COMPETITION TRIBUNAL OF SOUTH AFRICA

CT CASE NO: CR079Aug22

In the matter between:

COMPETITION COMMISSION OF SOUTH AFRICA	Applicant
and	
FRASER ALEXANDER (PTY) LTD	1st Respondent
PARAGON TAILINGS (PTY) LTD	2nd Respondent

Panel	:	M Mazwai (Presiding Member)
	:	A Ndoni (Tribunal Member)
	:	A Wessels (Tribunal Member)
Heard on	:	27 – 28 October 2025 and 25 February 2026
Date of last submission	:	14 April 2026
Order and Reasons issued on	:	21 August 2026

ORDER AND REASONS FOR DECISION

INTRODUCTION

Commission's Complaint referral

[1] The matter involves a complaint of alleged collusive tendering which the Competition Commission ("Commission") referred to the Competition Tribunal ("Tribunal") in terms of section 50(1) of the Competition Act No 89 of 1998 as amended ("the Act") against Fraser

Alexander (Pty) Ltd ("Fraser") and Paragon Tailings (Pty) Ltd ("Paragon") (collectively referred to as "the respondents").

[2] On 17 February 2022, the Commission initiated a complaint against the respondents for allegedly entering into an agreement and/or engaging in a concerted practice to tender collusively in contravention of section 4(1)(b)(iii) of the Act when bidding for a tender as described below.

[3] Specifically, the Commission alleges that the respondents entered into an agreement and/or engaged in a concerted practice to tender collusively when bidding for tender number: TEN/CAP/PROC/20/004 for the provision of remedial works and related construction work to Sibanye-Stillwater Limited's ("Sibanye") tailings dam in Rustenburg ("the tender"). Such conduct, according to the Commission, is in contravention section 4(1)(b)(iii) of the Act.

[4] Fraser made a formal application to the Commission for corporate leniency and was granted conditional leniency by the Commission in terms of the Commission's Corporate Leniency Policy ("CLP").

[5] In its notice of motion in the complaint referral, the Commission seeks orders –

5.1. Declaring that the respondents have contravened section 4(1)(b)(iii) of the Act;
5.2. Declaring that Paragon be liable for the payment of an administrative penalty equal to 10% of its annual turnover in terms of section 58(1)(a)(iii) read with section 59(2) of the Act;
5.3. No relief is sought against Fraser; and
5.4. Granting the Applicant further and/ or alternative relief.

[6] Having considered the evidence before us, we concluded that the Commission's complaint referral ought to be dismissed. Our order and reasons for decision are set out below.

[7] We set out the relevant background before turning to the parties' cases and the issues arising for determination.

Factual Background

[8] Fraser is a firm that provides outsourced services, related infrastructure and customised materials, waste and water solutions to the mining industry, including the construction, maintenance and management of tailings storage facilities.

[9] Paragon is a specialist tailings solutions provider to the global mining industry, with a strong focus on hydraulic reclamation and deposition operations.

[10] The complaint arises from a tender issued by Sibanye on 1 October 2020, inviting tailings and construction companies, including Fraser and Paragon, to bid for the Tailings Dam No. 2 Remedial Works project. The Commission alleges that confidential and competitively sensitive information from Fraser's bid was used by Paragon, through the conduct of Mr Wade Leaf ("Mr Leaf"), then employed by Fraser. Both companies attended the site meeting on 2 October 2020, and submitted their bids for the tender by the closing date of 23 October 2020.

[11] During the bid adjudication, Sibanye noted similarities between the two bids in pricing, appearance, formatting, and content. By letter dated 25 November 2020, it called on Paragon and Fraser to investigate and report back, together with statements confirming their submissions had been independently compiled. Paragon responded on 1 December 2020, denying that any of its staff had access to Fraser's tender information, and advised that it was withdrawing its tender in light of Sibanye's concerns.

[12] According to Fraser before receiving Sibanye's letter, Fraser had already acted on a tip-off about potential irregularities in the tender process.[1] On 13 November 2020, it engaged forensic investigators Basileus Consilium Professional Services (Pty) Ltd ("BCPS") and confiscated the phones and computers of Mr Leaf, at the time the General Manager, Construction Division at Fraser and Mr Pieter Kock ("Mr Kock"), an Estimator in the same division who reported to Mr Leaf, for mirror imaging.

