by the respondents were untrue.

[41] Adv Engelbrecht who represented the first, second, fourth and fifth respondents agreed that many of the facts were common cause, including that the respondents submitted prices for 707 office stationery items. However, the prices were the same for only about 15 of the 707 items.

[42] According to Adv Engelbrecht, the Commission had not interrogated any of the respondents.

- [43] We understood Adv Engelbrecht to suggest that a detailed investigation had not been carried out and that the respondents would argue that the Commission did not have any evidence of a meeting, agreement, arrangement or understanding between the respondents to fix prices or to tender collusively.
- [44] Adv Watson, who represented the third respondent, aligned herself with Adv Engelbrecht's opening remarks, except to add that the third respondent went directly to BLOS and not through Ms Gloria Nakanyane because it had an account with BLOS.

Striking out application:

- [45] At the beginning of the proceedings, the Commission made an application to strike out two paragraphs in Ms Gloria Nakanyane's

witness statement, insofar as they relate to Catha and NBS (the first and fourth respondents, respectively).

- [46] Ms Gloria Nakanyane works as a sales representative at BLOS. In her witness statement she stated that suppliers had asked for quotes and that she had assisted them by completing their tender documents and by calculating prices for them.[5] According to her, she had assisted Catha and NBS with pricing for the tender.

- [47] The Commission contended that these paragraphs raised new issues; arguing that it should have been "afforded an opportunity to discover the relevant documents underlying Mrs Nakanyane's witness statement in order to test the veracity of the statement" made. According to the Commission, Catha and NBS had not mentioned Ms Gloria Nakanyane in their answering affidavits.

- [48] In addition, according to the Commission, they would require supporting documentation because of the alleged inconsistencies in the statements regarding the completion of the bid documents.

- [49] The Commission claimed that they would suffer prejudice if the paragraphs were not struck out but could not say whether further and better discovery would have cured the prejudice.

- [50] Rule 55 of the Competition Tribunal Rules stipulates that where there is uncertainty regarding the practice and procedure to be followed, the Tribunal may have regard to the High Court Rules.

- [51] Rule 6(15) of the High Court provides guidance as to the approach to be adopted by the Tribunal when considering the Commission's application. This rule provides that a court may, on application, order to be struck out of any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted.

- [52] In our view, the relevant paragraphs in Ms Gloria Nakanyane's witness statement are neither scandalous nor vexatious and are relevant to the proceedings.
- [53] Furthermore, the Commission's assertion that the statement introduces new issues is not entirely correct. Ms Gloria Nakanyane worked for BLOS at all relevant times.
- [54] In paragraph 4, one of the paragraphs sought to be struck out by the Commission, Ms Gloria Nakanyane states that she assisted three of the respondents – Catha, NBS and Litabe (the first, fourth and fifth respondents respectively) – with prices.
- [55] In her answering affidavit, Ms Nosisa Millicent Catha, the sole member of Catha, explained that it made sense for her to approach BLOS for a supporting letter because she was a customer of that firm.[6]
- [56] Ms Mating Elizabeth Nakanyane,[7] a member of NBS, who deposed to the answering affidavit on its behalf, also stated that she had obtained the quote from BLOS because of an existing relationship with BLOS.[8]
- [57] Whilst the Commission is correct to say that no reference is made in these answering affidavits to Ms Gloria Nakanyane, clear reference is made to BLOS which provided both Catha and NBS with quotes.
- [58] The Commission did not explain its failure to canvas the allegations in the answering affidavits of both Catha and NBS with BLOS.
- [59] The Commission, having been alerted to this evidence, was able, prior to the hearing, to seek further discovery if it wished to do so, to satisfy itself as to the correctness or otherwise of those allegations.
- [60] In any event, the Commission was not prejudiced by our refusal to grant its application to strike out paragraphs 4 and 5 of the witness statement, as they had the right to cross examine the witness in order to test the veracity of her statement, which they did.
- [61] For the above reasons, the strike out application was dismissed.

Evidence

- [62] Mr Mabilo explained the role of prices submitted in a bid, the final adjudication of the bid and the process of negotiating prices to be paid to all successful bidders, post the bidding process.
- [63] Mr Mabilo describes the process as follows:

“Once we are there then we have the recommended[,] what sometimes is called[,] the shortlisted candidates and then we go back and then negotiate the price with the bidders. It is not the treasury necessarily that decides, what will happen is that the team will make a background work just to make sure to say what is in there in the market, the recent prices that are there in the market that are attainable, for example, in Bloemfontein. And then we will go on a process, check the average in terms

of prices that were submitted, check that demand analysis that were done and then we will come to the conclusion. The idea of negotiation is not to rob suppliers but equally so it will protect government. Then there will be one price for all the bidders, for all the bidders if there are five bidders that has been appointed all five will use the same price and will charge the same price. After those negotiations then we will be doing the contract work now, making sure that the SLAs and so on you know, the contract is in place and then we will sign and then there will be date of effectiveness where the actual contract will start and then from there it will be contract management.”[9]

[64] After confirming that competitive bids were expected, Mr Mabilo was asked:

“Mr Moropene: And then that will not be the same as what would be the outcome of the negotiated price after the suppliers did the bid, am I correct to say that? From your explanation.

