



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CR022May15

In the complaint referral between:

COMPETITION COMMISSION

Applicant

And

TOURVEST HOLDINGS (PTY) LTD

First Respondent

SIYAZISIZA TRUST

Second Respondent

Panel:	Andreas Wessels (Presiding Member) Enver Daniels (Tribunal Member) Medi Mokuena (Tribunal Member)
Heard on:	20 – 24 February 2017; 18 – 19 September 2017; 26 March 2018; 3 May 2018 and 21 November 2019
Order issued on:	29 September 2021
Reasons issued on:	29 September 2021

ORDER AND REASONS FOR DECISION

INTRODUCTION

- [1] This case concerns a complaint of collusive tendering or price fixing which the Competition Commission (“Commission”) referred to the Tribunal against Tourvest Holdings (Pty) Ltd (“Tourvest”) and the Siyazisiza Trust (“Trust”) (collectively referred to as ‘the respondents’).

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- [2] We are asked to determine whether the respondents' impugned conduct contravenes section 4(1)(b)(iii), alternatively section 4(1)(b)(i) of the Competition Act 89 of 1998, as amended ("the Act")¹. Should we find in favour of the Commission, the respondents may be liable to pay an administrative penalty pursuant to the provisions contained under section 58(1)(a)(iii), read with section 59(2) of the Act.
- [3] This matter has an extensive litigation history as it has taken approximately three years to fully adjudicate on the merits and the remedies of the case.
- [4] During the hearing, we not only heard three interlocutory applications, but various objections were raised by the parties on certain issues.

FACTUAL BACKGROUND

- [5] Tourvest conducts business in the tourism industry. Amongst others, it operates five arts, crafts and curio retail stores, and two branded homeware stores in the international departures' terminal section of the OR Tambo International Airport in Johannesburg ("OR Tambo").²
- [6] The Trust is a broad-based craft enterprise development agency and works with around 400 rural crafters. The Trust sells the crafters' products to retailers, government entities, corporate clients within South Africa, and foreigners.³
- [7] The Trust's operations are financed through mainly donor funding and revenue derived from craft sales. One of its donors is Tourvest, which donates funds as

¹ 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) ...

(iii) collusive tendering.

² Tourvest's Answering Affidavit, para 12.

³ Tourvest's Answering Affidavit, para 13. This information is not contested.

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part of its enterprise development and corporate social investment responsibility strategy. Tourvest is the Trust's largest donor.⁴

- [8] In February 2013, Airports Company South Africa ("ACSA") published a request for bids for a tender in relation to arts, crafts and curio retail leasing opportunities at OR Tambo.⁵ The tender, which was to be for a period of five years, was divided into three, viz., Shop DF02 ("Opportunity 1"), DF Shop 20 ("Opportunity 2") and Shops IPR 04, DFE 04, BS 02 ("Opportunity 3"). Although prospective bidders could only bid for two of the opportunities, Tourvest submitted tender bids in respect of all three. The Trust only submitted a bid in relation to Opportunity 3.
- [9] It is common cause that Tourvest assisted the Trust in the preparation of the Trust's bid for Opportunity 3 and that the parties concluded a Memorandum of Understanding ("MOU").
- [10] During the evaluation of the bids, ACSA noticed that the respondents' bids were similar in the following respects:
- the projected rental revenue and annual minimum rental;
 - the annual income, cash flow and business plan;
 - the marketing plans;
 - the statistical substantiations and analyses; and
 - the methods of operation and management.⁶
- [11] On 16 April 2013, ACSA addressed a letter to both respondents informing them about the similarities and that the similarities suggested possible collusive conduct by the two. In this letter, ACSA requested an explanation from the respondents.
- [12] As Tourvest had been primarily responsible for the preparation of the two bids, Mr Eric De Jager ("Mr De Jager") of Tourvest replied on behalf of both

⁴ Tourvest's Answering Affidavit, para 14.

⁵ Request for Bids (RFB) for Arts, Crafts and Curio Retail Stores in the International Departures Airside Terminal at OR Tambo International Airport' Bid No. ORT 011/2013.

⁶ The Trust's bid was not evaluated, but ACSA noticed the similarities when it compared the bid documents submitted by Tourvest and the Trust. In this regard see para [20].

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respondents. In response to ACSA and addressing the suggestion of possible collusive conduct, Mr De Jager stated that there had been full disclosure of the arrangement between the respondents.

- [13] On 25 April 2014, the Commission received a complaint of collusion against the respondents in respect of their bids for Opportunity 3 from ACSA. The Commission then referred the complaint to the Tribunal on 25 May 2015.
- [14] In the referral, the Commission alleges that as both respondents are active in the market for the selling of arts, curios and crafts, they are in a horizontal relationship for the purposes of meeting one of the jurisdictional grounds of section 4(1)(b) of the Act.⁷ In addition, the Commission contends that, at the very least, the respondents became actual or potential competitors, when they both submitted their bids for Opportunity 3.⁸
- [15] The Commission concluded, based on its investigation, that the respondents had colluded when bidding for the tender, in contravention of section 4(1)(b) (iii) of the Act, alternatively section 4(1)(b)(i).

THE RESPONDENTS' DEFENCES

- [16] The respondents deny the allegations made against them by the Commission.

Tourvest

- [17] Tourvest argues that it had assisted the Trust to prepare its bid because the Trust would not have been selected as the preferred service provider without that assistance, as the Trust assists rural crafters and has no experience in bidding for tenders of this kind. According to Tourvest, the tender documents issued by ACSA had specifically stipulated that bids would not be considered, unless the bidders had the requisite qualifications and experience in running a retail store, which the Trust lacked.⁹

⁷ See definition in fn 1.

⁸ CCSA Replying Affidavit, para 8.

⁹ Tourvest's answering affidavit, pages 7-8.

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- [18] Tourvest undertook, in terms of the MOU, to manage the store on behalf of the Trust, and to assist the Trust to develop the requisite management skills and other expertise to conduct the business efficiently on its own, in the event of the Trust's bid being successful.¹⁰
- [19] Tourvest submitted that the Trust had not purchased the bid documents and had not attended the compulsory briefing session that had been arranged for the bidders by ACSA.¹¹ The Trust's bid was, for those reasons, not opened and was not considered by ACSA. Therefore, the Trust's bid had no impact whatsoever on the competitiveness of the bidding process for the tenders.
- [20] Tourvest also denied that it and the Trust are in a horizontal relationship in terms of the Act.¹²

The Trust

- [21] Like Tourvest, the Trust opposed the Commission's referral on similar grounds and raised various "*in limine*" points. The Trust's argument was that it is not in a horizontal relationship with Tourvest, as the Trust's customer base is totally different to that of Tourvest, and the commercial size of the Trust's operations is significantly smaller than that of Tourvest. Without Tourvest's assistance, the Trust would not have been able to bid for the ACSA tender.¹³
- [22] The second point was that the respondents' conduct could not be characterised as falling under section 4(1)(b) of the Act, as the respondents did not intend to collude, but wanted to promote competition. Tourvest would have assisted the Trust to gain the requisite management and other expertise to manage the business on its own in terms of the MOU, which was entered into for upliftment purposes.¹⁴ That, according to the Trust, was why the MOU was attached to its bid documents.

¹⁰ Tourvest's answering affidavit, pages 11-12.

¹¹ Tourvest's answering affidavit, pages 15-16.

¹² Tourvest's answering affidavit, pages 23.

¹³ The Trust's answering affidavit, pages 5-6.

¹⁴ The Trust's answering affidavit, pages 7-9.

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- [23] The Trust also argued that section 4(1)(b) does not apply as the applicable provision should be section 3(1)(e) of the Act, as the Trust's main intention in submitting a bid for Opportunity 3 was for socio-economic upliftment purposes.¹⁵
- [24] The Trust submitted that the Commission's referral ought to be dismissed purely on the "*in limine*" points.

THE WITNESSES

- [25] Three factual witnesses and one expert witness testified.
- [26] The Commission called one witness, Mr Jabulani Khambule ("Mr Khambule") who was the former general manager for Regional Airports for ACSA. Mr Khambule was involved in evaluating the bids submitted by Tourvest and the Trust.
- [27] Tourvest called a factual witness, Mr De Jager, who was the Executive Director and Divisional Chief Executive Officer of the Travel Retail Division of Tourvest, until his retirement on 1 March 2016. He was involved in collating and submitting Tourvest's bid. He had suggested to the Trust that it bids for Opportunity 3 and formulated the tender arrangements between Tourvest and the Trust.
- [28] Tourvest also called Mr James Hodge ("Mr Hodge"), an economist employed by Genesis Analytics at the time, as its expert witness. Mr Hodge provided an expert view on behalf of Tourvest on economic issues pertaining to collusive tendering in the context of this matter.

¹⁵ 3. Application of Act — (1) This Act applies to all economic activity within, or having an effect within, the Republic, except—
(a) ...
(e) concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose.

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- [29] The Trust called one witness, Ms Jane Zimmerman (“Ms Zimmerman”), who has been the executive director of the Trust since 2014. Ms Zimmerman was asked by Mr de Jager to bid for the impugned tender and was personally involved in the preparation and submission of the Trust’s bid.

PROCEDURAL BACKGROUND

- [30] Several procedural issues arose during this matter. These were the Commission’s application to re-open its case after it had previously narrowed its case; its application to withdraw that and the pleadings filed in the assessment and determination of the remedies; and the Trust’s application to hand in an affidavit relating to the Commission’s witness, Mr Khambule.

COMMISSION’S EVIDENCE

- [31] In advancing its case, the Commission submitted firstly that Tourvest and the Trust were competitors under the Act as they tendered for the same retail opportunity at ACSA and in so doing, Tourvest and the Trust independently and jointly held themselves out to be competitors in the provision of the same service. Secondly, the Commission submitted that it is of the view that in failing to bid independently, the conduct of Tourvest and the Trust was collusive.
- [32] Mr Khambule, who was the retail manager at OR Tambo when the bidding process relating to this matter started, testified on behalf of the Commission in support of its case. Mr Khambule’s duties entailed managing ACSA’s retail portfolio, identifying new or potential retailers and assisting with the evaluation of retail opportunities, amongst other duties.¹⁶
- [33] We understand from Mr Khambule that ACSA usually contracts with retailers for a period of five years and a great deal of market research is conducted to determine the types of retail outlets that should be established at the airports.

¹⁶ Transcript, pages 68 (line 18) – 69 (line 6).

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Once ACSA has decided on a particular type of retail outlet, the procurement division will issue a request for bids.¹⁷

- [34] Mr Khambule explained that the bid evaluation takes place after the bids have closed. The evaluation process commences with the opening of the bids in the presence of an auditor. The bid evaluation committee then checks whether the bidders had purchased the bid documents and had attended the compulsory briefing session. Once that has been done, the committee evaluates the mandatory administrative requirements and the technical capabilities of the bids and then the price and the BBBEE requirements. Thereafter, the bid evaluation committee prepares a report and recommendations for the bid adjudication committee.¹⁸
- [35] Bidders who had not attended the compulsory briefing session would be disqualified.
- [36] It's obvious from Mr Khambule's later evidence that the Trust was disqualified because it had not purchased the bid documents and had not attended the compulsory briefing.¹⁹ This happened after the committee had satisfied itself that the Trust had not purchased the bid documents and had not attended the compulsory briefing, because the bid adjudication committee did not simply want to disqualify the Trust.²⁰
- [37] According to Mr Khambule, the bid adjudication committee telephoned Ms Zimmerman and enquired whether the Trust had attended the compulsory briefing session and had purchased the bid documents. Ms Zimmerman confirmed that the Trust was represented at the briefing by Tourvest and in relation to the purchase of the bid document, referred the bid adjudication committee to the MOU. Upon being told that, the bid adjudication committee then looked at the MOU. They then also looked at both bids and noticed that they were the same in certain respects.²¹

¹⁷ Transcript, page 69 (lines 9 - 20).

