IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

Case Number: 168/CAC/Oct18

In the matter between:

A'AFRICA PEST PREVENTION CC First Appellant

MOSEBETSI MMOHO PROFESSIONAL SERVICES CC Second Appellant

and

THE COMPETITION COMMISSION OF SOUTH AFRICA Respondent

Delivered: 2 July 2019

JUDGMENT

BOQWANA JA (VICTOR JA *et* VAN DER LINDE AJA concurring)

Introduction

[1] Section 4 (1) (b) of the Competition Act 89 of 1998 ("the Act"), prohibits restrictive horizontal practices between firms by stating that:

> "(1) An *agreement* between, 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 -

(a)…

(b) it involves any of the following *restrictive horizontal practices*:

(i) directly or indirectly fixing a purchase or selling price or any other trading condition;

(ii) dividing markets by allocating customers, suppliers, territories, or specific types of *goods or services*; or

(iii) collusive tendering."

[2] The fundamental concern is that these practices may deprive *"the marketplace of the independent centers of decisionmaking that competition assumes and demands"*[1], in that *"two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed, but suddenly increases the economic power moving in one particular direction."*[2]

[3] These contraventions are commonly referred to as *per se* prohibitions, as the efficiency defence expressed in section 4 (1) (a) cannot be raised, due to their being inimical to economic competition.

[4] In terms of section 4 (5), however, section 4 (1) prohibitions do not apply to:

"…

(a) a company, its wholly owned subsidiary as contemplated in section 1 (5) of the Companies Act, 1973, a wholly owned subsidiary of that subsidiary or any combination of them; or

(b) the constituent firms within a single economic entity similar in structure to those referred to in paragraph *(a)*." (underlined for emphasis)

[5] The appeal before us concerns the interpretation of this section. Pursuant to a complaint of price fixing and collusive tendering, referred by the Competition Commission ("the Commission") to the Competition Tribunal ("the Tribunal"), against the appellants (i.e. A'Africa and Mosebetsi), the Tribunal found that the

[1] *Copperweld v Independence Tube*, 467 US 752 (1984) at page 769
[2] Ibid fn 1, page 769

appellants had contravened sections 4 (1) (b) (i) and (iii) of the Act. This arose from the appellants having submitted identical quotations for fumigation services at Hertzogville Magistrates Office to the Department of Public Works ("the Department"). The appellants had both quoted an amount of R 2640.00 (excluding VAT in the case of the Mosebetsi) to render the requested services.

Factual background

[6] The appellants are close corporations conducting business in the pest control industry. A'Africa was established by Aletta Labuschagne ("Labuschagne") in October 2004, as a sole member, to provide pest prevention and control services to customers in Bloemfontein and surrounding areas. In April 2006 she sold 49% of her member's interest to Albertus Smith ("Smith"), which was initially registered in both his and his wife's names ("Mrs Smith"). This arrangement was later changed with Labuschagne acquiring a further 3% of the member's interest in the business. Labuschagne testified that by October 2015 she held 59% of the member's interest in A'Africa, whilst Mr Smith held the remainder. From its inception Labuschagne had managed the day to day activities of A'Africa and its administration.

[7] In 2008 Labuschagne and Smith incorporated another close corporation, Mosebetsi, with the view to providing outsourced cleaning services; however, nothing came of this business objective, and as a result Mosebetsi lay dormant for many years. They decided not to deregister it in case it became a necessary venture for future business activities.

[8] Meanwhile an important figure in this matter, Modise Maleho ("Maleho"), had joined A'Africa in 2007 as a trainee pest control operator, later becoming a fully-fledged one. Maleho proved to be a valuable employee. In order not to lose him, and to fulfil a growing demand for Black Economic Empowerment ("BEE") compliance so as to obtain business, Labuschagne and Smith decided that Maleho be offered 52 % interest in Mosebetsi, whilst Smith and Labuschagne would hold

the remaining 48% in equal proportions. This was also because Maleho would not have been able to buy into A'Africa.

[9] Maleho started working as an employee of Mosebetsi in March 2014. It was agreed that initially A'Africa would cover all the costs of establishing Mosebetsi, and thereafter it should become self-sufficient. Maleho operated out of A'Africa's offices. A'Africa provided all the tools, equipment, the material that Maleho required, and administrative services needed to operate the business, including its administrative assistant, Marlene Kruger ("Kruger"), when required. It also funded Maleho's salary, by loaning Mosebetsi such and all cash that it needed to operate.

[10] Informal members' meetings were held monthly, which concerned mostly discussions on problems. According to Labuschagne, this was where she and Smith would give Maleho directions and in essence they "*exercised strategic and management control*", in that their view on an issue would be determinative. According to Maleho, decisions were by discussion and persuasion, but he always looked to Labuschagne and Smith for guidance as they were more experienced in the industry.

[11] It is alleged that Maleho struggled to get the business off the ground, and that as a result A'Africa, and sometimes Labuschagne, and/or Smith and/or A'Africa Trust (which owned A'Africa's intellectual property), often had to advance funds to Mosebetsi, allegedly "*on A'Africa's behalf*", which funds "*would be accounted for in Mosebetsi's books as a group loans payable.*" When Maleho did not have sufficient duties in Mosebetsi, he would often do work for A'Africa. This became more frequent the longer Mosebetsi struggled.