Mr Mabilo: Put it just in my own words, by the time any bidder submits in terms of our process the pricing is going to have a twofold role. Firstly, it is going to play a role in the calculation on the 90/10, that is the first point. That is w[h]ere normally our tenders will indicate that you must price all items because if you do not price all items, we will not be able to completely calculate. That is the first step that it takes in terms of importance of pricing. The second step that the pricing does is that at the point of negotiation those prices serve as a very serious base for negotiations because they are taken into consideration although there are some instances where the bidder’s proposal, it is extremely high or it is extremely low and then we will probably resort to what we found on the market, and rather use that what we found on the market and put the mark-up. But under ordinary circumstances we need pricing firstly for the calculation of the 80/20, 90/10 and secondly for the negotiation of the prices because in some instances the prices submitted are – because you have – I will make a practical example, you have tenders where a single bidder is appointed where like for example public information platform. So, you will find that we are likely maybe to agree if the prices are right, with the proposal that was given. But on the other hand, you find tenders where we are appointing more than

one bidder so it means the prices will vary. So, no one price will be taken as some will take average some will take the market. Ja that is the long and short of it.”[10]

[65] It is apparent from Mr Mabilo’s evidence that an average price is determined from the prices submitted in the bid documents by all the bidders. The average price is then checked against actual market prices and the Free State Provincial Treasury will ultimately determine a price which the bidders may charge for the stationery. Bidders who don’t want to supply goods at the finally determined selling price will not be appointed as suppliers.

[66] Mr Mabilo stated that they had noticed similarities in the pricing in the bids of Catha and Melemo, the first and second respondents, who had also submitted similar letters. The Free State Provincial Treasury, therefore, decided to refer the matter to the Commission for it to determine whether or not collusion had taken place.

- [67] According to Mr Mabilo, the meeting which the respondents had alleged had been convened by the Free State Provincial Treasury to inform potential suppliers about pricing and related matters, which he knew nothing about, was different from the meeting convened by his department to brief people on the transversal contracts.
- [68] He stated that it would be wrong for a department to advise on tender pricing, specifically on what mark-ups would be acceptable.
- [69] With reference to the fact that only about 15 out of approximately 700 items were priced similarly by the respondents, he said that the 15 items represent an insignificant number, although he acknowledged that he was not a specialist in the field of competition law and would not know what to look for.
- [70] Mr Mabilo could not state whether Catha's and Melemo's assertions that they were advised on the mark-up percentages were incorrect as he simply did not know. He also stated that had he received a reasonable explanation from the respondents, he would not have referred the matter to the Commission.
- [71] The Commission's case begs the question why bidders who are colluding, would collude on only a small portion of a tender.
- [72] It is conceivable that the similarity in the respondents' prices in relation to only 15 items was because the respondents had received the same advice on pricing from Ms Gloria Nakanyane.
- [73] Ms Gloria Nakanyane testified on behalf of the fifth respondent. At the time of testifying she was employed by Bloemfontein Wholesale Stationery, a stationery business, but at the time of the tender she was working for BLOS. It was she who had alerted some of the respondents, whom she described as Mr Litabe, Catha and NBS, (first, fourth and fifth respondents) to the tender and had assisted them to complete the tender documents for a fee of R200 each.
- [74] She was a sales representative and hoped that her sales would improve if the persons, whom she had assisted, received the tenders and, bought from her.
- [75] She heard about the Commission's investigation into the tenders when Mr Litabe and Ms Mating Elizabeth Nakanyane had contacted her after they had been approached by the Commission.
- [76] She said that she gave those respondents whom she had assisted a wholesale price as well as a final price which was included in the tender documents.
- [77] However, she had not assisted Lounge 848 to complete its tender documents. She could also not explain why Lounge 848 appeared to have quoted the same prices, for certain stationery items, as the other respondents had.

- [78] She testified that she had made certain errors when advising the relevant respondents on the pricing of their bids which explains the similarity in the prices of some of the items quoted and why only 15 out of about 700 items had similar prices. She explained how she had calculated the prices. She appeared to have taken care to ensure that the prices were not identical, but made some mistakes.
- [79] Ms Gloria Nakanyane did not at any stage in her evidence suggest that she met collectively with the respondents to discuss the tender bid. The individual bidders assisted by her only became aware that she had assisted some of the other respondents when they questioned her after the Commission made enquiries from them about their tenders.
- [80] Ms Gloria Nakanyane's evidence was satisfactory and corroborates the statements which the first, second and fifth

respondents made in their witness statements regarding the prices. The Commission had indicated that it would show that her evidence was untruthful but was not able to do so.

- [81] We are not able to conclude, on her evidence, which was not seriously challenged by the Commission, that the respondents had reached an agreement amongst themselves. There is simply no such evidence. The Commission led no evidence to substantiate their "concerted practice" argument either.