¹⁸ Transcript, pages 70 (line 8) - 71 (line 4).

¹⁹ Transcript, page 129 (lines 9 -13).

²⁰ Transcript, pages 73 (line 12) – 74 (line 8).

²¹ Transcript, page 74 (lines 9-21).

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- [38] Mr Khambule said that Tourvest “ticked all the boxes” relating to the mandatory requirements.²² However, it was only after receiving the information about the MOU from Ms Zimmerman that they became “a little bit uncomfortable” ... (and) went through both set of documents.²³ Upon noticing what he referred to as the “glaring similarities between the two documents,”²⁴ they reported the matter to ACSA’s internal legal counsel, Mr Bongani Mashobane (“Mr Mashobane”), and told him what they had observed from the documents and indicated that it may be collusion. Mr Mashobane went on to obtain legal advice and advised the bid adjudication committee to report the matter to the Competition Commission, which it did.²⁵
- [39] Mr Khambule noted that not only were the bids identical in certain respects, but both the Trust and Tourvest were bidding for the same opportunity, being Opportunity 3.²⁶
- [40] In addition, and of relevance to the Commission’s case was Mr Khambule’s evidence as appears in his witness statement, where he said:
- “It was one thing for Tourvest and the Trust to jointly submit a tender in which they agreed on pricing, costing and trading conditions (the joint opportunity 3 bid), but it was quite another for them to do so and for Tourvest also to submit a separate bid (the Tourvest opportunity 3 bid) or virtually on the same terms. This to the BEC at the time of the evaluations of the bids smacked not only of opportunism on Tourvest’s part, but also of anticompetitive behaviour.”²⁷*
- [41] During cross-examination, Mr Khambule seemed to confirm a great deal of what was put to him, and more importantly, he confirmed that he had no problem with Tourvest helping the Trust. Mr Khambule averred that his problem

²² Transcript, page 73 (line 15).

²³ Transcript, page 75 (line 1).

²⁴ Transcript, page 75 (line 15).

²⁵ Transcript, pages 75 (line 21) – 76 (line 3).

²⁶ Transcript, page 85 (lines 6-10; and line 13).

²⁷ Transcript, pages 123 (lines 20-23) – 124 (lines 1 -5).

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was that Tourvest had submitted a bid itself for Opportunity 3, in competition with the Trust. He reaffirmed this in his response to a question by Tribunal Member, Ms Mokuena, where he said the following:

*“... remember Tourvest and the Trust they are saying to us they are not competitors. Now the Trust in its own right, it’s 100% entity owned by the Trust, so it has people who manages it. Now that makes that entity at the moment of the submission of the tender a separate legal and capable entity to compete with Tourvest for this opportunity, which is opportunity 3, it puts them at that level and these two entities then get together and agree amongst themselves that we are going to put in the same facts, basically the identical document in all aspects. So, it is two entities that are competing against each other colluding, in my view.”*²⁸

[42] This evidence by Mr Khambule seems to suggest that the committee had viewed the Trust as a competitor of Tourvest when it submitted a bid for Opportunity 3 and that the two entities had colluded with each other in respect of the substance of their bids.

[43] When asked how he could regard the Trust and Tourvest as being on the same level (in terms of experience) when the Trust had specifically said that it does not have the experience, skills or infrastructure to operate Opportunity 3, Mr Khambule conceded that if one deletes every reference to Tourvest in the Trust’s document and one ignores the MOU, the Trust would not have been able to satisfy ACSA that it could exploit the opportunity on its own.²⁹ However, this does not diminish in any way his evidence that, in his view, the Trust and Tourvest were competing with each other for Opportunity 3.

TOURVEST’S EVIDENCE

[44] Following the testimony of Mr Khambule, the Tribunal heard the testimony of Mr De Jager who testified on behalf of Tourvest. At the outset, he explained

²⁸ Transcript, page 418 (lines 11 – 21).

²⁹ Transcript, pages 435 – 436.

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that Tourvest has been operating at airports since 1993. He confirmed that Opportunities 1, 2 and 3 are groupings of shops which were occupied and run by Tourvest. According to him, Opportunity 1 was a single store, Opportunity 2 was a Sneakers footwear store, and Opportunity 3 consisted of three shop sites. Out-of-Africa, Impulse and Indaba Origins comprised the three shops located within Opportunity 3 and carried stock of R700, 000.00, R600,000.00 and R1,25 million respectively. The Out-of-Africa store is about 500 square metres and Tourvest has had the exclusive rights to that store for 10-years.³⁰

- [45] Tourvest shops, according to Mr De Jager, are replenished with stock three times a day, because they experience rushes of people, with intense trading especially between 18h00 and 21h00. He described the business as being a high volume, low value business which sells volumes of items to a diverse market of clientele, who are worried that they might miss their flights and are in a hurry.³¹
- [46] A central warehouse or distribution facility feeds the airport. Mr De Jager explained that the stock is diverse, between 72, 000 - 100, 000 line items, designed to cater for any potential customer. Approximately one hundred people are employed in the distribution facility. They do the accounts and process the goods which they receive from between 650 – 750 suppliers. He explained in detail how the operations are conducted.³²
- [47] Despite having a 10-year lease for the Out-of-Africa shops and presumably the other shops as well, Tourvest appears to have been put on notice, as early as 15 November 2007, when it received an email from Rory Mackey (“Mr Mackey”) of ACSA. This email noted that Tourvest should not necessarily expect its leases to be renewed as ACSA was interested in the empowerment of craft workers and as such, ACSA was under pressure from “high powered political figures” to accommodate rural craft workers.³³ Further, Mr Mackey suggested

³⁰ Transcript. Page 446 (lines 5- 6).

³¹ Transcript, page 453 (lines 13-21).

³² Transcript, pages 452 – 455.

³³ Transcript, page 457 (lines 8 -19).

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to Tourvest that they conclude a commercial deal [with rural female crafters].³⁴ In response, Mr De Jager explained to Mr Mackey that the Trust, which Tourvest has a relationship with, does exactly what he had proposed, and according to him, without the assistance of the Trust, the rural crafters would have no access to the market.³⁵

- [48] Tourvest told Mr Mackey that it did not think that the proposal was workable and took ACSA executives on a site visit to show them *“the dynamics you are faced with under the circumstances of dealing with rural crafts people in remote areas.”*³⁶
- [49] Although Mr De Jager did not say so, Tourvest must have been very worried by this development, which threatened some of its operations, if not all its operations at OR Tambo.
- [50] Mr De Jager continued to provide some history to the ACSA tender dispute. In 2011, ACSA put out a request for bids in respect of premises, described as Cluster A and Cluster B. These clusters included the shops which in the current tender are referred to as Opportunity 3. In 2011, Tourvest put in bids for both clusters to “cover all bases.”³⁷
- [51] Prior to the 2011 tender, Tourvest had exclusive rights in the airport. In that year ACSA split those rights. The whole approach to the tendering process was changed and in 2013, the cluster of stores was broken up into three groups of stores – one store in Opportunity 1, one store in Opportunity 2 and three stores in Opportunity 3.³⁸
- [52] According to Mr De Jager, the process and the empowerment aspect could have been handled better. He was of the view that the three stores, which when grouped together created the second largest curio business in the country,

³⁴ Transcript, pages 457 (line 21) – 458 (lines 1-4).

³⁵ Transcript, page 458 (lines 5 – 21).

³⁶ Transcript, page 460 (lines 7 -9).

³⁷ Transcript, page 462 (lines 7-20).

³⁸ Transcript, pages 463 – 464.

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could have been split into three individual tenders and ease of access could have been facilitated through a much cheaper vehicle. In essence, Mr De Jager was saying that the development initiative could have been advanced better had Opportunity 3 been split into three separate tenders. Mr De Jager noted that few contenders had the necessary experience to run such a business, and Tourvest had accordingly discussed that with ACSA.³⁹

[53] In the current tender, ACSA set the threshold of experience in relation to the operation of a retail store with a turnover of R500 000 per month or R6 million a year over two of the last three years.⁴⁰ Other than Tourvest, only Thebe Tourism Group (“Thebe”) met the criteria, and it had also shown an interest in the bids. At the time, Thebe had a store at the V&A Waterfront.⁴¹

[54] Mr De Jager also spoke of Nomanini Crafts (“Nomanini”), another bidder, who in Mr De Jager’s view would win a bid even though it did not meet the criteria.⁴² When asked whether Tourvest researched Nomanini and its credentials, Mr De Jager noted that they did “some homework” because Tourvest felt that Nomanini was being set up to win the tender or a part of it. Tourvest investigated the directors, their financial records, and their infrastructure.⁴³ Our view that Tourvest must have been very concerned about the possibility of losing their shops at the airport is reinforced by the lengths Tourvest went to, to obtain information about Nomanini.

[55] In 2013 Nomanini won two opportunities, the mega store and the sneakers store. Tourvest interdicted ACSA from awarding the tender.⁴⁴ That and the fact that Nomanini could not provide a financial guarantee resulted in Tourvest still conducting their business under Opportunity 1 at the time of the hearing.⁴⁵

[56] Thebe was awarded Opportunity 3 and was included in the interdict.

³⁹ Transcript, page 464 (lines 1 -17).

⁴⁰ Transcript, page 464 (lines 18-20).

⁴¹ Transcript, page 465 (lines 5-7).

⁴² Transcript, page 465 (lines 15-20).

⁴³ Transcript, page 466 (lines 1-10).

⁴⁴ Transcript, page 467 (lines 3-8).

⁴⁵ Transcript, page 467 (lines 13-16).

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- [57] The Tourvest review application filed in the North Gauteng High Court in Pretoria, included asking the court to set aside the awards of the bids to Nomanini and Thebe, and to set aside the disqualification of Tourvest.⁴⁶
- [58] Moving on to the relationship between Tourvest and the Trust, when asked why he had not simply suggested to the Trust that they consider tendering themselves for Opportunity 3, Mr De Jager stated that the Trust had no infrastructure in place, they do not operate a retail outlet, had no staff and no technology. However, he hastened to add that with Tourvest's systems in place, the Trust could be upskilled over a period of time.⁴⁷ We are certain that the irony of this statement was not lost on Mr De Jager who described Nomanini in similar terms.
- [59] Mr Marolen took over the cross-examination of Mr De Jager from Mr Bodlani and attempted to introduce evidence to show that the Trust was involved in retail trade prior to its bid for Opportunity 3. This line of questioning elicited objections from both Mr Maenetje and Mr Maritz. To contextualise those objections, we pause to review what the Commission had said about its case –

59.1 In his opening address, counsel for the Commission, Mr Bodlani submitted that –

“...the evidence is going to show that the two respondents were in fact on a horizontal relationship in respect of each other and in relation to the tender in issue. We are going to argue that even if we do not make a case on the horizontal relationship, but at least the Trust in relation to Tourvest was a potential competitor.”⁴⁸

59.2 When asked by the Chairperson whether the Commission's case was that the Trust entered the retail market through the tender as a new

⁴⁶ Transcript, page 468 (lines 11-14).