[12] For all intents and purposes, Mosebetsi was commercially wholly parasitic on A'Africa. It had neither vehicle, premises, pesticides, telephone line, nor staff other than Maleho.

[13] On or about 12 October 2015 Maleho broached the news of his resignation to Labuschagne, to take up a position in Rentokil (a bigger competitor). On 16 October 2015 he left Mosebetsi, offering nothing in writing. According to

Labuschagne, she had informed him that he had to give them a written letter of resignation, for the purposes of registering Mosebetsi's change of membership with the Companies and Intellectual Property Commission ("CIPC"). This was not done. Maleho testified, however, that he did not know that he had to give anything in writing, but nevertheless viewed himself as having resigned as both an employee and a "shareholder", as he put it. He only learnt later that he was "still" a member of Mosebetsi, in that his name was still registered with the CIPC.

[14] It is alleged by both Labuschagne and Maleho, that since his resignation on 12 October 2015, Maleho had not been involved in the affairs of Mosebetsi in any capacity whatsoever. At the time of Maleho's departure, Mosebetsi was indebted to the A'Africa Trust in the amount of R32 780, and to A'Africa in the amount of R116 992. Since it had no contacts, customers, employees or assets, it is alleged that Mosebetsi did not have any foreseeable opportunity to trade out of these difficulties.

[15] Labuschagne alleges that on 19 November 2015 she received two sets of tender forms, addressed to A'Africa and Mosebetsi individually, from Kruger, in relation to an invitation by the Department to submit a bid for the removal of bees at Hertzogville DOJ & CD, under reference number BFN/1015/102304 ("the tender"). Kruger apparently completed the forms in respect of both, leaving the pricing of the quotes and signatures blank. Labuschagne then calculated the price using A'Africa's hourly rates, taking into account distance and travelling times. She further asserted that "[g]*iven that the same pest control operator would be providing the service, the price was the same for A'Africa and Mosebetsi.*" The only difference between the quotes was VAT, which was not included in Mosebetsi's pricing, as it was not a registered VAT vendor. Labuschagne returned the completed and signed documents to Kruger, who arranged for them to be delivered to the Department.

[16] During the screening of the bids, the Department noticed that the forms submitted by A'Africa and Mosebetsi were identical, or contained similarities in

many respects, ranging from the handwriting, address, signatures and an indication that Smith and Labuschagne appeared on the CIPC documents of both firms, showing that they were members of both firms. There was also no disclosure on the quotations submitted that the firms were related. The appellants, in fact, answered this question in the negative. Labuschagne's explanation for this, was that she had always answered "no" to this question, well before Mosebetsi came into existence. Kruger, who took over the completion of forms and who completed the current ones, simply copied what Labuschagne had previously done. Without question when receiving the forms from Kruger she, Labuschagne, did not pay that much attention to that question; she simply filled in the missing information and signed. Kruger was not called as a witness to verify this. Maleho's explanation as to why he completed the forms in the manner he did when still with Mosebetsi, was that he had thought that the question was directed at him as a person.

[17] Pursuant to these perceived irregularities, Petrus Whielers ("Whielers") of the Department lodged a complaint with the Commission, on behalf of the Department, regarding possible collusive tendering in respect of the above tender. The Commission conducted an investigation and concluded that the appellants had contravened the Act, as they appeared to have engaged in collusive tendering. Whielers also submitted quotations submitted by the appellants in the past, at the request of the Commission. These were the subject of the striking out application at the Tribunal, which was unsuccessful. I deal with that later.

[18] The Commission referred a complaint to the Tribunal on the basis that the appellants *"... whilst being firms in the horizontal relationship have entered into an agreement and/or alternatively engaged in a concerted practice to fix prices and tender collusively when bidding"* for the tender, and that *"[t]his conduct may amount to price fixing and collusive tendering in contravention of sections 4(1)(b)(i) and (iii) of the Act." (Own emphasis.)* Further that "[t]*he respondents have entered into an agreement or an arrangement to coordinate their tender bids when bidding for tender ... in that they charged similar prices.*" (Underlined for

emphasis.) Further that "*the tender documents of the respondents were completed and signed by the same person. In addition, the respondents have common shareholders and directors, namely, Ms Aletta Magrieta Elizabeth Labuschagne and Albertus Joubert Smith.*"

[19] The appellants raised contentions that at the relevant period, they were constituent firms within a single economic entity, as envisaged in section 4 (5); that, in any event, properly characterised, their conduct did not coincide with the character of the prohibition in section 4 (1) (b) (i) and (iii) of the Act; and that they were not in a horizontal relationship.

The Tribunal's decision

[20] The Tribunal found that the threshold in section 4 (5) (b) of the Act, requiring the concerned firms to be "*similar in structure*" to a parent and a wholly owned subsidiary (whilst the subordinate need not be wholly owned), was not met. This was because the common membership that existed between Mosebetsi and A'Africa (Labuschagne and Smith) was capable of only exerting partial or joint control over one of the two firms (i.e. Mosebetsi).