[1] First Respondent's Answering Affidavit, p38 of the hearing bundle and Transcript, p 77, lines 1-20.

[13] BCPS's preliminary report, issued on 24 November 2020, found that Mr Leaf had founded his own company, Wade Leaf Projects and Consulting (Pty) Ltd ("Wade Leaf Projects"), in July 2020. He had then approached Paragon's financial director, Ms Gomolemo Phusoane ("Ms Phusoane") to arrange a meeting with Operations Director Mr Constantin Svoronos ("Mr Svoronos"). At a September 2020 meeting, Mr Leaf, Ms Phusoane and Mr Svoronos agreed Paragon would pursue the work related to the tender and subcontract a portion to Wade Leaf Projects. At a further meeting in October 2020, Mr Leaf agreed to supply Paragon with Fraser's pricing and tender documentation to inform its own bid.

[14] Mr Leaf instructed Mr Kock to produce another version of Fraser's tender documents reducing the mark-up by 4%, removing Fraser's branding, converting the project programme to MS Project format (again removing Fraser's logo), altering the organogram by removing of certain roles, and lowering the margin in the bill of quantities. After delivering this version of the tender documents to Mr Svoronos, Mr Leaf drafted Paragon's cover letter in response to the bid using Ms Phusoane's home computer and contributed to its Preliminaries and General documents. BCPS concluded that Mr Leaf had stolen Fraser's pricing and bid information to assist Paragon.

[15] Fraser immediately suspended both Mr Leaf and Mr Kock and issued disciplinary notices with the hearing scheduled to be heard on 30 November 2020. Both resigned in October 2020, with a last working day of 30 November 2020. Fraser nonetheless proceeded with disciplinary hearings on that date. According to the evidence of Ms Claire Amanda McMaster ("Ms McMaster"), the Executive Head of Human Resources at Fraser, Mr Kock pleaded guilty and was summarily dismissed. Mr Leaf's hearing was disrupted by procedural objections and remained unresolved when, at 16h00, his representative announced that his employment had ended and withdrew from proceedings. The chairperson of the disciplinary hearing recommended that Fraser pursue action against Mr Leaf under the Prevention and Combatting of Corrupt Activities Act ("PRECCA")[2] and civil proceedings for the breach of confidentiality.

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[2] Act 12 of 2004.

[16] On 2 December 2020, Fraser advised Sibanye of its findings, characterising the conduct as an isolated, unsanctioned act by two former employees rather than corporate wrongdoing. Sibanye subsequently awarded the tender to Fraser.

[17] Subsequent to Fraser's internal investigation, on 7 January 2021, Fraser submitted a marker and a corporate leniency application with the Commission.

The Hearing

[18] The matter was set down for hearing on 27 and 28 October 2025, with closing argument on 25 February 2026.

[19] We heard oral evidence from four witnesses.

[20] As indicated above, Fraser was granted conditional immunity and participated in the proceedings as a leniency applicant. In that capacity, Fraser did not call its own witnesses but made its employees available to the Commission to be led as witnesses. Fraser's interest in the proceedings was limited in scope, pertaining only to opposing the granting of a declaratory order against itself, Fraser. Its participation was accordingly confined to questioning those witnesses it had made available to the Commission, and only on those narrow issues, namely opposing the granting of the declaratory relief insofar as it concerned Fraser.

[21] In advancing its case, the Commission called three (3) witnesses from Fraser, Mr Kock, Ms McMaster, and Mr Lourens Wilhelm de Koning ("Mr De Koning"), the Chief Operations Officer ("COO") of Fraser.

[22] Paragon called only one (1) witness in support of its case, Mr Svoronos the owner and Operations Director of Paragon. Paragon elected not to call Ms Phusoane.