⁴⁷ Transcript, page 471 (lines 16 -19).

⁴⁸ Transcript, page 2 (lines 22 – 22).

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entrant into the retail market, Mr Bodlani's response was that "*... on the tender document that was submitted by the Trust they had indicated that they had vast experience in the retail market. It is part of our case that as soon as they submitted, they became a competitor in respect of that tender.*"⁴⁹

- 59.3 There was an interesting ebb and flow in Mr Bodlani's opening address regarding the Trust and Tourvest. On the one hand, it was alleged that Tourvest and the Trust were in fact in a horizontal relationship in the retail trade and specifically in relation to the tender in question. However, so the argument went, even if the horizontal relationship argument cannot be sustained, then, at the least, the Trust in relation to Tourvest was a potential competitor. On the other hand, the Trust had indicated in the tender documents that it had vast experience in the retail market but, it was part of the Commission's case that during the Trust's tender for Opportunity 3, they became competitors in respect of that tender.
- 59.4 At this stage, we note that initially the Commission was represented by Mr Bodlani and Mr Marolen. Their mandates were terminated at some point and then the Commission was represented by Mr Nzabandzaba, the instructing attorney, who later in the proceedings instructed Mr Bodlani again together with Mr Ngcukaitobi to represent the Commission. The difficulty with having so many lawyers representing the Commission is, perhaps, best illustrated by what follows.
- 59.5 Perhaps mindful of the ebb and flow of the opening address, Mr Wilson, on behalf of Tourvest, asked for clarification of the case Tourvest was expected to meet, and that is whether the contention that Tourvest and the Trust are competitors is based on the fact that they both tendered for Opportunity 3 and it is not based on the fact that they were pre-existing competitors in the broader retail market. Mr Wilson asserted on behalf of Tourvest, that the understanding was that the Commission no longer contended that the parties were competitors based on their pre-existing

⁴⁹ Transcript, page 3 (lines 14 -19).

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competition, but rather that they became competitors when they both submitted bids for Opportunity 3.⁵⁰

59.6 Mr Maenetje asked for a similar clarification, to which Mr Bodlani responded that “... *whilst there may have been some retail conduct on the part of the Trust and so on before the tender, but the Commission is not going to be relying on that. We are going to put our eyes squarely on what was the conduct during the period of tendering.*”⁵¹

59.7 To us, it appeared that the Commission clearly and unambiguously confirmed that its case rested on the conduct of the two parties during the tender period. This is clear when looking back at the Commission’s examination in chief of Mr Khambule, and the cross-examination of Mr De Jager, where the Commission’s counsel intimated that prior to the bid the parties were not competitors or alternatively were negligible competitors.⁵²

[60] As the cross-examination of Mr De Jager continued, Mr Marolen, for the Commission attempted to show that it was the case (of the Commission) on Tourvest’s own version that there was a supplier/customer relationship between the Trust and Tourvest prior to the bid, and furthermore a horizontal relationship between them because both parties were in the same line of business.⁵³ This too was met with objections from the respondents’ counsel respectively, on the basis that at the commencement of the Commission’s address, the Commission had unequivocally stated that its case rests on the proposition that the Trust and Tourvest became competitors during the period of bidding for Opportunity 3.⁵⁴ Tourvest and the Trust were required to meet that case. We pause again to briefly deal with the Commission’s application to re-open what we understood was its previously narrowed case –

⁵⁰ Transcript, page 64 (lines 4-14).

⁵¹ Transcript, page 65 (lines 12-18).

⁵² Transcript, page 92 (lines 15-18); pages 498 (line 22) - 499 (lines 1-2).

⁵³ Transcript, pages 516 (lines 9 -12).

⁵⁴ Transcript, page 516 (lines 1-3 and 14 – 23).

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- 60.1 After a short adjournment, Mr Bodlani explained that he and Mr Marolen were informed during the proceedings that they had not followed the “proper instruction” which was that Tourvest and the Trust were in a horizontal relationship before the tender was submitted to ACSA.⁵⁵ As such, the Commission wanted to re-open its previously narrowed case. In order to consider this, we had regard to the Uniform Rules of the High Court (High Court Rules), in terms of which, a party who wishes to tender more evidence must make a substantive application to do so.⁵⁶ We ruled that the Commission must make such an application to re-open its case, which it did from the Bar with the approval of the respondents, who stated that much of what was contended was common cause between the parties and as such, obviated the need for a formal application.
- 60.2 However, the respondents’ counsel asked us to dismiss the Commission’s application. Mr Maenetje submitted that there is a need for finality and that the Trust would be prejudiced, as the Commission had closed its case after the Commission’s only witness gave evidence and the Trust would incur additional costs. Mr Maritz argued that Mr Khambule had mentioned in his witness statement that the two entities were competitors, as on the face of their bid documents they were both active in the retail market for the sale of arts, crafts, and curios and that he would lead evidence in support of that at the hearing. According to him, Mr Khambule had given evidence regarding those documents and the case cannot be reopened because there is no relevant evidence which would have a bearing on and contribute to the case.
- 60.3 After hearing arguments on the application, we dismissed the Commission’s application. In *National Association of Pharmaceutical Wholesalers and others v Glaxo Wellcome (Pty) Ltd and others*⁵⁷ (“*Pharmaceutical Wholesalers*”) the Tribunal had relied on the

⁵⁵ Transcript, pages 518 (lines 19-21) - 519, (lines 1-2).

⁵⁶ Transcript, page 520.

⁵⁷ Case No: 68/IR/Jun00.

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authoritative judgment of the Appellate Division (as it was then) in *Mkhwanazi v Van der Merwe*.⁵⁸

- 60.4 In *Pharmaceutical Wholesalers* the Tribunal stated that the re-opening of a case is an extraordinary measure and the courts have clearly identified circumstances under which it ought to be permitted.⁵⁹ In *Mkhwanazi* the court held that Magistrate Court Rule (MCR) 28(11) must be exercised judicially after considering all the relevant factors as it is a matter of fairness to both sides. Such factors must not be viewed as inflexible or as being individually decisive. Some are more cogent than others, but they should be weighed in their scales.
- 60.5 The factors pertinent to re-opening a case are: (i) the reason why the evidence was not led timeously; (ii) the degree of materiality of the evidence; (iii) the possibility that it may have been shaped to relieve the pinch of the shoe; (iv) the balance of prejudice; (v) the stage which the particular litigation has reached; (vi) the healing balm of an appropriate order as to costs; (vii) the general need for finality in judicial proceedings; and (viii) the appropriateness, or otherwise, in all the circumstances, of visiting the remissness of the attorney upon the head of his client.⁶⁰
- 60.6 Mr Bodlani and Mr Marolen had both clarified what the Commission's case was, from time to time, during the hearing. They stated repeatedly that the Commission's case was that Tourvest and the Trust became either actual or potential competitors during the period when they both submitted bids for Opportunity 3. If one of the Commission's legal representatives had laboured under a misapprehension regarding their instructions, then the Commission was able to correct that immediately, as the Commission's attorney of record and the Commission's own staff members were present throughout the proceedings.

⁵⁸ 1970 (1) SA 609 (A).

⁵⁹ *Pharmaceutical Wholesalers* para 187.

⁶⁰ *Mkhwanazi* at 616 to 617.

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- 60.7 The Commission's application would have had the effect, if granted, of re-introducing facts which were already common cause, to a degree, but which the Commission abandoned unequivocally at the commencement of the hearing, without those facts having been canvassed during the Commission's case.
- 60.8 The Commission did not provide cogent reasons which would justify the reopening of its case. The Commission did not tell us what instructions it gave to Mr Bodlani and Mr Marolen and why the instructions were changed during the course of the proceedings. Such information, had it been forthcoming, would have been of assistance to us in our consideration of the application. If the Commission was simply allowed to re-open its case, given that its witness, Mr Khambule had already been led, cross examined and re-examined under the Commission's clarified case, it would have delayed proceedings and would have been prejudicial to the respondents. Mr Bodlani indicated that they wanted to lead further evidence from Mr Khambule.
- 60.9 As the Commission failed to explain why it wanted to re-open its case and what evidence it would lead to establish a retail relationship between the parties prior to the period of tendering for Opportunity 3, we dismissed the Commission's application to re-open its case in the interest of justice and fairness and to avoid prejudice to the parties, all of whom would have incurred considerably more legal costs.
- 60.10 After we had delivered our decision, Mr Bodlani indicated that his and Mr Marolen's briefs to act for the Commission had been terminated and that Mr Ndzabandzaba would take over from them. In this regard, both Mr Maritz and Mr Maenetje placed on record that a party's right to cross-examine is through only one representative, unless exceptional circumstances arise, such as the death or incapacity of the cross-examiner. However, in this case the Commission had merely terminated the mandate of its representatives. Mr Maritz and Mr Maenetje noted that provided Mr Ndzabandzaba does not traverse anything which had

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already been traversed in cross-examination, they will consent to him continuing with the cross-examination.

- [61] The cross-examination of Mr De Jager proceeded, under Mr Ndzabandzaba. Continuing on the relationship between Tourvest and the Trust, Mr De Jager confirmed that during discussions with the Trust, he “*did sow the seed that there might be an opportunity for the Trust to enter into the tender bid that had been announced by ACSA,*” but he did so “in very loose terms.”⁶¹ By then, the compulsory ACSA presentation had already taken place. After that discussion, an email was addressed to the Trust in which more details were provided to the Trust to ascertain whether the Trust would be interested.
- [62] The Trust according to Mr De Jager, finally accepted the offer by Tourvest about 5 – 7 days before the tenders closed and the MOU was signed the day before the actual tender documents were handed in on 8 April 2013.⁶²
- [63] Mr De Jager explained why it was necessary to conclude the MOU with the Trust. According to him, the Trust did not have the expertise to run the business and would be assisted in the management of the business by Tourvest until they were able to do so themselves. The Trust and its craft beneficiaries would hold 100% of the equity in the venture. The management fee would be 7.5% of the turnover or total sales that would be made. The Trust would pay Tourvest for all the services which it rendered. The amount envisaged to set up the business was going to be in the region of R6,5 million. Mr De Jager reminded the Tribunal that the Trust would not have been able to get into the business without Tourvest’s support, as they had neither the infrastructure nor the capabilities. Tourvest had the warehouse, the human resource function and IT capabilities, which were critical. It was intended that Tourvest would charge a commercial rate for this assistance.⁶³

⁶¹ Transcript, page 607 (lines 7-11).

⁶² Transcript, page 610 (lines 15-18). The tender closed on 8 April 2013.

⁶³ Transcript, pages 620 – 625.