[21] It held that Labuschagne and Smith did not have *de jure* control of Mosebetsi as they together held only 48% members interest. It also found that, in its view, the evidence indicated that, factually, the majority of strategic decisions regarding Mosebetsi were made jointly with Maleho, "*Mosebetsi did enjoy a degree of autonomy in determining its course of action in the market, even bidding for tenders without instruction from Mr Smith or Ms Labuschagne*" and "[*t*]*he fact that the respondents shared premises, equipment and consumables is not sufficient to constitute a complete unity of interest, especially considering that A'Africa recorded these expenses as loan accounts payable to A'Africa by Mosebetsi.*" (Footnote omitted.)

[22] In its view, the fact that Labuschagne and Smith may have had negative control over Mosebetsi, for the purposes of section 12 (2) (g) of the Act, did not make the firms exempt from section 4 (1) (b). It noted that Maleho's departure as a *de facto* joint controller did not significantly change the structure of the relationship between the appellants; he remained a 52% *de jure* member in Mosebetsi, allowing it to retain its status as a majority BEE owned entity, benefiting from the public procurement advantages that came with it. Finally, on this point, the Tribunal pointed out that "*any control exercised by Ms Labuschagne and Mr Smith, was done solely as members of Mosebetsi, and not in the capacity of A'Africa. To thus conclude that Mosebetsi and A'Africa are part of a single economic entity would be incorrect.*"

[23] As to the issue of characterisation, the Tribunal concluded that the "suppression" involved in this case was the kind that could not be characterised in the manner envisaged in *ANSAC*[3], because even if the two firms formed part of a single economic entity, they fell within the scope of section 4 (1) (b) by virtue of submitting two bids, which inhibited competition; the two firms purported to be in competition with one another, whereas they were in fact one entity, which conduct undermined the very object of calling for tenders. In its view, because bid-rigging is an antithesis of competition, it did not allow for characterisation. Even were that to be done, the Tribunal did not see how the two firms' conduct was efficiency enhancing or pro-competitive.

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[3] *American Natural Soda Ash Corporation and Another* v *Competition Commission and Others* 2005 (6) SA 158 (SCA) ("*ANSAC*"). There, the Supreme Court of Appeal ("SCA") held that an enquiry ought to be adopted "*whether the character of the conduct complained of coincides with the character of the prohibited conduct: and this process necessarily embodies two elements. One is the scope of the prohibition: a matter of statutory construction. The other is the nature of the conduct complain of: this is a factual enquiry. In ordinary language this can be termed 'characterising' the conduct – the term used in the United States, which Ansac has adopted...*" [at para 47]..."*But while pricing-fixing inevitably involves collusive or consensual price determination by competitors, it does not follow that pricing-fixing has necessarily occurred whenever there is an arrangement between competitors that results in their goods reaching the market at a uniform price.*" [at para 49]

Issues

[24] The appellants challenge the Tribunal's interpretation of section 4 (5), its findings on horizontal relationships, and on characterisation, as being contrary to the *ANSAC,* and this Court's own, jurisprudence[4], which in its view demand characterisation of the conduct to establish whether it falls within the prohibited conduct as set out in section 4 (1) (b).

[25] It was accepted by both parties that if the appellants' argument is good on the single economic entity principle, then characterisation and horizontal relationship points do not arise.

[26] While I question whether this is a proper test case, owing to the small amounts and sizes of the firms involved, it is true that this Court is yet to grapple with a case where the section 4 (5) (b) exemption is raised as a defence to an alleged violation of section 4 (1) (b).

Single economic entity

[27] The doctrine has its origins in the United States and Europe, and notably in the *Copperweld*[5] judgment, where the Court held that:

> "... the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder. If the parent and a wholly owned subsidiary do "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny....in reality, a parent

[4] *Competition Commission v South African Breweries Ltd and Others* 2015 (3) SA 329 (CAC)
[5] Ibid fn 1, at page 771

and a wholly owned subsidiary *always* have a "unity of purpose or a common design."" (Underlined for emphasis)

[28] In *Century Oil*[6] the single economic entity concept was applied beyond a parent and wholly-owned subsidiary. In that case two companies were separately incorporated, but commonly owned by three men, two of whom each owned 30 percent of each corporation, and one of whom owned the remaining 40 percent of each corporation. All three were directors and officers of each corporation. One drew his compensation from one company and the other two from the other company, but the compensation of each was based on his percentage of ownership of both corporations. The court saw no relevant difference between a corporation wholly owned by another corporation, two corporations wholly owned by a third corporation, or two corporations wholly owned by three persons who together manage all affairs of the two corporations. It said "[*a*] *contract between them does not join formerly distinct economic units. In reality, they have always had "a unity of purpose or a common design."" (Footnote omitted.)*

[29] The appellants argue that they perfectly fit within this scenario, i.e. after Maleho's departure, A'Africa and Mosebetsi had exactly the same members.

[30] In the European Union ("EU") the position, as pronounced in *Viho*[7], is that where the subsidiaries did not enjoy real autonomy in determining their course of action in the market, but carried out the instructions issued by the parent company, they formed a single economic entity.[8] The point is categorised in the European Commission's Guidelines[9] as "[*w*]*hen a company exercises decisive influence over another company they form a single economic entity and, hence, are part of the same undertaking.*"[10] (Own emphasis, text footnote omitted.)