Commission's case

[23] On 4 August 2022, the Commission referred a complaint to the Tribunal in terms of section 50 of the Act, against the respondents, seeking a declaration that the respondents have contravened section 4(1)(b)(iii) of the Act as well as the imposition of an administrative penalty on Paragon.[3]

[24] In terms of the complaint, the Commission alleges that Fraser and Paragon both are active in the market for provision of remedial works and related construction work, and that they are in a horizontal relationship for the purposes of the jurisdictional grounds of section 4(1) of the Act.[4]

[25] As mentioned, the Commission further alleges that Fraser and Paragon concluded an agreement or engaged in a concerted practice to collusively tender in response to the tender.

[26] Ms McMaster, testifying on behalf of the Commission, stated that Mr Leaf was responsible for determining pricing, and prepared and approved Fraser's bid which was submitted to Sibanye.[5]

[27] Mr De Koning, testifying on behalf of the Commission, stated that Fraser's tender price submitted to Sibanye was determined by Fraser's tender submission team, comprising himself, Mr Kock and Mr Leaf, before being submitted to Sibanye.[6]

[28] Mr Kock testified on behalf of the Commission that, after finalising Fraser's bid, Mr Leaf instructed him, to generate a separate document using the approved Fraser bid document reducing the mark-up and removing Fraser's identifying details.[7] The Commission alleges that this document was subsequently used by Mr Leaf as a basis to prepare Paragon's Bill of Quantities. In addition, the

[3] Commission's Referral Affidavit, p6 – p19 of the hearing bundle.
[4] Commission's Referral Affidavit, p14– p15 of the hearing bundle.
[5] Transcript, p 74, lines 11-17, p157, lines 12 – 14, and also Commission's Referral Affidavit, p16– p17 of the hearing bundle, Commission's HOA paras 26 – 29, p10 – p11.
[6] Transcript ,p166, lines 5 – 20 .
[7] Transcript, p 46, lines 15 – 20.

Commission alleges that Mr Leaf assisted Paragon with the preparation of a method statement and construction schedule.[8]

[29] The Commission further avers that Ms Phusoane, a representative of Paragon, was present when Mr Leaf prepared Paragon's bid documentation.[9]

[30] It is the Commission's case that at the time of the events described above, Mr Leaf was employed in a senior managerial capacity at Fraser. The Commission submits that both Mr Svoronos and Ms Phusoane, of Paragon, who were former employees of Fraser, were aware of Mr Leaf's role at Fraser and his involvement in preparing Fraser's bid for the tender.[10]

[31] Finally, the Commission pointed to pricing patterns in the bids, noting that Paragon's submitted prices for the tender were consistently lower than Fraser's, with differences of approximately 5% across 36 of 57 line items, 6% across 11 items, and 9% across 3 items. The Commission contended that these pricing consistencies were indicative of coordination between Fraser and Paragon, rather than the result of independent pricing decisions. In particular, the Commission alleged that Fraser and Paragon agreed amongst themselves which entity would submit the lowest bid and, consequently, emerge as the successful bidder. [11]

[32] According to the Commission, such conduct constitutes collusive tendering prohibited by the Act. The Commission further submitted that Fraser and Paragon's conduct was characterised by secrecy, deceit, and surreptitious behaviour. Importantly, that Paragon's tender was not independently prepared, as Paragon utilised Fraser's tender information in compiling its own bid. The Commission argued that this conduct undermined and subverted the purpose of Sibanye's tender process, namely, to procure goods and services through a competitive and independent bidding process capable of yielding competitive prices.[12]

[8] Commission's Referral Affidavit, p16– p17 of the hearing bundle.
[9] Commission's Referral Affidavit, p16– p18 of the hearing bundle.
[10] Commission's Referral Affidavit, p16– p17 of the hearing bundle.
[11] Commission's HOA para 19 at p7.
[12] Commission's HOA para 20 at p7.

[33] Having regard to the above, we note that, among the relief sought in its Notice of Motion, the Commission seeks an order declaring that the respondents have contravened section 4(1)(b)(iii) of the Act. We do not propose to deal with all the relief sought by the Commission. Of relevance for present purposes, however, is that the Commission expressly states in its Notice of Motion that "*no relief is sought against Fraser*." Notwithstanding the grant of leniency to Fraser, the Commission nevertheless seeks a declaratory order in respect of Fraser's participation in the contravention. The Commission submitted that a leniency applicant approaches the Commission with full knowledge of the applicable requirements and the consequences of its participation in prohibited conduct. It argued that a leniency applicant should not, once the matter is before the Tribunal, be permitted to avoid a declaratory order.