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- [64] Later during the proceedings and upon questioning by Mr Maritz, Mr De Jager confirmed that the Trust would not have been able to submit a bid by itself. The cash flow projections were based on Tourvest's historical experience in running the outlets and was based on the same management and staff continuing to run the business. Gross sales were estimated to be R31 million per year and the management fee in respect of that would be 7.5%. Apparently, the Trust would make an estimated R4,9 million profit on the arrangement.⁶⁴
- [65] Although the Trust had evidently indicated that it would try to find a sponsor to assist it financially, it had not been successful at the time of submitting its bid and would have had to rely on Tourvest, which would have lent the Trust the money. That would have been in the region of R6,5 million without the Trust having to provide security.⁶⁵
- [66] However, the above does not explain why Tourvest also submitted a bid for Opportunity 3 in its own name.
- [67] On 18 September 2017, when the case resumed, we were informed that Adv Bodlani, together with Ms Tabatha and Mr Ngcukaitobi were instructed to act for the Commission by Ndzabandzaba Attorneys. The Commission, through Mr Bodlani, made an application to withdraw their argument that Tourvest and the Trust were only in a horizontal relationship in the period of tendering for Opportunity 3 and not at any time before that. We detail briefly this new application by the Commission –

66.1 The Commission submitted that this application is dissimilar to its February 2017 application to re-open its case. In this new withdrawal application, the Commission did not wish to introduce further evidence or amend its pleadings.⁶⁶ The respondents objected to this application arguing that it was an attempt by the Commission to re-open a case which was denied by the Tribunal. As such, the withdrawal application

⁶⁴ Transcript, page 723 (lines 1-18).

⁶⁵ Transcript, page 734 (lines 17-22).

⁶⁶ Transcript, pages 744 - 749.

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amounts to an abuse of process and will result in significant prejudice to the respondents.⁶⁷

66.2 In this application, the Commission in fact wanted to re-introduce the notion that the respondents were in a horizontal relationship prior to the period of submission of the two bids for Opportunity 3.

66.3 The Commission had, through its legal representatives, clarified its case on several occasions by repeating that the Commission's case was that the respondents were competitors in the period when they both submitted bids for Opportunity 3. That was the case which the respondents had to meet and which they had prepared for.

66.4 We dismissed the Commission's withdrawal application as it was similar to the application to re-open its abandoned case but couched in a withdrawal of a concession made. Our dismissal is based on the reasons provided by us in respect of the application to re-open the Commission's case, and those reasons do not have to be repeated here again.

66.5 We move on, on the premise that the Commission's case, as clarified, is that during the period when Tourvest and the Trust both submitted bids for Opportunity 3 they became actual or potential parties in a horizontal relationship.

THE TRUST'S EVIDENCE

[68] Ms Zimmerman, executive director of the Trust, testified on behalf of the Trust.

[69] According to Ms Zimmerman, the Trust was established to assist rural communities with enterprise development to better their quality of life.⁶⁸ The Trust started with food security initiatives and agricultural development in 1987. In 1994, craft development was identified as a possibility through which rural people could generate income and thereby attain food security and all other

⁶⁷ Transcript, page 806 (lines 13-21).

⁶⁸ Transcript, pages 821 (lines 21-22) - 822 (line 1).

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things that are their right, to send their children to school and so forth.⁶⁹ The Trust's product developers develop new products based on traditional skills and their technical trainers work with the rural groups to ensure that the quality of the crafts, the standard and the interpretation of the design is as honest as possible.⁷⁰

- [70] The Trust assists rural communities in KwaZulu-Natal, Mpumalanga, around the Kruger National Park and north of the Swaziland border, with pricing, access to raw materials, transport, basic record keeping, quality control, training, start-up equipment, marketing, and access to markets for the crafts.⁷¹
- [71] The Trust negotiates prices with potential retailers such as Tiger's Eye (a division of Tourvest) to protect the crafters. The Trust adds about 40% to the price which the crafter would get in order to contribute to their field costs.⁷²
- [72] The Trust is a non-profit organisation which depends mainly on grants from the corporate sector and the occasional government grant and cannot function without funding. While Tiger's Eye/Tourvest is its biggest benefactor, they have relationships with the Anglo American Chairman's Fund, the Ackerman Pick n Pay Foundation, Nedbank and others, but raising funds is an ongoing activity.⁷³
- [73] Ms Zimmerman described the Trust as being the link or middleperson between the producers, the crafters and the market and ensured that the correct quantity and quality of a product would get to the buyer.⁷⁴ The Trust realised over the years that it was important to attract young people who had marketing skills or the potential to become marketers to attract them into small profit-making businesses that would take over the role of the Trust and thereby develop enterprises. In pursuit of that goal a co-operative pilot programme model was set up at the Cradle of Humankind.⁷⁵

⁶⁹ Transcript, page 822 (lines 7-12).

⁷⁰ Transcript, page 824 (lines 1-8).

⁷¹ Transcript, pages 825 - 826.

⁷² Transcript, page 827 (lines 13-14).

⁷³ Transcript, page 829 (lines 10-12).

⁷⁴ Transcript, page 831 (lines 3-11).

⁷⁵ Transcript, page 830 (lines 11-12).

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- [74] Tourvest had been looking for an enterprise development partner and approached the Trust in 1999. The Trust mounted an exhibition at the airport and Tourvest, which had shops there, provided the crafters with a platform for their products and made the Trust a shareholder in some of the shops at the airport.⁷⁶ Tourvest donates a percentage of the pre-tax profits to the Trust quarterly.⁷⁷ Tourvest restructured the organisation, bought the shares which the Trust had in the Tourvest shops and replaced those shares with a donation's agreement, which remains in place.⁷⁸
- [75] Following a meeting,⁷⁹ which Ms Zimmerman had with Mr David Brenner ("Mr Brenner") and Mr De Jager to discuss the Trust's new model, Mr Brenner called her to discuss the possibility of the Trust submitting a bid for Opportunity 3.⁸⁰ Following that conversation, an email was sent to her by Mr Brenner, and it outlined the empowerment model for the tender of Opportunity 3. The email summarised the model as follows –

"(1), the tender has three opportunities. We currently operate all three. However, the rules state that we can only operate two in future; (2), we are tendering on the normal basis (with a donation for the Trust for two of the opportunities; (3), we believe that ACSA have reserved the third opportunity to allow for the development of an empowerment retailer. The fact that Tourvest is a black owned and controlled entity means that they are looking for enterprise development, i.e. the development of a small business in this site; (4), we suggest that the Trust be the entity that tenders for the site; and (5), we would manage the site for an agreed fee and the profits of the outlet would go to the Trust to be used for ED purposes; and (6), in order to provide retail skills, we will have a clause, which indicates that there will be handover of the business to the Trust on an agreed date and basis, i.e. the Trust will then be responsible for running the shop on its own. We would still have a supply agreement.

⁷⁶ Transcript, pages 832 (line 20) – 833 (line 13).

⁷⁷ Transcript, page 834 (lines 1-4).

⁷⁸ Transcript, page 836 (lines 11-16).

⁷⁹ It was at this meeting that Mr De Jager planted the seeds in loose terms about a bid by the Trust.

⁸⁰ Transcript, page 835 (lines 1-12).

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However, the Trust would have the ability to put its own merchandise into the store as well; (7), this opportunity has the potential to make a couple of million Rand profit per annum for the Trust, if successful; (8), we believe that this structure would result in the creation of a new ED retailer”, “and (9), the refurb and capex cost for this opportunity is approximately 4 million. We could either provide the finance on an agreed basis or you could raise finance from other sources. The tender is for 5 years plus a potential 2-year option, starting later this year.”⁸¹

[76] Excited by the prospects of the proposal, Ms Zimmerman forwarded the email to the trustees on 14 March 2013 at 02h01. The trustees thought it was a good idea but raised concerns.⁸² According to Ms Zimmerman, the questions were about the risk and Ms Zimmerman understood this as the Trust wanted to “*guard our name and our funding sources and our reputation fiercely and this was something that we had never done before.*”⁸³

[77] Ms Zimmerman noted that there was not the remotest sense that the bid involved any illegal or deceptive activity. One of the trustees, Hugh Sundelson (“Mr Sundelson”), who had a financial background met with Mr Brenner to discuss the issue, as “*He wanted to make sure from our point of view there wouldn’t be a huge unnecessary risk, were we covered, how was the partnership going to go forward ...*”⁸⁴

[78] Following the meeting between Mr Sundelson and Mr Brenner, Ms Zimmerman wrote to the Trustees again noting that an MOU was to be received from Tourvest and the following has been confirmed –

“1, there will be no risk for the Siyazisiza Trust, and 2, the possible need for Tiger’s Eye to manage the entire outlet on our behalf for a 7% management fee was discussed after the 2-year period as David originally suggested. 3, our relationship with Tiger’s Eye is intact and this

⁸¹ Email dated 14 March 2013 in Bundle A and quoted in full at pages 837 – 838.

⁸² Transcript, page 840 (lines 3-15).

⁸³ Transcript, page 840 (lines 12-15).

⁸⁴ Transcript, page 841 (lines 18-20).

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opportunity may present the next level of our relationship once the donation agreement ends and 4, there is no guarantee that the bid will be successful.”⁸⁵

- [79] On this basis, Ms Zimmerman requested the board’s permission to proceed with the bid, together with Tourvest.
- [80] Importantly, we note that neither Tourvest nor the Trust has sought legal advice on the proposal and the MOU.
- [81] Although the matter was raised “loosely”, Tourvest followed up the matter enthusiastically with the Trust, which suggests that Tourvest knew that the stakes in respect of their business ventures at OR Tambo were indeed high.
- [82] However, despite her enthusiasm for the project, Ms Zimmerman appears to have had just the slightest bit of doubt. On 2 April 2021, she addressed an email to Mr Brenner and Mr De Jager questioning, amongst other the flexibility of the proposal and other concerns regarding the financial aspects of the proposal, as she did not want the Trust to be put at risk.⁸⁶
- [83] Her concerns were assuaged by an email from Mr Brenner and Mr De Jager.⁸⁷ She again asked the board for approval and even prepared the information which Tourvest required for the bid.
- [84] There are two additional aspects of Ms Zimmerman’s evidence which need specific mentioning. Firstly, Ms Zimmerman was certain that the Trust would actually take over the running of the outlet after skills had been transferred to them by Tourvest, as they always had to look at the potential for new income streams and the bid would present crafters with a platform for the goods and a potentially different income stream for the Trust. They would have wanted to learn the skill and takeover during that 3-year period.⁸⁸ Secondly, and more significantly, Ms Zimmerman confirmed that the Trust was absolutely not in a

⁸⁵ Transcript, pages 842 - 843.

⁸⁶ Transcript, pages 845 – 846.

⁸⁷ Transcript, pages 847 – 849.

⁸⁸ Transcript, page 849 (lines 19-20).

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position to determine its own financial offer because the Trust had never run a shop, let alone a store of the magnitude of any of the Tourvest shops at OR Tambo or any other destination. According to her, the Trust did not have the skills to even contemplate what putting the finances together for such a bid would entail or would have to rely on Tourvest to put it together.⁸⁹

[85] Pursuant to receiving the draft MOU on 2 April 2013, the board approved the submission of the bid on or about 5 April 2013.⁹⁰

[86] Ms Zimmerman confirmed Tourvest's conflict of interest declaration, which reads as follows:⁹¹

"In submitting this document Tourvest Holdings Limited wishes to record that it has no direct or indirect shareholding interest in any other tenderer or in any member of any other tenderer's consortium relating to opportunity 3. It does record that it will provide support services to the Siyazisiza Trust in terms of the Siyazisiza Trust bid for opportunity 3. The nature of these support services, clearly documented in the Siyazisiza Trust bid document. The purpose of this service is to facilitate skills transfer to the Siyazisiza Trust and the level of service reduces over the proposed tenure of the lease. ... We believe that this represents no conflict of interest as bullet1, Tourvest will have no voting power of any form in the Trust's venture. Bullet 2, the financial offer of both bids is equivalent and bullet 3, the purpose of the service is to provide ACSA with the opportunity to review a bid specifically designed to create a strong crafting retailer with impeccable enterprise development credentials."