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[6] *Century Oil Tool, Inc. and Jerry Raggio, Plaintiffs-appellants, v. Production Specialties, Inc., Gerald Hebert and Gas Liftsupply, Inc., Defendants-appellees, 737 F.2d 1316 (5th Cir. 1984)*
[7] *Viho Europe BV v Commission of the European Communities* 1996 ECR 1, Case C-73/95, I- 5482
[8] Ibid fn 7, at 5487 -5490
[9] *Official Journal of the European Union: Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (2011/ C 11/01)
[10] Ibid fn 9, at para 11

[31] A number of features that can be derived from the cases above are: (a) that a parent and its wholly owned subsidiary have a complete unity of interest (i.e. their objectives are common, not disparate); (b) their general corporate actions are guided or determined not by two separate consciousnesses, but by one; and (c) they are akin to a team of horses under the control of a single driver. In other words, a parent exercises decisive influence over the subordinate entity, such that the latter does not enjoy real autonomy in determining its own market conduct.

[32] This is indeed the test that the appellants seek this Court to adopt: to find that following Maleho's departure, Labuschagne and Smith exercised decisive influence over Mosebetsi; and that even if the period prior to Maleho's departure is considered (which should not be done), A'Africa and Mosebetsi always had a complete unity of interest (as the real drivers had always been Labuschagne and Smith), and the fact that Maleho's name remained in the CIPC records after his departure made no real difference as he had nothing to do with Mosebetsi's affairs after his resignation. In the appellants' view, to regard as determinative their failure to ensure the removal of Maleho's name from the CIPC records, when Maleho regarded himself as having left both as employee and "shareholder" (as he put it in evidence), is to put form over substance.

[33] According to the Commission, the South African position is nuanced compared to other jurisdictions. The difference lies in the "additional" requirement, which requires the single economic entity to be "*similar in structure to those referred to in paragraph (a)*." In other words, it is not sufficient for constituent firms to be firms within a single economic entity, they must also show that the entity is similar in structure to a company and a wholly-owned subsidiary and / or other forms of relationships within that structure as indicated in paragraph (a).

Interpretation of section 4 (5) (b)

[34] As already mentioned, section 4 (5) disqualifies the application of section 4 (1) to an agreement between, or concerted practice engaged in by, - (a) a company, its wholly-owned subsidiary as contemplated in section 1 (5) of the Companies Act, 1973, a wholly-owned subsidiary of that subsidiary, or any combination of them; or (b) the constituent firms within a single economic entity similar in structure to those referred to in paragraph (a).

[35] The Act defines neither what a single economic entity is, nor what a similar structure necessarily entails. Section 4 (5) (b) has been criticised as being vaguely drafted and problematic[11], and somehow superfluous, in view of the fact that the prohibitions in 4 (1) are directed at firms in horizontal relationships, which firms in a single economic entity necessarily would not be.[12]

[36] The position as to how a statute should be interpreted needs no repetition, save to mention that it must be given its grammatical meaning (except where it would lead to absurdity), be properly contextualised, interpreted purposively and be construed consistently with the Constitution.[13]

The scheme of the Act

[37] Any discussion of the meaning and reach of the concept of "*single economic entity*", as also of the phrase *"similar in structure"*, begins with expressly acknowledging that the Act is intended to reach widely into the economic sphere: it *"applies to all economic activity within, or having an effect within, the Republic..."*[14] These are "*words of great generality*" extending the operation of

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[11] Sutherland & Kemp, *Competition Law of South Africa*, November 2017, Issue 18 at 5-47

[12] Fasken Martineau, Mackenzie et al, *The Single Economic Entity Doctrine in South Africa and its implications for Competition Policy* at pages 1 & 8. The authors observe that it is doubtful that firms within a single economic entity could ever be competitors.

[13] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18; *Cool Ideas 1186 CC v Hubbard and another* 2014 (4) SA 474 (CC) at para 28.

[14] Section 3(1)

the section to the *"countless forms of activity which people undertake in order to earn a living."*[15]

[38] The scheme of the Act defines the economic units that participate in this economic milieu as "*firms*". It is notable that the expression "*firm*" is used in paragraph (b) of section 4 (5), as opposed to "*company*" in (a). This is in keeping with the wide application of the Act, and also an indication that (b) is not confined to company relationships, but to firms in general.

[39] The Act does not tell us what a "*firm*" actually is, but it defines the word to include *"a person, partnership or a trust"*. And a *"person"*, according to the Interpretation Act 33 of 1957 ("the Interpretation Act"), includes *"(a) any divisional council, municipal council, village management board, or like authority; (b) any company incorporated or registered as such under any law; (c) any body of persons corporate or unincorporate"*. It includes also, self-evidently, natural persons.

[40] The expression "*includes*" clearly widens its meaning to be beyond limited liability companies, partnerships, and trusts. It may include sole proprietorships, joint ownerships, and any other actors who carry out economic activity.