[34] According to the Commission, declining to grant such an order would undermine the deterrent purpose of the Act by conveying a message that participation in prohibited conduct will not be formally recognised where leniency has been granted. The Commission submitted that the potential chilling effect should not be understood as discouraging firms from approaching the Commission under its leniency programme; rather, the concern is that granting the relief sought by Fraser could have a chilling effect on deterrence by weakening the message that conduct prohibited by the Act will not be tolerated.

Fraser's case

[35] Fraser, a corporate leniency applicant, denied any collusive agreement with Paragon. It described itself as a victim of "corporate treason"; its former General Manager, Mr Leaf, used Fraser's own tender to help Paragon submit a better bid, acting purely for self-gain and to Fraser's detriment. On learning of this from Sibanye, Fraser commissioned a forensic investigation, disciplined Mr Leaf and Mr Kock, reported the matter to the Commission and criminal authorities, and cooperated fully with the ensuing investigations and prosecutions. Mr Leaf was convicted of corruption, and Fraser received conditional immunity from the Commission.

[36] Fraser noted that it is cited as the first respondent but it is not the substantive subject of the case, given the Commission's repeated confirmation that no relief is sought against it.

[37] Fraser nonetheless argued that the declaratory relief sought, i.e., an order that "*the respondents have contravened section 4(1)(b)(iii) of the Competition Act No. 89 of 1998*", is broad enough to include a finding against it, which it said was inconsistent with the Commission's expressly stating that it seeks no relief against it.

[38] Fraser further submitted that the granting of the declarator would result in massive reputational harm for it, jeopardising future work especially with government linked counterparties, and in turn affect its employees' jobs.[13] Fraser's position was narrow, taking no view on whether the conduct amounted to collusion, it argued only that it should not be included in any declaratory order if the Tribunal finds that collusion occurred.

[39] Fraser submitted that the Tribunal is not bound to grant the declaratory relief in the terms sought by the Commission. Rather, it is required to exercise its remedial discretion in terms of section 58(1) of the Act and determine whether it is appropriate, in the circumstances, to do so.

[40] As we have dismissed the Commission's complaint referral, our order contains no declaratory relief, making it unnecessary to address this issue further.

Paragon's defence

[41] Paragon's challenge to the Commission's case was twofold. First, Paragon denied that any agreement existed between itself and Fraser. Second, Paragon raised a point *in limine* that Mr Leaf lacked the requisite authority to act on behalf of Fraser. We address each of these issues separately below.

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[13] Transcript line 20,p111 and lines 1 -3, p112.

Agreement

[42] Paragon denies that an agreement between itself and Fraser to tender collusively was concluded. Paragon further submitted that, upon the issuance of the tender by Sibanye, it independently requested to be included on the tender list, which request was acceded to, and it was duly invited to participate. This occurred prior to any interaction between Mr Leaf and Paragon.

[43] Mr Svoronos in his testimony on behalf of Paragon testified that while Paragon was in the process of preparing its tender, he was informed by Ms Phusoane that she had been approached by Mr Leaf, who indicated a desire to present a business proposal to Paragon in relation to the tender and other prospective work.[14]

[44] At a meeting held at Paragon's offices in early October 2020, Mr Leaf informed Mr Svoronos and Ms Phusoane that he was in the process of resigning from Fraser and that, upon his departure, he intended to offer consultancy services within the industry through his own company.[15]

[45] Mr Svoronos further submitted that, at the meeting in question, Mr Leaf indicated that he could assist Paragon with its tender submissions and expressed an interest in establishing a business relationship with Paragon following the termination of his employment with Fraser. In particular, he referred to the tender as an example and proposed that he would provide such assistance on the understanding that, should Paragon be successful, it would appoint his company, Wade Leaf Projects to perform work as a sub-contractor to Paragon.[16]

[46] Mr Svoronos informed Mr Leaf that Paragon would be willing to consider engaging with him and his company in relation to the tender, as well as other potential contracts, on an "*as and when required*" basis. However, Mr Svoronos

[14] Transcript line 21, p192, lines 1 – 20, p193 and Svoronos' witness statement, paras 5 to 6, p1056 of the hearing bundle.
[15] Transcript lines 10 – 20, p193, lines 6 – 13, p209, and line 10 – 15,p208.
[16] Transcript lines 10 – 20, p193.

emphasised that any such arrangement remained subject to further discussion and agreement between the parties.