[87] Ms Zimmerman stated that the declaration accords with her understanding of the arrangement between Tourvest and the Trust.⁹²

⁸⁹ Transcript, page 850 (lines 6-11).

⁹⁰ Transcript, page 851 (lines 1-5).

⁹¹ Transcript, pages 862 (lines 9-18) – 863 (lines 1-7) Adv Maenetje read from sections of the record.

⁹² Transcript, pages 862 (lines 19-21)

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- [88] Ms Zimmerman also confirmed that the Trust did not meet one of the criteria which required a bidder to have sufficient experience in successfully managing at least one retail store with minimum monthly sales of R500, 000.00 or R6 million per annum in any of the prior three years. The Trust's monthly sales did not amount to anywhere near R500,000.00 and without knowledge of the particular market, would not have been able to formulate rentals which it could offer to ACSA.⁹³
- [89] During cross examination by Mr Ngcukaitobi, Ms Zimmerman confirmed that the Trust's sales amounted to R671,000.00 in 2016 and R466,000.00 in 2015, which was considerably less than what ACSA required.⁹⁴
- [90] According to Ms Zimmerman, most of the Trust's revenue came from donations and grants. The Trust received donations amounting to R9,7 million in 2016 and 2015, and grant funding amounting to R5,2 million for 2016 and R2,8 million for 2015.⁹⁵
- [91] With reference to the relationship with Tourvest and particularly the declaration that Tourvest was competing for the tender in its own right, Ms Zimmerman explained that the two bids provided ACSA with an option of an enterprise development entity being assisted by another very experienced retailer at the airport. She also explained that they were competing with Thebe and Nomanini, two other bidders, but conceded that the declaration could be interpreted in a way which suggests that the Trust was also competing with Tourvest.⁹⁶
- [92] When pressed by Mr Ngcukaitobi regarding the statement that "*the purpose of this service is to provide ACSA with the opportunity to review a bid specifically designed to create a strong crafting retailer with impeccable enterprise development credentials.*", she stated that it was important to note that the

⁹³ Transcript, page 866 (lines 14-15).

⁹⁴ Transcript, page 869 (lines 6-11).

⁹⁵ Transcript, page 869 (lines 4-5 and 21-22).

⁹⁶ Transcript. Page 872 (lines 1-6 and 19-20).

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sentence reads “*to create a strong crafting retailer*”, which in Ms Zimmerman’s view was reference to the Trust.⁹⁷

[93] When questioned about the Trust’s retail experience, Ms Zimmerman denied that when she mentioned in her statement that the Trust’s interaction with and focus on retailer customers meant it could claim some experience of activities in the retail space, that she was suggesting that the Trust’s bid contained false information.⁹⁸

[94] Notably, in her witness statement, Ms Zimmerman said that the Trust had gained insight and understanding of airport and destination retail through its 14-year long partnership with Tourvest and the Out of Africa megastores, but not experience in running such stores because they were not actually operating a store at the airport and could not, therefore, claim to have experience.⁹⁹ Ms Zimmerman made it clear that the Trust’s retail experience could not be compared to that of Tourvest and that she used the word ‘retail’ in a very loose sense.¹⁰⁰

[95] It is apparent from Mrs Zimmerman’s own evidence, that while the Trust had some retail experience and some understanding of, and insight into how Tourvest operated their retail outlets at the airports, she did not regard that as sufficient experience to actually run a business the size of the Tourvest stores at OR Tambo.¹⁰¹ Her evidence in this regard was consistent throughout her testimony.

[96] Ms Zimmerman’s evidence also made it clear that had the Trust’s bid been successful, the Trust would have been dependent on Tourvest as a service provider to the Trust for the efficient management of Opportunity 3.

[97] When it was put to Ms Zimmerman that by submitting a bid the Trust was increasing the chances of Tourvest being successful either on its own or

⁹⁷ Transcript. Pages 874 – 875.

⁹⁸ Transcript, page 875 (lines 1-4).

⁹⁹ Transcript, page 878 (lines 5-17).

¹⁰⁰ Transcript, page 887 (lines 10-13).

¹⁰¹ Transcript, page 888 (lines 3-10).

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through the Trust, Ms Zimmerman was adamant that the bid was designed to benefit the Trust and conceded, with the benefit of hindsight, that a joint venture may have been appropriate but had not been considered.¹⁰²

- [98] The above however does not explain why Tourvest also submitted a bid for Opportunity 3 in its own name.

EXPERT EVIDENCE

- [99] Tourvest commissioned an expert report which was prepared by Mr Hodge, an economist, who also testified on behalf of Tourvest. He supposed that the primary dispute is ultimately whether the parties were considered to be competitors and, alternatively, if they were competitors could the conduct properly be characterised as bid rigging and a *per se* prohibition falling within section 4(1)(b) of the Act. Mr Hodge also placed a great deal of emphasis on the Trust's inability to operate Opportunity 3 without Tourvest's help.
- [100] Mr Hodge observed that in *Competition Commission v South African Breweries Limited and Others (SAB)*¹⁰³, the Competition Appeal Court ("CAC") had considered two components. The one was whether the parties were in a horizontal relationship and the other was whether the conduct constituted bid rigging. He was of the view that if one fails on either of those then the conduct does not fall within section 4(1)(b), as both elements of the characterisation must be proved.¹⁰⁴
- [101] Further, Mr Hodge testified that from an economics perspective the idea behind the *per se* offence is that there is almost certain harm to competition. It is, therefore, unnecessary to prove effects because those are fairly certain to follow. Essentially, he explained, with reference to the *SAB* case, that in principle certain types of co-ordination between undertakings can be regarded

¹⁰² Transcript, pages 919 – 922.

¹⁰³ (129/CAC/Apr14) [2015] ZACAC 1; 2015 (3) SA 329 (CAC).

¹⁰⁴ Transcript, page 961 (lines 9-16).

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by their very nature as being harmful to the proper functioning of normal competition.¹⁰⁵

- [102] With reference to both *American Natural Soda Ash Corporation and another v Competition Commission and others (ANSAC)*¹⁰⁶ and *SAB*, he stated that the characterisation must determine whether the parties are in a horizontal relationship and whether the case involves the direct or indirect fixing of a purchase or selling price, the division of markets, or collusive tendering within the meaning of section 4(1)(b).¹⁰⁷
- [103] A peculiar aspect of this case is that the rental offered by the parties was identical, which with reference to Mr Hodge noted that although identical prices are not a common feature of bid rigging, it does occur within a certain context. He gave two examples. The one related to multiple buyers who can buy all the volumes they require of an input but at a lower price. The other related to public tenders where the public institution may buy from multiple players because it may not want to be dependent on a single entity so that an identical price may mean that the bidders share the order at the same price.¹⁰⁸ He also noted that putting in level pricing looks suspicious and, therefore, firms engage in more subtle means of bid rigging.¹⁰⁹ This however ignores the fact that Tourvest was cognisant that ACSA wanted to promote enterprise development in relation to Opportunity 3, and if the Trust won the tender Tourvest would be a significant service provider to the Trust.
- [104] Mr Hodge further argued that disclosure of bids is an important element because the evaluator of the bids cannot really then be under the impression that the bids are independent and that the bid prices are reasonable. An express disclosure of the same pricing would not make for an effective cover bidding strategy.¹¹⁰ We further deal with the issue of disclosure under remedies.

¹⁰⁵ Transcript, pages 961 – 962.

¹⁰⁶ 2005 (6) SA 158.

¹⁰⁷ Transcript, page 964 (lines 2-6).

¹⁰⁸ Transcript, page 972 (lines 1-8).

¹⁰⁹ Transcript, page 972 (lines 9-11).

¹¹⁰ Transcript, page 974 (lines 7-11).

ADMISSIBILITY OF THE EVIDENCE OF THE COMMISSION'S WITNESS

- [105] At the end of the oral evidence, the Trust made an application for the admission of a letter from ACSA in which ACSA confirms that Mr Khambule, the Commission's witness, along with two of his colleagues Mr Sithole and Mr Machobani, who were also involved in the tender processes at ACSA, were dismissed for serious misconduct.
- [106] Mr Khambule had during his evidence in chief stated that he was on suspension at the time of testifying but had written authorisation from ACSA to testify.
- [107] During the cross-examination of Mr Khambule, Mr Maritz insisted that if Mr Khambule was suspended because of irregularities in connection with this tender, then it would be important for the Tribunal to know that. However, Mr Khambule was adamant that he had not been suspended because of such irregularities. Mr Maritz indicated that he would argue that if the grounds of his suspension did not reflect on Mr Khambule's credibility and reliability, he would have had no hesitation in disclosing those.
- [108] Mr Maenetje stated that they do take issue with Mr Khambule's reliability as a witness and that the letter which they wanted to introduce completes that picture.
- [109] Mr Ngcukaitobi opposed the application strenuously, even though the issue of Mr Khambule's suspension had been canvassed by the Commission in his evidence in chief.
- [110] Mr Khambule's credibility was called into question by the respondents, and we granted the application made to introduce the ACSA letter into the record, on the basis of Section 55(2) of the Act, which states as follows:

[111]

55. Rules of procedure.—

(3) *The Tribunal may—*

(a) accept as evidence any relevant oral testimony, document or other thing, whether or not—

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- (i) it is given or proven under oath or affirmation; or*
- (ii) would be admissible as evidence in court; but*
- (b) refuse to accept any oral testimony, document or other thing that is unduly repetitious.*

[112] Mr Khambule had been reticent about the reasons for his suspension. He played an important role in evaluating the ACSA tenders and the Tribunal was entitled to know the reasons for his suspension. As such, we granted the application, although nothing turns on the introduction of the letter at all since it was common cause that Tourvest assisted the Trust with its bid for Opportunity 3, that their two bids contained significant similarities, *inter alia* the same price, and that they concluded an MOU.

ISSUES

[113] Considering the factual evidence before us, we must determine whether Tourvest and the Trust tendered collusively when submitting their respective bids in response to the ACSA request and whether that was in contravention of section 4(1)(b)(iii) of the Act, alternatively, whether the respondents' conduct contravenes section 4(1)(b)(i). However, the Commission ultimately argued that the conduct in question must be regarded as collusive tendering and therefore we only deal with the section 4(1)(b)(iii) allegation.

ANALYSIS

[114] Section 4(1)(b) of the Act deals with specific restrictive horizontal practices which are viewed to be *per se* prohibited. In other words, such conduct is presumed to be anti-competitive and cannot be justified by any technological, efficiency or pro-competitive gains (efficiency defence).

[115] When assessing the conduct complained of to determine if it falls within the confines of section 4(1)(b), the conduct must be properly characterised. In other

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words, the conduct complained about must be conduct which the legislature intended the Act to condemn *per se*, with no scope for any justification.