[41] When are two or more firms conjoined within a single economic entity? A factual answer beckons; and this court has indeed responded in such terms when called on to comment on section 4 (5):[16]

> "[28] The contention raised by the s 4(5)(b) claim is not an alternative claim based on the same facts as the main claim but adding nothing to the factual material that the Tribunal will have to consider at the hearing. It is a separate and distinct claim on a novel legal ground seeking to attach liability to parties who have not hitherto been regarded as liable in respect of the particular complaints that are at present before the tribunal for determination. In order to pursue this claim it will be necessary for the

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[15] *Standard Bank Investment Corporation Ltd v Competition Commission and Others; Liberty Life Association of Africa Ltd v Competition Commission and Others* 2000 (2) SA 797 (SCA) at para 9

[16] *Loungefoam (Pty) Ltd and others v Competition Commission and others: in re: Feltex Holdings (Pty) Ltd v Competition Commission and others and two related review applications* [2011] 1 CPLR 19 (CAC); 2011 JDR 0451 (CAC); [2011] JOL 27570 (CAC)

commission to show that Steinhoff International and Steinhoff Africa are, together with Loungefoam and Vitafoam, an economic unit. That will require a consideration of the corporate structures of the group, the manner of its management and the relationship between the different companies in the group. In order to deal with it the Steinhoff appellants will be required to lead evidence of the operation of the different entities within the group. This goes beyond merely the relationship between Loungefoam and Vitafoam..." (Underlined for emphasis, footnote omitted.)

And again, referring to section 4(5):

"[65] The purpose of this section is to prevent companies operating within a group of companies, or firms operating within a single economic entity similar to a group of companies, from being accused of perpetrating restrictive horizontal practices in consequence of their interactions with one another as part of the group. The purpose of the section is exclusionary. ...It permits companies or firms forming part of a group to engage in conventional corporate trading activities such as joint purchasing or co-ordinated price-setting. One can readily imagine a retail group operating under five different brands and five separate subsidiaries, consolidating its purchasing power to purchase goods collectively for the group. Equally it would be understandable if two or more subsidiaries traded in the same category of goods that the group might think it undesirable to engage in price competition with itself. The purpose of s 4(5) is to exclude such conduct from the ambit of restrictive horizontal practices." (Underlined for emphasis.)

[42] The test propounded by the appellants as to what standard should be adopted for a single economic entity, essentially employing the imagery of a carriage drawn by multiple horses under the control of single driver[17], has not been quibbled with by the Commission.

[43] The facts too, seem to support a finding that the two appellants were, certainly by the time the quotes were submitted and despite a viable argument that it had not necessarily always been the case, a single economic entity, given the complete conflation of their affairs and management. Section 4 (5) (b), however,

[17] Ibid fn 1, at page 771

requires a single economic entity *"similar in structure"* to those referred to in paragraph (a).

Similar in structure

[44] The words *"similar in structure"* must be given a meaning separate and distinct from *"a single economic entity"*. This is in accordance with the rule of interpretation that each word of a statute must be given a meaning. Further elaboration of this rule is found in *The Law of South Africa*, 2nd Edition, Volume 25, Part 1, paragraph 353.[18]

[45] And the recent *dictum* of Van der Westhuizen J in *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) is apposite:

> "[99] A longstanding precept of interpretation is that every word must be given a meaning. Words in an enactment should not be treated as tautologous or superfluous. This is for good reason. Interpretation is a cooperative venture between legislature and judge, bounded by mutually understood rules, in which the latter seeks to give meaning to the text enacted by the former. The mutual suppositions, and the constraints of principle and constitutional precept on the judge's role, enable the joint process to reach a coherent and practical outcome. For this, it has to be assumed that the legislature's enacted text includes only words that matter. For to enact words that do not would violate the most basic supposition of the shared enterprise. Hence none can be ignored.
>
> [100] The shared enterprise is imperilled if this precept is too readily ignored. It could seem to license judges to pick and choose among words and phrases, and to omit those considered inconvenient. That cannot be. Everything the legislature has enacted must be included in the meaning assigned to the whole. The rule performs a boundary-setting function. Its observance shows that judges are staying within their assigned role of interpretation, and not straying outside it into amendment, enactment

[18] See also L C Steyn, *Die Uitleg van Wette*, 5th Edition at page 17; Sutherland & Kemp at 5 -42 also suggest that: "*The Act apparently sets two requirements. There must be a single economic entity and the entity must be similar in structure to one that exists between a company and its wholly owned subsidiary or between wholly owned subsidiaries.*"

> or innovation. As this court pointed out in its very first judgment, if the language used by the lawgiver is ignored in favour of other pursuits, 'the result is not interpretation but divination'. Though said in a different context, the point is that constitutionalism has not upended the basic rules of interpretation." (Footnotes omitted.)

And further:

> "[105] .....There is then no particular constitutional imperative to squeeze a meaning from the provision. Rather, we must accept the words of the provision for what they say, even at the cost of accepting that the provision is ineffectual. It is better, in my view, to acknowledge the drafting error, and to leave parliament to correct it."

[46] With these considerations as background, one therefore begins with the straight-forward proposition that it is not sufficient for the invocation of section 4 (5) that the two protagonists are bound together within a single economic entity. Their unison must also be "*similar in structure to those referred to in paragraph (a)*". The Commission stressed this requirement, and – referring to section 1 (5) of the Companies Act 61 of 1973 - laid particular emphasis on the notion that the holding company must be the owner of the entire interest in the subsidiary.

[47] According to section 1 (5) of the Companies Act 61 of 1973 ("the 1973 Companies Act"), a wholly-owned subsidiary has no members except the holding company (or another wholly-owned owned subsidiary). It provides that:

> "(5) For the purposes of this Act, a subsidiary shall be deemed to be a wholly owned subsidiary of another company <u>if it has no members except that other company and a wholly owned subsidiary of that company and its or their nominees.</u>"(Underlined for emphasis.)

