

SOUTH AFRICA / JUDGMENT

**Tourvest Holdings (Pty) Ltd v Competition
Commission,
Trigon Travel (Pty) Ltd v Competition Commission
(CR209Feb17/EXC134Aug17, CR209Feb17/
EXC132Aug17)
[2018] ZACT 45 (10 January 2018)
[2018] ZACT 45**

COURT

Competition Tribunal

BEFORE

Norman Manoim, Enver Daniels, Anton Roskam

CASE / FILE NUMBER

CR209Feb17/EXC134Aug17

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: CR209Feb17/EXC134Aug17

In the Exception application between:

TOURVEST HOLDINGS (PTY) LTD

Excipient (First Respondent)

and

COMPETITION COMMISSION

And

Case No.: CR209Feb17/EXC132Aug17

TRIGON TRAVEL (PTY) LTD

Excipient (Second Respondent)

In Re:

The Complaint referral between:

THE COMPETITION COMMISSION

Applicant

TOURVEST HOLDINGS (PTY) LTD

First Respondent

TRIGON TRAVEL (PTY) LTD

Second Respondent

Panel

: Norman Manoim (Presiding Member)

Enver Daniels (Tribunal Member)

Anton Roskam (Tribunal Member)

Heard on : 08 December 2017

Order issued on : 10 January 2018

Reasons

issued on : 10 January 2018

REASONS

FOR DECISION

Introduction

- [1] This case concerns two exceptions the respondents have brought to a case referral from the Competition Commission.

Background

- [2] This is the second time in this matter that the two respondents, Tourvest Holdings (Pty) Ltd ("Tourvest") and Trigon Travel (Pty) Ltd ("Trigon"), have filed exceptions to the Competition Commission's complaint referral. In response to the first round of exceptions, which we upheld, we required the Commission to file a supplementary affidavit. The Commission has done so. The respondents allege that despite the supplementary affidavit the referral remains excipiable.
- [3] To explain the present decision it is necessary to consider the referral as it was, and its deficiencies, and then to consider whether it has been remedied by the supplementary affidavit.

Original referral

- [4] The Commission alleges that in 2015, Parliament issued a tender to the travel industry for the provision of travel services for members of Parliament. The services included, booking of flights and accommodation. Sixteen firms submitted tenders, amongst them the respondents, Tourvest and Trigon.
- [5] The Commission's case was that the respondents had reached an agreement to fix prices and tender collusively, thus contravening sections 4(1)(b)(i) and 4(1)(b)(iii) of the Act.[1]
- [6] The Commission concluded that the respondents had entered into an agreement based on the following facts. First the similarities in their bids. They had submitted an identical price for their transaction. Secondly, they had the same B BEE status and thirdly the same procurement level recognition. In addition they had submitted their bids on the same date. The Commission also alleged that the firms were related to one another. Trigon is owned by the Travel Assignment Group (TAG). TAG is alleged to be a franchisee of Tourvest.

Tribunal's first Decision

- [7] In the first round of exception applications, Tourvest and Trigon had filed exception applications on the basis that the Commission's

complaint referral raised no cause of action, and is thus vague and embarrassing. The nub of the respondents' criticism was that the facts on which the Commission relied, did not constitute a sufficient basis on which to conclude the existence of an agreement. During argument the Commission conceded that it had no proof of an agreement and was relying on a case based on inference, although it had not pleaded this. The second criticism was that if the Commission was alleging a case of bid rigging it made no sense for the respondents to have submitted an identical price. In response to this valid criticism, counsel for the Commission indicated that she was instructed that the prices were not the same, and that the Commission would supplement its referral, if allowed to do so. We gave the Commission an opportunity to remedy its complaint referral by ordering that the Commission allege all the facts on which it seeks to rely onto draw the inference that Tourvest and Trigon have engaged in an agreement to tender collusively. The Commission duly filed its supplementary affidavit which revealed the following:

4.1 "Tourvest is the incumbent service provider of travel services to Members of Parliament; and the request for tenders issued by Parliament allowed for an award of the tender to more than one bidder at the discretion of the Secretary of Parliament."

4.2 "Tourvest has substantial scale and uses its bargaining power to negotiate better travel deals on behalf of itself and its affiliates like TAG. The relationship between TAG and Tourvest is for their mutual benefit, because TAG's additional volumes enable Tourvest to negotiate higher discounts with travel services providers, to the benefit of Tourvest and TAG and its subsidiaries such as Trigon."

4.3 "The tender that is the subject of this referral allowed for an award to more than one bidder at the discretion of the Secretary of Parliament. A possibility therefore exists that, given the size of the tender, Tourvest and Trigon could both win the bid at the same price. Alternatively, Tourvest as the incumbent could retain the existing tender in the event Parliament decides not to award the tender that is the subject of this referral on the suspicion of collusion."

[8] This resulted in Tourvest and Trigon then filing a second set of exception applications, on the basis that the Commission's complaint referral, as supplemented, is still defective as it discloses no cause of action against them and is thus vague and embarrassing. Both Tourvest and Trigon raised the same grounds for the current applications as they had raised in the first round of applications. At the hearing, the respondents argued that based on the facts in the Commission's referral and supplementary affidavit, no inference can be drawn that the respondents agreed to tender collusively.