[116] The issue of characterisation in a cartel context was dealt with by the Supreme Court of Appeal's ("SCA") judgment in *ANSAC*¹¹¹, then elaborated upon by the CAC in various decisions.¹¹²

[117] In *ANSAC*, the SCA held that the characterisation exercise entails two elements. The first is to determine the scope of the conduct – that is the form or character of the conduct prohibited by the section. The second is to determine whether the impugned conduct falls within the terms section,¹¹³ with reference to the evidence presented.¹¹⁴

[118] The CAC in *SAB*¹¹⁵ held that when conducting a characterisation exercise under the Act, it must be determined whether "(i) *whether the parties are in a horizontal relationship, and if so (ii) whether the case involves direct or indirect fixing of a purchase or selling price, the division of markets or collusive tendering within the meaning of s 4(1)(b).*"¹¹⁶ The CAC also said: "*However, since characterisation in this sense involves statutory interpretation, the bodies entrusted with interpreting and applying the Act (principally the Tribunal and this Court) must inevitably shape the scope of the prohibition, drawing on their legal and economic expertise and on the experience and wisdom of other legal systems which have grappled with similar issues for longer than we have.*"¹¹⁷

[119] We must make the two determinations mentioned.

[120] We deal first with whether the respondents were in a horizontal relationship, mindful that both respondents deny that they were in such a relationship.

¹¹¹ 2005 (6) SA 158.

¹¹² See *Competition Commission v South African Breweries Limited and Others* (129/CAC/Apr14) [2015] ZACAC 1; 2015 (3) SA 329 (CAC) ("*SAB*"); *Dawn Consolidated Holdings (Pty) Ltd and Others v Competition Commission* (155/CAC/Oct2017) [2018] ZACAC 2 (4 May 2018) ("*Dawn*"); *A'Africa Pest Prevention CC and Another v Competition Commission of South Africa* (168/CAC/Oct18) [2019] ZACAC 2 (2 July 2019) ("*A'Africa Pest*").

¹¹³ See *ANSAC*, paras 44 to 52.

¹¹⁴ *ANSAC*, para 59.

¹¹⁵ *Competition Commission v South African Breweries limited and others* [2014] 2 CPLR 339 (CAC).

¹¹⁶ *SAB*, para 37.

¹¹⁷ *SAB*, para 37.

[121] The Commission's case was that at the very least Tourvest and the Trust became actual or potential competitors during the time that they both tendered for Opportunity 3. When the respondents submitted their respective bids for the same opportunity in response to ACSA's request for bids, the respondents held themselves out to be competitors for the provision of the services contemplated in the request for bids, and as such, the respondents were actual or potential competitors.¹¹⁸ The Commission correctly relies on *Competition Commission v Eye Way Trading (Pty) Ltd and Another* ("Eye Way Trading")¹¹⁹, where the respondents were accused of agreeing to tender collusively in respect of two separate tenders in contravention of section 4(1)(b) of the Act. The respondents raised two defences in this regard – firstly, they were not competitors since Eye Way was not a manufacturer of fabrics; and secondly, that, even if they were found to be competitors, their pricing conduct, properly characterised, falls outside of the scope of section 4(1)(b) of the Act. The Tribunal rejected the respondents' defences. Of relevance for this matter, is the Tribunal's finding in relation to the question of whether the respondents were competitors. The Tribunal held –

*"...the tender issued by Treasury was for the supply of fabrics and not their manufacture. Therefore, the lack of manufacturing capacity by Eye Way did not preclude it from becoming a competitor for the tenders in question. The tender, being the supply and not the manufacture of products, allowed for any intermediary that wished to respond to the tender to do so provided it could ultimately supply the necessary fabrics that comply with the tender requirements. Therefore, by virtue of submitting a bid in its name (even though it disclosed its source for fabrics), Eye Way held itself out as a competitor with any other bidders that would submit a bid, whether that bidder was itself a manufacturer of fabrics or an intermediary like Eye Way."*¹²⁰

¹¹⁸ CCSA Heads of Argument, para 2.

¹¹⁹ Case Number: CR073AUG16/CR074AUG16.

¹²⁰ *Ibid*, para 23.

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- [122] What is relevant for our purposes is the respondents' conduct in relation to the ACSA tender for Opportunity 3. This was also the point that the Tribunal stressed in *Aranda*¹²¹ where it found:

"[42] When Aranda and Mzansi both submitted bids for the 2015 Tender they were competing against each other and vis-à-vis the remaining bidders that also competed for this tender....

[44] In other words, despite the vertical arrangement between the two, the fact that both Aranda and Mzansi had submitted bids for the 2015 Tender placed them in a specific horizontal relationship with each other for purposes of that tender.

*[45] Thus, it is not axiomatic that because the respondents are also in a vertical arrangement with each other we should confine our evaluation only or primarily through the lens of section 5."*¹²²

- [123] In her testimony, Ms Zimmerman's claimed that the Trust had experience of and was familiar with Tourvest's operations at the airport. In addition to that evidence, the Trust, in its covering letter to ACSA, dated 8 April 2013, stated confidently that it had developed wholesale and retail craft for 14 years and had an intimate understanding of craft retail within ACSA's airports through an alliance which it had with Tourvest, which also finances the Trust. The covering letter was submitted to ACSA together with the bid documents. According to the Commission, the Trust during this period of submitting a tender became an actual or potential competitor of Tourvest for Opportunity 3. Further, Ms Zimmerman confirmed this when she explained that they were competing with two other bidders, Thebe and Nomanini, but conceded that the declaration could be interpreted in a way which suggests that the Trust was also competing with Tourvest.¹²³

- [124] Although we must accept that the Trust did not have the retail experience for the opportunity, they did not rule out being able to run the opportunity and being able to compete with Tourvest and other similar retail outlets in the future as

¹²¹ *Competition Commission and Aranda Textile Mills (Pty) Ltd; Mzansi Blanket Supplies Case No.: CR016APR18 ("Aranda")*.

¹²² *Ibid*, paras 42, 44 and 45.

¹²³ Transcript, page 872 (lines 1-6).

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the intention was “to create a strong crafting retailer.” Therefore, on the basis of that evidence, the Trust became, as pleaded by the Commission, either a competitor or a potential competitor. Our view in this regard is fortified by Mr De Jager’s own evidence when he volunteered information, of his own volition, after reflecting on the evidence which he gave the previous day. He said –

*“Okay, in terms of ... Adv Marolen was referring to opportunity 3 and depending upon who ACSA awarded opportunity 3 to, certainly if we won a tender out of the other two, we would be a competitor in the long-term. There’s no question about it. After 3 years we would be a competitor, but that’s dependent upon actually winning some sort of tender on our side, which is Tourvest and that ACSA chose out of the alternative bids to pick the Trust...”*¹²⁴

[125] This evidence by Mr De Jager must also be construed within the context of all the evidence. Tourvest submitted bids for all the opportunities at OR Tambo which included Opportunity 3. It is common cause that the Trust, by agreement with Tourvest, submitted a separate bid for Opportunity 3 with Tourvest as a service provider to the Trust should the Trust’s bid succeed.

[126] What is important is that Ms Zimmerman conceded that the Trust was competing in its own right for Opportunity 3 and competing amongst others with Tourvest as is clear from the following exchange:

“MR NGCUKAITOBI: Well, you’ve used the words specifically ‘competing in their own right’.

MS ZIMMERMAN: Well, we were competing in our own right with the identity of the Trust.

ADV NGCUKAITOBI: Competing among others against Tourvest?

MS ZIMMERMAN: It could be looked at that way.

ADV NGCUKAITOBI: Well, it is the only way it can be looked at from this document.

MS ZIMMERMAN: Okay.”

¹²⁴ Transcript, page 508 (lines 12-15).

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[127] Furthermore, the respondents' argument that because the Trust could not have fulfilled the requirements of the tender by itself absent the agreement with Tourvest (as a service provider) – even though it had submitted its own bid – does not find support in competition jurisprudence. The ability of a party to a collusive agreement to ultimately perform is not relevant when deciding whether or not there was an agreement to collude. As held in the American judgment of *Reicher*.¹²⁵

“Here the decisive circumstance in defining “competitors” is the simple fact that Giolas Sales submitted a bid for the OCA contract. Despite its ultimate inability to perform the contract, Giolas held itself out as a competitor for purposes of rigging what was supposed to be a competitive bidding process. This is exactly the sort of “threat to the central nervous system of the economy” . . . that the antitrust laws are meant to address . . .”

[128] Accordingly, we find that at the point the bid was submitted, the Trust was in fact holding itself out as a competitor of Tourvest and the other bidders. We, therefore, conclude that Tourvest and the Trust were in a horizontal relationship in relation to Opportunity 3.

[129] As the characterisation principle involves two stages, we now consider the second stage of the enquiry where we must determine whether the conduct of the respondents involves collusive tendering and / or directly or indirectly fixing a purchase or selling price in contravention of section 4(1)(b)(iii) or (i) of the Act. This determination requires us to evaluate the factual and economic evidence presented to us.

[130] Mr Khambule explained in his testimony that potential bidders had to buy the bid documents and had to attend a compulsory briefing meeting which was arranged by ACSA. Tourvest submitted that it attended the meeting, and it was fairly confident that it would be successful in respect of opportunities 1 and 2. However, two other potential bidders – Thebe and Nomanini – were present,

¹²⁵ *United States v Reicher* 983 F.2d 168 (10th Cir. 1992)170 (“*Reicher*”).

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and as such Tourvest observed that there was a risk that it may not succeed in its bids for opportunities 1 and 2, in which event it did not want to forego the possibility of being successful in respect of Opportunity 3.¹²⁶

- [131] Tourvest was cognisant that ACSA wanted to promote enterprise development in relation to Opportunity 3 and expressly enquired of ACSA at the briefings session whether it would be permissible to be a party to more than one consortium in the same leasing opportunity.¹²⁷ ACSA confirmed that it was possible, but that this would have to be disclosed. This is consistent with Mr Khambule's evidence that ACSA would not have had a problem with a joint venture between parties. There is no suggestion in the evidence that Tourvest considered going into a joint venture either with the Trust or some other empowerment partner, and Tourvest provided no explanation as to why this was not a consideration at the time. Rather, Tourvest reasoned that if ACSA was looking for a retailer with enterprise development credentials, the Trust might win the tender in which case Tourvest would still benefit from being a service provider to the Trust.¹²⁸ As pointed out above, Tourvest also tendered for ACSA's Opportunity 3 in its own name.
- [132] Both Mr De Jager and Ms Zimmerman were adamant that the Trust's bid was designed to present ACSA with an opportunity to consider a bid with strong development credentials.
- [133] It is clear from the evidence that Tourvest did not want to enter into a joint venture with any empowerment entity, including the Trust. Had it wanted to do so, it would have. Rather, it sought to enter into a commercial arrangement with the Trust, which protected its own interests. It is obvious from the evidence that the loss of the opportunities at OR Tambo would have impacted significantly on Tourvest's business operations.

¹²⁶ Tourvest's Heads of Argument, page 20, para 42.

¹²⁷ Tourvest's Heads of Argument, page 21, para 43.

¹²⁸ Tourvest's Head of Argument, page 22, para 44.