[47] Mr Svoronos submitted that Mr Leaf indicated that he was amenable to proceeding on the proposed basis and undertook to prepare pricing for presentation to Paragon. According to Mr Svoronos, Mr Leaf subsequently presented such pricing a day or two later, at a meeting held at Paragon's offices on or about 19 October 2020.[17] Mr Svoronos further submitted that, in presenting the pricing, Mr Leaf furnished a letter on the letterhead of Wade Leaf Projects in which he expressed appreciation to Paragon for the opportunity to provide pricing in respect of the tender as a prospective subcontractor.[18] The letter recorded that the pricing would remain valid for a period of 45 days and set out the applicable payment terms, in the event that the pricing schedule was accepted.[19]

[48] Mr Svoronos further testified that this pricing was incorporated into Paragon's tender submission. The tender documentation, in particular Annexure E, required bidders to specify the identity of the intended subcontractors as well as the portions of the works to be performed by such subcontractors.[20] Mr Svoronos submitted that it did not include subcontractor information on the basis that Mr Leaf remained employed at Fraser at the relevant time.[21] Having satisfied itself as to the adequacy of its bid, Paragon proceeded to submit its tender to Sibanye on 20 October 2020.

[49] On 25 November 2020, Paragon received correspondence from Sibanye raising certain irregularities. These concerns related to the pricing prepared by Mr Leaf in respect of Paragon's tender. Paragon maintained that it had never seen, nor discussed, Fraser's tender with Mr Leaf or any other party, and that it was, at all material times, unaware of any similarities between its tender and that of Fraser.

[17] Transcript line 21, p196 and lines 1 – 4, p197.
[18] Transcript lines 15 – 20, p196.
[19] Trial Bundle pages 543 -544.
[20] Trial bundle page 394.
[21] Transcript lines 5 – 14, p231.

[50] In light of the allegations of irregularities, Paragon submitted that it elected to withdraw its tender, as it did not wish to be implicated in any dispute arising therefrom.

[51] Consequently, Fraser denied the existence of any agreement between it and Fraser.

Mr Leaf's authority to act on behalf of Fraser

[52] Paragon alleged that Mr Leaf lacked the requisite authority to act on behalf of Fraser and contended that the mere fact that Mr Leaf occupied a managerial position within Fraser was insufficient, in itself, to establish liability on the part of Fraser.[22] While it is common cause that Mr Leaf held a position of management authority within Fraser, Paragon submitted that this fact is not determinative of whether he acted on behalf of Fraser in relation to the impugned conduct.

[53] According to Paragon, Mr Leaf engaged with Paragon in his personal capacity as a prospective contractor, and he was not acting on behalf of Fraser, nor in furtherance of its interests.[23] In addition, Paragon contends that Mr Leaf's conduct was undertaken without the knowledge or consent of Fraser, and that he acted solely in pursuit of his own commercial interests and prospective business opportunities.[24] The Commission's witness did not dispute that the conduct of Mr Leaf was directed at his own personal affairs as opposed to the affairs of Fraser.[25]

Issues to be decided

[54] It is common cause that Paragon and Fraser are competitors in so far as the impugned tender is concerned (specifically in the market for the provision of remedial works and related construction work). The principal issue for determination is whether the evidence establishes, on a balance of probabilities that Fraser and Paragon entered into an agreement, or engaged in a concerted

[22] Paragon's Answering Affidavit, p77 – p79 of the hearing bundle.
[23] Paragon's Answering Affidavit, para 20.5 – 20.8, p82 – p83 of the hearing bundle.
[24] Paragon's Answering Affidavit, para 20.6, p83 of the hearing bundle.
[25] Transcript, p 134, lines 10- 20 , p135, lines 1 – 20.

practice, to tender collusively in contravention of section 4(1)(b)(iii) of the Act. If not, the complaint referral must fail.