[48] The important point to note here is that the 1973 Companies Act was concerned, in the context of the relationship between a holding company and its subsidiary, with a proprietary interest in, or ownership of, the shares of the

company lower down in the hierarchy. However the 1973 Companies Act has of course now been repealed by the new Companies Act 71 of 2008 ("the 2008 Companies Act").

[49] Section 3 (1) (b) of the 2008 Companies Act has re-enacted the definition of a wholly-owned subsidiary, and it differs from the previous definition in an important respect. The previous definition concerned itself with ownership of the shareholding. The new definition does not; as will appear below, it is now at least equally concerned with control (emphasis supplied):

> "3 Subsidiary relationships
>
> (1) A company is-
>
> (a) a subsidiary of another juristic person if that juristic person, one or more other subsidiaries of that juristic person, or one or more nominees of that juristic person or any of its subsidiaries, alone or in any combination-
>
> (i) is or are directly or indirectly able to exercise, or control the exercise of, a majority of the general voting rights associated with issued securities of that company, whether pursuant to a shareholder agreement or otherwise; or
>
> (ii) has or have the right to appoint or elect, or control the appointment or election of, directors of that company who control a majority of the votes at a meeting of the board; or
>
> (b) a wholly-owned subsidiary of another juristic person if all of the general voting rights associated with issued securities of the company are held or controlled, alone or in any combination, by persons contemplated in paragraph (a)." (Underlined for emphasis)

[50] A company is now a wholly-owned subsidiary of another company (call it the holding company) if the holding company holds or controls all of the general voting rights associated with the shares in the wholly-owned subsidiary. That is a meaning different from the previous definition in a material respect.

[51] The Interpretation Act impels us to read the 2008 Companies Act definition into section 4 (5) (a), unless the contrary intention appears. It states:

> **"12. Effect of repeal of a law**
>
> (1) Where a law repeals and re-enacts with or without modifications, any provision of a former law, references in any other law to the provision so repealed shall, unless the contrary intention appears, be construed as references to the provision so re-enacted." (Own emphasis.)

[52] Before turning to the facts, something must be said about the word *"similar"* in section 4 (5) (b). Clearly, the postulated single economic entity cannot be identical to the company law structure envisaged in section 3 of the 2008 Companies Act. If it were identical, there would be no need for a comparison. And of course, as pointed out, according to the Act *"firms"* that are active in the economic milieu may take many forms. The legislature must have envisaged therefore that the similarity envisaged can never be identical and may take many forms, and it is suggested that the interpretative function will bear this in mind.

[53] It is suggested, however, that the defining substance of the company law structure, of holding company and wholly-owned subsidiary – as defined in the 2008 Companies Act – must be the litmus test of the structure being measured up for compliance with section 4 (5) (b). And, as pointed out, if the suggested "holding company" controls all the general voting rights associated with the "shares" in the postulated "wholly-owned subsidiary", that is sufficient.

[54] Before moving any further, it seems convenient here to dispose of the argument that A'Africa could be viewed as akin to a holding company of Mosebetsi. Structurally, it can never hold interest in another close corporation. Members of another close corporation cannot act as its "*nominees*" in another. Unlike a company, it is run and administered by its members. It has no share capital and therefore no shareholders, its members are its owners. I tend to agree with the Commission's view in this respect. Furthermore, A'Africa could neither

give instructions, nor direct Mosebetsi's conduct in the market, *via* Labuschagne and Smith as its "*nominees*". That interpretation is at odds with the law and should not be preferred.

[55] That leaves us with the question whether A'Africa and Mosebetsi were analogous to "sister companies" or "co-subsidiaries" wholly owned by the same parent, being Labuschagne and Smith. There is an interesting aspect of the definition in section 4 (5) (a) which was not the subject of pointed argument before us. The definition refers to companies in a vertical corporate relationship: A holds all the shares in B which holds all the shares in C – in the scenario A, B and C are a single economic entity. What about where A holds all the shares in two companies, B and C - do all three companies belong to a single economic entity? According to a strict reading of the definition, in this situation A and B would be a single economic entity and A and C would be a single economic entity; what about B and C? The cases cited above suggest that A, B and C in this example do belong to a single economic entity. This might also be justified on the provision in the Interpretation Act that, in the absence of a contrary intention, the singular includes the plural, so that "wholly-owned subsidiary" should be read as including "wholly-owned subsidiaries" and reference to "any combination of them" may also embrace co-subsidiaries owned by the same owner. Furthermore, section 3 (1) of the 2008 Companies Act does envisage a pyramid-like structure of A at the top with B and C at the next tier below it – and thus the three of them belonging to a single economic entity.