Analysis

of the second round of exceptions

[9] The issue for us to decide is whether the Commission has now made sufficient allegations to make out a case in terms of sections

4(1)(b)(i) and 4(1)(b)(iii) of the Act.

[10] It is now clear from the supplementary affidavit that the Commission's case is based on inference.[2] The inference sought to be drawn is that the respondents submitted identical bids because they had colluded.

[11] It is common cause that a case for collusion can be based on inference. The debate between the respondents and the Commission is whether the facts pleaded by the Commission were sufficient to make out a cause of action. The respondents approached the matter by arguing that the similarities taken in isolation were unremarkable and hence did not constitute a sufficient basis for drawing an inference. The respondents concentrated on the similarities in 8BEE status, procurement level and said that these were not matters that parties could fix. Nor was there anything significant in the fact that the bids were submitted on the same dates. Most firms, they argued, would submit bids close to the closing date. The respondents had less to say about the similarity in the transaction fees. Note the Commission still alleges that this fee is identical and counsel's submission from the bar on this aspect in the first hearing has not found its way into the supplementary affidavit.

[12] The respondents did not refer us to any legal authority on what the legal test for a case based on inference should be at the time of exception. Cases we were referred to were not in point.

- [13] Case law exists for the test in civil cases where several inferences may be drawn. In the leading case of *Cooper*,^[3] the Appellate Division, as it was then, held that an inference may be drawn in favour of a party who bears the onus if it is the most probable inference to be drawn.
- [14] However this test does not apply in a case based on exception, where the respondents, as in this case, have not put up their own facts. We thus have no other facts to consider other than those alleged by the Commission in the referral. The proper test at this stage, is whether the Commission has alleged sufficient facts, from which a reasonable possible inference may be drawn that the respondents had reached a collusive agreement.
- [15] The new facts alleged by the Commission are this. First, the tender envisaged that more than one firm might win the tender. Thus the fact that two firms bid the same price is no longer as irrational as it seemed when this allegation was first made and, it seemed, in the absence of other facts, an all or nothing bid. The Commission now alleges that it is possible, given the size of the tender, that both firms could win the tender at the same price.^[4] The existence now of a rational explanation for the pricing behaviour, which was Jacking in the referral as originally pleaded,

makes the inference sought to be drawn more reasonable.

- [16] Second, it is now alleged that Tourvest is the incumbent supplier. The Commission alleges that the services being put up for tender are the same as those currently provided by Tourvest.^[5] It is thus possible that Tourvest as the incumbent, knowing that it might have to lose some share of the revenue to a rival, would have an incentive to ensure it could do so in circumstances where it would still have some economic gain. The Commission now alleges what that motive might be, as it explains the relationship between Tourvest and Tigon more fully in the supplementary affidavit. Recall that Tigon is a subsidiary company in the TAG group. Tourvest is alleged to procure airline and accommodation services on behalf of its affiliates, one of which is TAG. This enhanced bargaining power benefits both groups because they get better discounts. Thus to the extent that Tigon, a TAG subsidiary wins some of the services from Parliament, would still benefit Tourvest.
- [17] The third relevant fact about Tourvest being an incumbent means it is aware of what transaction fees Parliament is currently paying. In the referral it is alleged that the bidders transaction fees ranged from R75.00 to R1700.50 per transaction compared to the R150.00 offered by both the respondents. This wide range suggests that at least some bidders lacked any information as to what Parliament was likely to accept. Fourth, the fact that fees had such a wide range and were not clustered around a narrower range makes the coincidence sought to be drawn from the similar prices, more probative. Moreover the incumbent's knowledge of the client's current pricing would have been useful to Tigon.

Conclusion

[18] Based on our analysis above, we are of the view that the exceptions must be dismissed, because on the facts of the Commission's papers, as now supplemented, a reasonable possible inference can be drawn that the respondents may have contravened the Act. Of course the respondents may well have an answer to all these points but that is for them to raise in an answering affidavit. The respondents must therefore file their answering affidavits to the Commission's complaint as supplemented.

[19] There is no order as to costs.

ORDER

1. We hereby dismiss Tourvest's exception application under case number CR209Feb17/EXC134Aug17, and Trigon's exception application under case number CR209Feb17/EXC132Aug17.
2. Tourvest and Trigon must file answering affidavits to the Commission's complaint referral within 20 (twenty) business days of this order.

Mr Norman Manoim

Mr Enver Daniels and Mr Anton Roskam concurring.

10 January 2018

Date

Tribunal Researcher: Caroline Sserufusa and Ndumiso Ndlovu

For the 1st Respondent: PMP Ngcongo instructed by Cliffe Dekker Hofmeyr

For the 2nd Respondent: GD Marriot instructed by Nortons Inc.

For the Commission: K Madise and M Ngobese

[1] Competition Act 89 of 1998, as amended.

[2] See supplementary affidavit, paragraphs 5 and 11

[3] Cooper and Another v Merchant Trade Finance Ltd (1999) JOL 5830 (A).

[4] Supplementary affidavit paragraph 9.

[5] Ibid.

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