Legal framework

[55] Sections 4(1)(b)(i) and (iii) of the Act provide:

"*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…….. it involves any of the following restrictive horizontal practices:*

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

(ii) *……….*

(iii) *collusive tendering*."

Analysis

Was there an Agreement concluded?

[56] Section 1(1) of the Act provides that "*agreement', when used in relation to a prohibited practice, includes a contract, arrangement or understanding, whether or not legally enforceable*."

[57] The Commission contended that the respondents engaged in collusive tendering by discussing and agreeing upon the prices to be submitted in response to the tender. On this basis, the Commission alleged a contravention of section 4(1)(b)(iii) of the Act. In advancing this contention, the Commission relied on the evidence adduced during the hearing to establish the existence of an "*agreement*" as contemplated in the Act.

[58] The Commission argued that the respondents, through their respective representatives, reached an agreement regarding the outcome of the tender process by determining in advance which firm would submit the lowest bid and thereby secure the contract. In particular, it is alleged that Paragon (represented

by Mr Svoronos and Ms Phusoane) and Fraser (represented by Mr Leaf) coordinated their bids such that Paragon would emerge as the successful bidder (with the lowest tender price). The Commission contended that this conduct constitutes collusive tendering, a prohibited practice under the Act.

[59] In support of this proposition, the Commission relied on the jurisprudence of the *Competition Commission v Waco Africa (Pty) Ltd and Others ("Waco")*,[26] in which the CAC recognised that collusion in tendering processes may manifest in various forms and is not confined to rigid or formalistic categories. The CAC in *Waco* emphasised that the essence of collusion lies in the substitution of competition with coordination, irrespective of the particular mechanism employed by the parties.

[60] The Commission further submitted that, while the present matter does not constitute a "classic" case of cover pricing, it nonetheless bears hallmarks of such conduct. Cover pricing typically arises where one firm submits a deliberately inflated bid to give the appearance of competition while ensuring that a pre-selected firm wins the tender. In this instance, the Commission argued that Fraser, through Mr Leaf, submitted a bid of approximately R82 million with knowledge that Paragon's bid of R80 million would be substantially lower. On this basis, it is contended that Fraser's higher bid functioned as a "cover" for Paragon's bid, thereby facilitating Paragon's success in the tender process.

[61] Although the Commission submitted that the facts do not align squarely with the orthodox formulation of cover pricing as articulated in *Waco*, it submitted that the conduct nonetheless satisfied the underlying elements of that practice. Central to this argument is the allegation of prior knowledge and coordination: namely, that Mr Leaf was aware that Fraser's bid would not be competitive and that such non-competitive bidding was intentional, aimed at ensuring Paragon's success.

[62] Paragon denies that any agreement, as contemplated in section 4(1)(b)(iii) of the Act, was concluded between itself and Fraser. In this regard, Paragon relied on

[26] [2024] ZACAC 3; [2024] 2 CPLR 12 (CAC) (26 April 2024).

the principles articulated in *Netstar v Competition Commission ("Netstar")*,[27] where the CAC held that an agreement arises from conduct or discussions directed at achieving a meeting of minds that binds the parties, whether contractually or through moral suasion or commercial interest.[28] Paragon submitted that no such agreement existed between the respondents. It further argued that there was no arrangement, whether explicit or tacit, that bound Paragon and Fraser to coordinate their tender submissions. In particular, Paragon contended that the Commission failed to establish any consensus or coordinated conduct that would meet the threshold of an agreement as defined in the Act and interpreted in *Netstar*.

[63] Paragon further argued that Mr Leaf's involvement in the preparation of Paragon's tender was undertaken in his capacity as a representative of his own firm Wade Leaf Projects, and not on behalf of Fraser. According to Paragon, Mr Leaf's intention was to secure a commercial benefit in the event that Paragon was awarded the tender, namely through a prospective subcontracting arrangement. The Commission disputed this version.

[64] The Commission contended in response that Mr Leaf was, at all material times, acting on behalf of Fraser. The Commission further submitted that the letter, bearing the letterhead of Wade Leaf Projects, which Mr Leaf provided to Paragon together with the pricing schedule, was fictitious. In addition, the Commission alleged that the true reason Paragon omitted the details of the subcontractor in its tender submission to Sibanye was that Paragon was aware that Mr Leaf remained employed by Fraser at the relevant time and that it was an act to deceive Sibanye.