[56] More of a difficulty though, is that in this case two owners (Labuschagne and Smith) are posited as akin to a company wholly owning two subsidiaries. The question is whether the language of the Act allows for that scenario. Is that scenario comparable to paragraph (a) in that, if company A and company B each owns 50% of company C, C is not a "wholly-owned subsidiary" of either unless – by way of further shareholding – 100% control of C can be traced back to a single entity (as would be the case, for example, if A held all the shares in B, or vice

versa, or if all the shares in A and B were wholly held by another company D)? Same can equally be said regarding the notion of a person controlling all the general voting rights associated with issued securities, alone, or in combination with any of its subsidiaries as contemplated in section 3 (1) (b) of the 2008 Companies Act. *"It would therefore also be a holding/subsidiary relationship if (1) JP [juristic person] has the sole control of the majority of the voting rights in S [subsidiary] whether pursuant to an agreement with other members of S or otherwise, or (2) S is a subsidiary of a juristic person which is a subsidiary of JP; or (3) subsidiaries of JP, or JP and its subsidiaries together,*

> *(a) hold the majority of the voting rights in S or*
>
> *(b) have the right to appoint the directors holding a majority of the voting rights at meetings of the board of directors of S or*
>
> *(c) have the sole control of the majority of the general voting rights in S whether pursuant to an agreement with other members of S or otherwise.*

A "nominee" is "...a person that acts as the registered holder of securities or an interest in securities on behalf of other persons"".[19]

[57] When one applies this thinking to close corporations owned by individuals, A and B in this example above (Labuschagne and Smith in this case) are individual persons who together own the close corporations C1 and C2. Arguably, C1 cannot be viewed as similar to a "wholly-owned subsidiary", because the members' interest is not traceable to a single "entity" (i.e. one individual), but to two individuals A and B. Neither of those individuals – Labuschagne and Smith – "control" each other as individuals. When Maleho left, Labuschagne and Smith each would have control of 50% of the general voting rights in Mosebetsi. In other words they did not all devolve to either Smith or Labuschagne.

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[19] *Henochsberg on the Companies Act 71 of 2008*, Vol 1, Issue 18, at 32(7).

[58] On this approach, Labuschagne and Smith may be more akin to two separate companies each holding shares in a third company. If so, the third company is not akin to a "wholly-owned subsidiary" in relation to them. And if one of the corporations cannot be regarded as a "wholly-owned subsidiary" in relation to Labuschagne and Smith, there can be no question of the two corporations being part of the same economic entity, because neither of those corporations is akin to a "wholly-owned subsidiary", since each of the corporations has two separate individuals as its members, neither of those individual members controlling the other member. If that be the case, the appellants are not exempt in terms of section 4 (5) (b).

[59] It may be argued that because at a factual level Labuschagne and Smith control all the votes in both close corporations [after Maleho's departure], the two of them constitute a single parent, because they can always only act together in Mosebetsi, because no single one of them is a controlling member – their membership holdings are equal. They are as two sole joint owners in that close corporation. In A'Africa, Labuschagne was the controlling member, and for present purposes, she was the parent of that "subsidiary". So there is one holding company (Labuschagne) in A'Africa; and she is one of two individuals that form, with Smith, one undivided holding company into Mosebetsi. Of course, the similarity would be more evident if Labuschagne was the controlling member into Mosebetsi; but still, the comparison need only be similar. Indeed, since a firm includes also a partnership, if Labuschagne and Smith's relationship was *inter se* as such, then their partnership was the parent, irrespective of whether they would always agree on everything, and the two close corporations their two subsidiaries. The point is, their relationship was so commercially close, that their control of the two close corporations was joint, thereby resulting in a configuration "similar" to the subsidiary relationship provided for in the 2008 Companies Act.

[60] On balance, I point to the following. I am alive to the fact that other jurisdictions recognise common or collective controllers. The difficulty is that

ours is built into the statute and requires similarity to a structure in a company and a wholly owned subsidiary. Even if something required by paragraph (b) is less than 100%, which the authors seem to suggest and which I am not averse to,[20] it seems that a single person or a combination of persons upon which that first person has control (within the contemplation of section 3 (1) of the 2008 Companies Act), is postulated as a holder in our Act. A possible reason is the "presumption" of an identity of interest within these entities and the ability to control strategic directions by the holder, "*the parent and subsidiary always have a 'unity of purpose or a common design*".[21] Will Labuschagne and Smith always agree, if Smith were to be held to be in the position similar to a "subsidiary" of Labuschagne (holding or controlling the appellants together with Labuschagne within the contemplation of section 3 (1) of the 2008 Companies Act)? Maybe at times, but not "always".

[61] I am also mindful of the fact that common ownership by individuals has been approved in other developed competition law jurisdictions as indicated in some cases mentioned above, and in those jurisdictions the constitution of a single economic entity has been developed into law by judicial interpretation.[22] In our case the legislature has given the concept statutory recognition and has defined the structure that such a single economic entity should be comparable to (i.e. section 4 (5) (a)). I am however doubtful that in these circumstances that the appellants were in a single economic entity within the contemplation of section 4 (5) (b). Things might have been different if Labuschagne held or controlled all, or the majority, of members' interest in Mosebetsi.[23] It is so that the manner in which section 4 (5) is crafted is not without criticism, but that does not mean that its interpretation cannot allow for close corporations to be protected by section 4 (5)

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[20] Sutherland & Kemp at page 5 – 43: "*Section 4 (5) (b) should not only apply merely or exclusively where 100% control is exerted; the requirement that firms must form a single economic entity ought to be as important as in the case of companies*".

[21] Ibid fn 1

[22] Ibid fn 12, page 1

[23] This view is endorsed by Sutherland & Kemp at 5-43 who say section 4 (5) (b) "*may apply to a close corporation and a firm run by a controlling member as a sole proprietorship*".

(b) in appropriate circumstances, as already outlined. After my misgivings, I will thus assume on behalf of the Commission that section 4 (5) does not apply to this case and turn to deal with whether the appellants committed restrictive horizontal practices as stated in section 4 (1) (b).