Our

Analysis

- [82] The Commission acknowledged that the central issue is whether the Respondents had entered into an agreement and / or engaged in a concerted practice to fix prices and / or tender collusively in contravention of section 4(1)(b)(i) and (iii) of the Act.
- [83] The Commission bears the onus to prove the existence of an agreement and/or a concerted practice.[11]
- [84] The Commission was not been able to demonstrate either conclusively or in a manner which would enable us to infer from the evidence led that either an agreement had been reached between the respondents, who are competitors in a horizontal relationship; or that they had engaged in a concerted practice to directly or indirectly fix prices or to tender collusively.
- [85] Ms Gloria Nakanyane had stated that she had alerted those respondents, whom she had assisted, to the Free State Provincial

Treasury tender. She had calculated the prices to be used by them when they submitted their individual bids and had made certain

mistakes when doing so. That resulted in 15 out of some 700 stationery items being similarly priced. Her evidence, which was satisfactory, was not seriously challenged, as already indicated by us. There is also no evidence to suggest that the respondents whom she assisted had reached an agreement amongst themselves to use her services or that she had met with them collectively to discuss the tender pricing.

- [86] Ms Gloria Nakanyane had alerted three of the respondents to the tender and had, for the sum of R200, completed the forms for them and had calculated the bid prices to be submitted to the Free State Provincial Treasury. She had anticipated that the bidders would buy stationery from her if their bids were successful and hoped to benefit by her actions in alerting them to the tender. This evidence was not challenged.
- [87] It is clear, therefore, that at least three of the respondents (Catha, NBS and Litabe) submitted bids only because she had alerted them to the bid and because she had completed the necessary documentation for them and not because they had arrived at an agreement to do so. The second respondent (Melemo) was also assisted by Ms Gloria Nakanyane. There is no evidence which suggests that, in obtaining quotes from Ms Gloria Nakanyane, Melemo had colluded with any of the respondents. Ms Gloria Nakanyane testified that she completed the quotes for the four respondents without each of them knowing that she was doing the same for the others.
- [88] The third respondent, Lounge 848 was not assisted by Ms Gloria Nakanyane. It already had an account with BLOS and went directly to BLOS to obtain quotes and did not use Ms Gloria Nakanyane's services at all. Although Lounge 848's quoted tender prices were similar to or the same as those of the other respondents for a small number of stationery items, that alone, without any further evidence, is not sufficient to infer that it colluded with any of the other respondents in preparing its bid.
- [89] For the reasons mentioned above and based on the evidence before us the Commission's case stands to be dismissed.

Conclusion

- [90] In the light of the above, we conclude that the Commission's application declaring that the respondents have contravened section 4(1)(b)(i) and (iii) of the Act is dismissed.

Order

We accordingly make the following order:

1. The case against all the respondents is dismissed.
2. There is no order as to costs.

Signed by: Enver Daniels Signed at: 2020-04-30 20:13:34

Reason: Witnessing Enver

Date: 30 April 2020

Mr Enver Daniels

Ms Mondo Mazwai and Mr Andreas Wessels concurring

Tribunal Case Manager: Ms Busisiwe Masina

For the Applicant:

Mr Ngoako Peter Moropene assisted by

Khomotso Hlongoane on behalf of the Competition Commission

For the First Respondent: Advocate Greta Engelbrecht SC instructed by

Ms Millicent Nosisa Catha of Catha Silkscreen Printers CC

For the Second Respondent: Advocate Greta Engelbrecht SC

instructed by Mr Kamoho Lestie of Melemo Trading CC

For the Third Respondent: Advocate DMB Watson instructed by Brits &

Matthee Inc on behalf of Lounge 848 CC

For the Fourth Respondent: Advocate Greta Engelbrecht SC instructed by

Harbia Steyn Neuhoff Attorneys on behalf of Nakanyane Business Solutions CC

For the Fifth Respondent: Advocate Greta Engelbrecht SC instructed by Mr

Tumelo Perceverance Litabe of Litabe and Seema Trading CC

[1] See paragraph 9.4-13 p 248-250 of the Trial bundle.

[2] Ms Mating Elizabeth Nakanyane is the member of NBS.

[3] Witness Statement para 9 Trial Bundle p 1291

[4] Letters from Blue Line Office Supplies Trial Bundle pg. 119, 137 and 454.

[5] See Ms Nakanyane's Witness Statement at paragraph 2.

[6] See the first respondent's answering affidavit deposed to by Ms Nosisa Millicent Catha at paragraph 10.6.9.

[7] Ms Gloria Nakanyane is married to Ms Mating Elizabeth Nakanyane's uncle.

[8] See the fourth respondent's answering affidavit deposed to by Ms Mating Elizabeth Nakanyane at paragraph 22.6.

[9] Transcript pg. 138 lines 1-20, pg. 139 line 1.

[10] See Transcript pg140 lines 12-20, pg. 141 lines 1-19

[11] In Competition Commission vs Roadspan Surfaces (Pty) Ltd and another. Case No CR163Nov16. Para [69]. We reiterated that the Commission bears the onus of proving an agreement. However, the Commission also bears the onus to prove a concerted practice.

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