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- [134] The MOU between Tourvest and the Trust was to regulate the relationship between the parties in respect of Opportunity 3. Some of the essential elements of the MOU were that Tourvest's staff would be seconded to the Trust to conduct the business, Tourvest would supply the Trust with stock, would charge a management fee, use its own IT systems and empower the Trust to take over the running of the business itself after three years.
- [135] The parties also agreed that the financial details provided by the Trust in its bid would be identical to the information which Tourvest would provide. The financial details form the basis of the bid rigging and collusive tendering allegations against the respondents.
- [136] In terms of its rationale for submitting the bids on the same financial terms, Tourvest contends that it knew that the Trust would not be able to operate the retail stores more effectively than Tourvest because of the Trust's lack of relevant retail experience.¹²⁹ Tourvest assumed, therefore, that the performance of the business would be the same irrespective of which of the two bids was successful, because Tourvest would manage the business.¹³⁰ Tourvest had been conducting the businesses for more than 10 years and knew what income the businesses could generate. Tourvest tendered the highest rental based on its own assessment of the potential of the business and could not include a rental which was higher than the Trust's as that would not have been sustainable on its own calculations.¹³¹
- [137] The real reason, set out in Tourvest's Heads of Argument, which we have to evaluate as part of the characterization exercise is as follows¹³² –

“53.2 In addition, it made no sense for Tourvest to put together and formulate a bid to be submitted by the Trust at a lower rental than the rental offered by Tourvest in its bid, as the Trust's bid, would then have received a lower pricing score than that of Tourvest. At the

¹²⁹ Tourvest's Heads of Argument, para 53.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*, para 53.1.

¹³² Tourvest's Heads of Argument, paras 53.2 and 53.3.

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same time, it made no sense for Tourvest to reduce the rental in its own bid to a level lower than the rental in the Trust bid because, in that event, Tourvest's bid would be vulnerable to be defeated by higher rental offerings by Thebe and Nomanini if ACSA decided to disqualify the Trust on the grounds that it did not meet the mandatory criteria of qualifications and experience for Opportunity 3.

53.3 The only viable and logical arrangement was, therefore, the one that was arrived at, being the submission of alternative bids by Tourvest and the Trust on the same financial terms.” (Footnotes omitted)

- [138] Therein lies the rub. The financial terms of both bids were non-negotiable and if the Trust had wanted to tender a different rental, then Tourvest would not have entered into an agreement with it. In other words, the Trust determined its bid price for Opportunity 3 in collusion with Tourvest and not independently, and vice versa.
- [139] We are mindful of the fact that the bids had to be prepared in a short space of time and both Mr De Jager and Ms Zimmerman testified that the Trust would not have known what a viable rental would be. However, the Trust was not given an opportunity of exploring what an alternative viable rental would have been. It could be said that Tourvest simply held a gun to the Trust's head. Tourvest knew that if the Trust tendered a higher rental than Tourvest, then the Trust, in its own right stood a better chance of being awarded the bid than Tourvest. Apart from the fact that Tourvest felt that the rental would not be sustainable, this suggests that Tourvest did not want to provide the Trust with a better chance to be awarded the bid. Bear in mind that the Trust would probably have scored highly on its development and empowerment credentials. At the same time, if Tourvest tendered a rental which was lower than the Trust's then it was likely that any higher rental offerings by Thebe and Nomanini would probably defeat Tourvest's bid.
- [140] Tourvest wanted the Trust, with it as a service provider, to submit its own bid at the same price as Tourvest's bid. That presented ACSA with a dilemma which Mr Khambule identified during his evidence.

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- [141] It was likely that that was the reason why the financial details and other details tendered in the bid documents were the same. The Trust could not be left to determine those details by itself as it may have priced Tourvest out of the market completely or have eroded the margins which Tourvest hoped to make in a deal with the Trust.
- [142] The arrangement was therefore a sophisticated attempt on the part of Tourvest to collude with the Trust. The pricing arrangements were part of that attempt.
- [143] The scheme of the arrangement designed by Tourvest properly characterized was an arrangement to subvert competition in contravention of the Act. Sight must not be lost of the fact that Tourvest submitted its own independent bid for ACSA's Opportunity 3, whilst reaching agreement with the Trust about its bid for the same opportunity.
- [144] When pertinently asked by Mr Daniels whether there was an intention to deceive ACSA in the submission of the two bids, Mr Hodge said "*that is a core factual issue. ... there was sufficient disclosure so that ACSA knew these were not completely independent competing bids with each other. But I suppose for the Tribunal that is going to be an important element of your assessment.*"¹³³ We shall further consider the issue of disclosure under remedies. We however note that the Commission argued that Tourvest and the Trust did not disclose the precise nature of their relationship to ACSA and that there was significant "under" disclosure in their bid documents.
- [145] The evidence before us suggests that the mechanics of the MOU were very carefully designed and must be viewed in the context of Tourvest fearing that its hegemony of the retail space was being threatened by ACSA's new position relating to the retail space at OR Tambo and by the interest shown in the bids by Nomanini and Thebe. The MOU was non-negotiable by Mr De Jager's own admission. The Trust simply had to take it or leave it, but Tourvest used Ms

¹³³ Transcript, page 973 (lines 12-17).

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Zimmerman to sell the idea to her trustees which Ms Zimmerman did, either naively or as a willing participant in an elaborate scheme to secure a bid in some form or another for Tourvest.

- [146] When taken as a whole, the evidence suggests that the disclosure was designed simply to create the illusion that the two bids were competitive and that ACSA could consider the bids independently of each other.
- [147] Mr Hodge could not point the Tribunal to any authority in any jurisdiction in which a bid rigging case was decided as lawful because of characterization and conceded that he was not aware of any bid rigging case that has been salvaged by characterising it.¹³⁴
- [148] Therefore, we are of the view that it matters not, as Mr Hodge tried to argue, for a section 4(1)(b)(iii) contravention that Tourvest and the Trust disclosed the details of their respective bids. Our view is fortified by Tourvest's and the Trust's actions when ACSA asked them to explain the similarities in the bid. The Trust was not in a position to explain its actions and Tourvest drafted its response. As indicated, we do however take the disclosure into account when we consider appropriate administrative penalties.
- [149] For completeness, we briefly deal with the Trust's defence that its conduct falls within section 3(1)(e) of the Act. This section provides that the Act does not apply to concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose.
- [150] No evidence at all was led to show what exactly the non-commercial socio-economic objective or similar purpose was. Instead, the Trust in its heads of argument relies on sections of the MOU, Mr De Jager's evidence regarding the Trust's relationship with Tourvest in the future, and Ms Zimmerman's evidence that the Trust wanted to source funding for enterprise development and to secure a platform for the crafter's products. The Trusts Heads of Argument are flimsy in this regard and understandably so.

¹³⁴ Transcript, page 1099 (lines 7 – 11).

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[151] The factual evidence was clear that the agreement reached between the two respondents had a commercial purpose, since both parties would commercially benefit from it. The evidence also shows that the Trust was under great pressure to submit a bid as quickly as possible and would not have a chance to properly consider how the bid would achieve a non-commercial socio-economic objective or similar purpose. Therefore, the defence must fail.

[152] We have concluded that the conduct of and the agreement (MOU) concluded by Tourvest and the Trust, read with Tourvest's own independent bid for Opportunity 3:

1. was an agreement between parties in a horizontal relationship;
2. was entered into to subvert competition; and
3. contravenes section 4(1)(b) (iii) of the Act.

REMEDIES

[153] In its Notice of Motion, the Commission seeks an order in the following terms in relation to remedy:

- (i) declaring the Respondents to be liable for the payment of an administrative penalty equal to 10% of their turnovers in terms of section 58(1)(a)(iii), read with section 59(2) of the Act; and
- (ii) granting the Applicant such further and/or alternative relief.¹³⁵

[154] The above requested relief was repeated in the Commission's Founding Affidavit.¹³⁶

[155] We first deal with an appropriate remedy in relation to the Trust.

¹³⁵ Commission's Notice of Motion, paras 2 – 3.

¹³⁶ Commission's Founding Affidavit, page 6.

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The Trust: administrative penalty

- [156] As already indicated above, the Commission seeks an order declaring that the Trust is liable for the payment of an administrative penalty equal to 10% of its turnover in terms of section 58(1)(a)(iii), read with section 59(2) of the Act.
- [157] In the Commission's Supplementary Heads of Argument filed with the Tribunal on 08 October 2019 in relation to the Trust, it recommended a penalty amount of R701, 809.00. Since nothing for purposes of our remedy decision in relation to the Trust turns on the Commission's calculation, we do not deal with this in any further detail. We however note that there was a dispute about the affected turnover to be used for purposes of calculating any potential penalty against the Trust, but we find no need to discuss that.¹³⁷
- [158] The Trust submitted that no purpose is to be served by a conviction of the Trust, and that at the penalty stage the alleged triviality of the Trust's conduct should be taken into account. The Trust further submitted that it depends on donor funding largely and that a penalty will squeeze its finances and endanger the achievement and/or expansion of its public purpose.
- [159] We, using our discretion in the context of this case, have decided not to impose any administrative penalty on the Trust for its involvement in the collusive conduct given its size and purpose, the fact that it did not benefit from the conduct, as well as its role in the conduct. On the factual evidence before us Tourvest clearly was the mastermind behind and leader in the collusive tendering. It drew the Trust into the collusive conduct for its own intended financial benefit (as a significant service provider to the Trust) in the event that it itself did not win the tender for Opportunity 3. The Trust had its own reasons for submitting a bid to ACSA, including that there would have been benefits to it if the tender succeeded in that it would improve the Trust's sources of revenue for purposes of its various projects.

¹³⁷ Transcript, page 201 (lines 9 -16); and page 202 (line 9) to page 203 (line 9).

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[160] We turn next to an appropriate administrative penalty in relation to the instigator of the collusive conduct, Tourvest.

Tourvest: administrative penalty

[161] In the Commission's Supplementary Heads of Argument filed with the Tribunal on 30 August 2018, it asked that a penalty amount in relation to Tourvest of R288, 819, 844.00 be granted and set out its calculations and arguments to arrive at that amount. During argument on 21 November 2019, the Commission however submitted that such penalty amount would be "*glaringly excessive*".¹³⁸ We concur that such an administrative penalty would not be appropriate in the circumstances of this case.

[162] On a later date, 08 October 2019, the Commission filed another set of Supplementary Heads recommending a radically lower administrative penalty in relation to Tourvest amounting to R6, 169, 681.00. This document was referred to during argument as the Commission's 'Second Supplementary Heads'. We however note that the Commission provided no details in this submission regarding the factors / evidence that underpin its six-step calculation. The Commission during argument stated - for the first time - that it wants to withdraw the latter document since it was defective and had no rational underpinning.¹³⁹ However, no explanation was provided for why the Tribunal and Tourvest were not advised of this prior to the hearing of argument.

[163] The Commission's legal representatives on the day of argument also indicated that they would like more time to consult with the Commission on an appropriate penalty in order to make meaningful submissions to the Tribunal. No valid explanation was however provided for why the Commission's legal representatives had to be afforded more time to consult.¹⁴⁰ The respondents objected to any delay in arguing (potential) remedies, and since both respondents were ready to deal with remedies, the Tribunal heard all parties on remedies.¹⁴¹

¹³⁸ Transcript, page 43 (lines 4-24).

¹³⁹ Transcript *inter alia* pages 195, 204 and 206 (line 1) - page 208 (line 11).

¹⁴⁰ Transcript, page 194 (line 24) - page 196 (line 7).

¹⁴¹ Transcript, page 47 (lines 20-22); and page 198 (line 3) - page 202 (line 8).