Characterisation

[62] The approach by the Tribunal on characterisation seems not to be consonant with the observations expressed in *ANSAC*[24] (where the need to characterise the nature of the conduct was explained at length) and this Court's jurisprudence in *SAB*[25] and recently in *Dawn.*[26] It has not been fully explained by the Tribunal why the conduct was one of those that would, at face value, be prohibited, except that by its very nature collusive tendering is inimical. This Court in *SAB*[27] contemplated collusive tendering cases to be included in enquiries aimed at placing the conduct within the scope of section 4 (1) (b). The approach followed by the Tribunal may have been too constrained given the circumstances of this case.

[63] It seems to me given the context in which the appellants operated: the complete conflation of the running of their affairs, staff complement, equipment, management strategy, and businesses, and most importantly, the person who decided on the prices contained in the tender forms and other identical information submitted there-in, was one and the same, namely Labuschagne. Evidence had to be assessed before a conclusion could be arrived at.

[64] The Tribunal's finding was based on the submission of two quotations which in its view exhibited dishonest behaviour geared towards gaining a BEE advantage over others (even though prices were the same). In its view, " *the appellants could not be allowed to benefit from their dishonest actions and the illusions of competing for the work.*"

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[24] Ibid fn 3
[25] Ibid fn 4
[26] *Dawn Consolidated Holdings (Pty) Ltd & Others v The Competition Commission* (155/CAC/Oct2017) [2018] ZACAC 2 (4 May 2018)
[27] Ibid fn 4, at para 37

[65] Whilst I take a dim view of the appellant's behaviour, in not disclosing their relationship and in using Maleho's members' interest in the form, without explaining his departure, it begs the question whether such behaviour necessarily fell foul of section 4 (1) (b), or whether such breach could be located elsewhere other than in competition law and particularly section 4 (1) (b). In other words did the conduct amount to either price fixing or collusive tendering for the purposes of section 4 (1) (b).

[66] In the first instance, it was accepted that BEE was not a consideration for the awarding of the tender. Mosebetsi would have acquired the tender purely based on price, as the tender was below R30 000.

[67] Secondly, the submission of the two separate bids without more cannot on its own bring the conduct within the ambit of section 4 (1) (b), something more is required. There must be an "agreement" or "concerted practise" by competitors to fix the price, or of collusive tendering. That presupposes an involvement by more than one firm, as we know behind "firms" that are corporations there are individuals.

[68] On the issue of similar prices, Labuschagne put the same price in the forms and the explanation was that the price strategy was exactly the same, given that the two firms used the same staff, equipment and the amount was calculated using the same number of hours that would be spent doing the work. The only difference was that Mosebetsi was not a VAT vendor and therefore VAT was not included in its pricing, that being the only reason its price was slightly lower than that of A'Africa. That is a legitimate explanation, in my view. There seemed to be no clandestine apparent purpose or one that could be inferred, in the submission of the same price.

[69] Also, the fact that identical prices were submitted may be counter to an argument of price-fixing in this case, as one would have expected one firm in this situation to tender with a highly uncompetitive price so as to make way for the

other who would have a lower bid to be awarded the tender. So, how the submission of similar prices would restrict competition in this case, is unclear.

[70] Furthermore, the reason for submitting two tenders, in my view, is not without foundation: it was to give Mosebetsi a chance, though not operational in reality, to pay its debts.

[71] As to collusive tendering, what is interesting about the appellants' conduct is the apparent uniformity in the forms. It does not appear to be covert, but rather overt in nature. The forms were prepared in a manner that identified common membership, addresses, prices and contained a signature of the same person. In this regard, Labuschagne did not pretend to be someone else in one of the forms in order to cover collusion.

[72] Although on paper, by virtue of being separate entities, firms may be capable of colluding, ultimately, the actual role players behind those firms are natural persons. The question in this case, is who was Labuschagne colluding with? Could she collude with herself, or engineer collusion between the two firms she completed the forms on behalf of, and what would the effect of that be? In my view, those are the questions that the Tribunal ought to have asked, because more and more they highlight the reason why the conduct ought to have been characterised. This on its own lacks the hallmarks of collusion, which necessarily would involve individuals behind the firms conducting prohibited practices. Labuschagne had no colluding partner, so I find it hard to find that she could collude with herself in submitting the two tenders on behalf of the appellants. I need not deal with horizontality, in light of my findings above.

[73] The Tribunal therefore erred by finding that the appellants' conduct fell foul of section 4 (1) (b) of the Act. Its decision accordingly falls to be set aside.

[74] In the result, the following order is made:

1. The appeal is upheld with costs including costs of two counsel.

2. The decision of the Tribunal is set aside and replaced with an order in the following terms:

(i) The complaint is dismissed.

(ii) There is no order as to costs.

N P BOQWANA

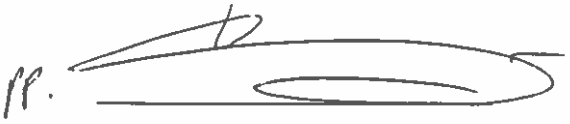
Judge of Appeal

I concur.

VICTOR

Judge of Appeal

I concur.



VAN DER LINDE

Acting Judge of Appeal