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- [164] The Tribunal in terms of section 58(1)(a)(iii) of the Act may make an appropriate order in relation to a prohibited practice and such order may include the imposition of an administrative penalty for section 4(1)(b) cases in terms of section 59(1)(a) of the Act. In terms of section 59(2) of the Act such penalty may not exceed 10% of the firm's annual turnover in the Republic and its exports from the Republic during the firm's preceding financial year. The Tribunal has previously determined that the relevant turnover is turnover in the "affected" line of business.¹⁴²
- [165] The factors that the Tribunal must take into consideration when calculating the appropriate penalty in the circumstances of each case are provided for in section 59(3) of the Act. These are:
- (i) the nature, duration, gravity and extent of the contravention;
 - (ii) any loss or damage suffered as a result of the contravention;
 - (iii) the behaviour of the respondent;
 - (iv) the market circumstances in which the contravention took place;
 - (v) the level of profit derived from the contravention;
 - (vi) the degree to which the respondent has cooperated with the Commission and the Tribunal; and
 - (vii) whether the respondent has previously been found to have contravened the Act.
- [166] In accordance with the jurisprudence of the CAC, the penalty amount ought to be proportional in severity to the degree of blameworthiness of the offending party, the nature of the offence and its effect on the South African economy in general and consumers in particular.¹⁴³

¹⁴² *Competition Commission And Aveng (Africa) Limited T/A Steeleale, Reinforcing Mesh Solutions (Pty) Ltd, Vulcania Reinforcing (Pty) Limited, And Brc Mesh Reinforcing (Pty) Limited* (CR057Dec09) decision of 7 May 2012 ("Aveng"), para 134; *Southern Pipeline Contractors and Another v Competition Commission* [2011] 2 CPLR 239 (CAC) ("*Southern Pipeline*"), para 60.

¹⁴³ See, for example, *Southern Pipeline*, para 9.

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- [167] In *Aveng*¹⁴⁴ the Tribunal developed a six-step methodology for the calculation of an appropriate penalty and this methodology has since become a common approach to determine the penalty based on the section 59(3) factors. We shall use this six-step methodology as a basis for the calculation of an appropriate penalty in relation to Tourvest. Tourvest agreed that the *Aveng* methodology should be followed: “... *the Commission correctly follows the Aveng methodology in its penalty calculation*”.¹⁴⁵
- [168] The first step of the six-step methodology is the determination of the affected turnover in the base year. It is common cause that the conduct in this instance occurred in April 2013 and that Tourvest’s financial year end in that year was the year ended August 2013.
- [169] The Commission in its Supplementary Heads of Argument submitted that the affected line of Tourvest’s business is the sale of arts, curio and craft and that Tourvest’s total turnover in that respect in the last financial year in which the contravention is known (i.e., the year ended August 2013) was R549, 773, 035.¹⁴⁶
- [170] Tourvest submitted that the Commission in its Second Supplementary Heads “*now correctly uses, for the first step of its calculation, an affected turnover or R [REDACTED]*”,¹⁴⁷ which reflects the total turnover of the three premises that were the subject of Opportunity 3¹⁴⁸ (*Indaba Origins, Out of Africa Impulse and Out of Africa Kiosk*) for the financial year 2012/13.”¹⁴⁹
- [171] Mr De Jager dealt with the issue of affected turnover in his Supplementary Witness Statement of 08 July 2019.¹⁵⁰ This was uncontradicted by the Commission¹⁵¹ and used by the Commission in its supplementary submission on penalty, where it limits the affected turnover to sales in relation to

¹⁴⁴ *Competition Commission v. Aveng (Africa) Limited t/a Steeledale, Reinforcing Mesh Solutions (Pty) Ltd, Vulcania Reinforcing (Pty) Ltd and BRC Mesh Reinforcing (Pty) Ltd* Case No.: 84/CR/Dec09 (“*Aveng*”).

¹⁴⁵ Tourvest’s Heads of Argument dated 31 October 2019, para 221.

¹⁴⁶ Commission’s Supplementary Heads of Argument dated 30 August 2018.

¹⁴⁷ Mr De Jager’s Supplementary Witness Statement of 08 July 2019, paras 2 – 4, record pages 514 and 515.

¹⁴⁸ There were three retail leasing opportunities put out to tender in terms of the RFB, which were described as “Opportunity 1”, “Opportunity 2” and “Opportunity 3”.

¹⁴⁹ Tourvest’s Heads of Argument dated 31 October 2019, para 222.

¹⁵⁰ De Jager’s Supplementary Witness Statement, paras 2 – 4, record pages 514 and 515.

¹⁵¹ See the Tribunal’s directive of 19 June 2019 in relation to remedies.

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Opportunity 3.¹⁵² We therefore based our calculations for an appropriate penalty on the turnover of Tourvest of R [REDACTED] for the financial year 2012/13.

- [172] The second step is the calculation of the base amount being that proportion of the affected turnover relied upon. In terms of jurisprudence this base amount can range from 0-30% of the affected turnover. The practice in determining the base amount is to consider the infringement as a whole, including the nature, gravity and extent of the contravention and the market circumstances in which the contravention took place.
- [173] The Commission appointed 15%¹⁵³ or 20%¹⁵⁴ as the appropriate and proportional percentage for purposes of determining the base amount. Tourvest argued that the appropriate base turnover percentage on the facts of this case should be a nominal percentage, if any.
- [174] Regarding the nature of the infringement, Tourvest's conduct relates to collusive tendering, a *per se* contravention of the Act, which is regarded as egregious anti-competitive conduct. Furthermore, the conduct was perpetrated against a state entity, ACSA.
- [175] The Commission requested that the Tribunal in deciding an appropriate administrative penalty for Tourvest send out a clear message that collusion, especially in respect of tenders, will not be tolerated.¹⁵⁵ The Commission further highlighted that OR Tambo is one of the national key points in South Africa, that there are numerous costs associated with the efficient running of it by ACSA. The leasing of spaces at OR Tambo form part of ACSA's sources of revenue, which is the very reason why ACSA goes on tender to lease spaces i.e., it is a source of revenue in the form of rental income.
- [176] It was common cause that the conduct related to the three stores at OR Tambo that were the subject matter of Opportunity 3. It was also common cause that

¹⁵² Commission's Supplementary Heads of Argument dated 08 October 2019.

¹⁵³ Second Supplementary Heads of 08 October 2019.

¹⁵⁴ Supplementary Heads of 30 August 2018.

¹⁵⁵ Transcript, page 235 (lines 3 – 5).

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both Tourvest's and the Trust's bids were disqualified by ACSA. Tourvest took its disqualification by ACSA on review.

- [177] The Commission however submitted that although the respondents' scheme was caught out before it succeeded, Tourvest successfully challenged the award of the relevant tender to a third party and as a result remained a beneficiary of its wrongdoing as it remained the incumbent. Tourvest argued that it remained in occupation of the Opportunity 3 premises not on any unlawful basis but, on the basis of an order of the High Court. The review proceedings were eventually settled between Tourvest and ACSA on 15 August 2017.
- [178] We note that we have not taken the review aspect itself and its outcome into account in our determination of the appropriate base amount or in any of the other steps in determining a penalty amount.
- [179] Tourvest submitted that ACSA was better off as a result of the impugned conduct, and not worse off as submitted by the Commission. We however disagree with this. Had the Trust independently determined its own bid, ACSA could have benefitted from this – in other words, ACSA could have been paid a higher rental by the Trust in a bid that it arrived at independently without the collusive conduct.
- [180] We consider 12.5% as an appropriate base amount in this case given the egregious character of the conduct, i.e., collusive tendering, that was perpetrated against a state entity. We note that we lowered the base amount from the maximum percentage of 30% to 12.5%, given the limited geographic scope of the conduct and that Tourvest's bid was disqualified by ACSA. Applying 12.5% to the affected turnover gives the following result: R [REDACTED] X 12.5% = R [REDACTED].
- [181] The third step is multiplying the amount obtained in step 2 by the duration of the contravention.
- [182] The Commission submitted that a multiplier of 5 should be applied since the collusion had long lasting effects as the tender was not awarded. As a result, Tourvest remained the net beneficiary of the mishap arising from the collusion.

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According to the Commission, benefits have undoubtedly accrued to Tourvest and continued at the time of prosecution of the complaint. Tourvest submitted that the impugned conduct did not have any effect at all, and accordingly the factor applied in step three of the calculation should be a nominal fraction of a year, if anything at all.

- [183] It is common cause that ACSA on 17 February 2013 published a request for bids for the leasing of arts, crafts and curio retail stores in the international departure airside terminal at OR Tambo for a five-year period. The appropriate multiplier in our view therefore is 5 since that is the period of the tender. This gives the following result R [REDACTED] X 5 = R [REDACTED].
- [184] The fourth step entails rounding off the figure obtained in step 3 if it exceeds the cap provided for by section 59(2) of the Act. No rounding off is required in this case. Tourvest's turnover for the year ended August 2017 was R [REDACTED] and the 10% cap in relation to Tourvest's annual turnover therefore is R [REDACTED].
- [185] The fifth step is to consider factors that mitigate and/or aggravate the amount reached in step 4, by way of a discount or premium. Under this step we consider factors such as the behaviour of Tourvest and its role in the collusion, the degree to which it has cooperated with the Commission and the Tribunal, and whether it has previously been found to have contravened the Act.
- [186] As mitigation of the penalty amount, we note that Tourvest has not previously been found to have contravened the Act. Furthermore, as already indicated above, Tourvest was disqualified by ACSA (but remained the incumbent through successful review proceedings), which were eventually settled between Tourvest and ACSA. A further significant mitigating factor in our view is the fact that the respondents expressly disclosed certain details of the relationship between them in their bidding documents to ACSA. It was expressly disclosed in the MOU that Tourvest would be submitting a separate bid for Opportunity 3 in its own name, and that the financial terms of the two bids were the same i.e., the rental proposed in the two bids would be identical.

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- [187] As aggravation of the penalty amount, Tourvest was the mastermind behind the collusive conduct, being the pro-active party throughout that coerced the Trust into becoming part of the collusive tendering. Furthermore, Mr. De Jager, an executive director and divisional chief executive officer of the retail division of Tourvest, was involved in the collusion. We found no further aggravating circumstances such as non-cooperation.
- [188] From the above it is evident that there are both aggravating and mitigating factors. The mitigating factors include the abovementioned disclosure by the respondents to ACSA, which in our view should be given a significant weight. In our view therefore the mitigation factors favour a further reduction of the administrative penalty by 50% which gives the following result: R18, 362, 147.50 minus R9, 181, 073.75 (50%) = R9, 181, 073.75
- [189] Step 6 involves rounding off the amount if it exceeds the cap provided for in section 59(2) of the Act. No rounding off is required in this case. The final administrative penalty therefore is R9, 181, 073.75 (which is approximately [REDACTED] % of Tourvest's total annual turnover of R [REDACTED] in the year ended August 2017 and thus is a fraction of the 10% statutory cap).

Order

1. The Respondents have contravened section 4(1)(b)(iii) of the Act.
2. Tourvest must pay an administrative penalty of R9, 181, 073 (Nine million, one hundred and eighty one thousand, and seventy three Rands) within 30 days of date hereof.
3. No administrative penalty is payable by the Trust.
4. There is no order as to costs.

Signed by: Enver Daniels
Signed at: 2021-09-29 15:42:19 +02:00
Reason: Witnessing Enver Daniels

Enver Daniels

Mr Enver Daniels

29 September 2021
Date

Concurring: Mr Andreas Wessels and Mrs Medi Mokuena

Tribunal Case Manager: Ndumiso Ndlovu.

For the Commission: T Ngcukaitobi SC, T Marolen and AM Bodlani instructed by Ndzabandzaba Attorneys.

For the First Respondent: J Wilson SC and NGD Maritz SC instructed by MacRobert Attorneys.

For the Second Respondent: H Maenetje SC instructed by Werksmans Attorneys.