[65] Paragon maintained that its tender was independently compiled and that it did not have access to Fraser's pricing. Fraser similarly confirmed that its pricing was independently compiled and denied any collusive engagement with Paragon. Paragon further contended that such evidence is inconsistent with the existence of collusion, which by its nature requires reciprocal or coordinated conduct

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[27] *Netstar v Competition Commission of SA* 2011 (3) SA 171 (CAC).
[28] Ibid at para 25.

between parties. In this respect, Paragon argued that the absence of mutual coordination shows the opposite of collusion. Paragon also raised the contention that any sharing of Fraser's information with Paragon arose from the dishonest and unauthorised conduct of an individual employee, Mr Leaf.

[66] On this basis, Paragon further submitted that Fraser cannot be held liable for actions undertaken unlawfully and outside the scope of that employee's authority. It further argued that such conduct cannot give rise to an agreement binding on Fraser, as there was no lawful or authorised consensus between the firms.

[67] Accordingly, Paragon maintained that the Commission had failed to prove the existence of an agreement between the respondents, as required under section 4(1)(b)(iii) of the Act.

Our analysis

[68] The central issue is whether the conduct described above constitutes an agreement to tender collusively, in circumstances where an employee of one bidder (Fraser) unlawfully provides confidential information (i.e. pricing and other bid information) to a competing bidder (Paragon).

[69] More specifically, the question before us is whether Paragon and Fraser entered into an agreement to tender collusively, having regard to the fact that Mr Leaf, a senior Fraser employee, arguably approached Paragon in his personal capacity, and through his own entity, Wade Leaf Projects, in circumstances where he remained employed by Fraser. This requires an assessment of the true nature of the arrangement, having regard to the substance of the relationship, as well as the capacity in which Mr Leaf engaged with Paragon.

[70] We agree with the Commission's submission that collusion in tendering processes may assume a variety of forms and is not confined to rigid or formalistic categories, as affirmed in *Waco*.

[71] The Commission however in our view did not provide convincing evidence in this case that Mr Leaf represented Fraser and not his own company, Wade Leaf Projects when he met with Mr Svoronos and Ms Phusoane of Paragon.

[72] Significant to our finding that there was no agreement between Fraser and Paragon to collude, but rather that Mr Leaf was acting on his own initiative, is the fact that Mr Leaf had already founded Wade Leaf Projects in July 2020, before he approached Ms Phusoane or met with Ms Phusoane and Mr Svoronos. This is confirmed by Wade Leaf Projects' own pricing submission for the EDT2 Buttress work at Sibanye Stillwater, which describes itself "*as a newly formed company, July 2020, with the purpose of subcontracting civil engineering and earthworks for main contractors in the mining and infrastructure space*" and records that Mr Leaf was "*the sole owner of the business*".[29]

[73] The timeline shows Mr Leaf had already established an independent commercial vehicle, in his own name and for his own account, before any approach was made to Paragon. This sequencing is significant: it suggests that having resigned from Fraser,[30] Mr Leaf was now securing a personal business opportunity using Fraser's information. This is consistent with the evidence of Mr Svoronos, who testified that a person does not ordinarily leave one company merely hoping to find work afterwards, but rather takes steps, such as conducting interviews to protect their monthly income, particularly where they have dependants to support.[31]

[74] Mr Kock concedes that there is no indication that the abovementioned subcontracting was done on behalf of Fraser.[32]

[75] The letter sent by Paragon to Sibanye after Sibanye raised concerns about the tender states that Paragon was approached by Mr Leaf, who informed Paragon that he was resigning from his position with Fraser and was looking for business for 2021 as he had set up his own company. Further that Mr

[29] Letter from Wade Leaf Projects (Pty) Ltd to Mr Svoronos, p882 of the hearing bundle.
[30] Ibid.
[31] Transcript, p 64, lines 1 – 10 and Commission's Interrogation of Mr Svoronos, p 237 of the hearing bundle.
[32] Transcript p 57 lines 5 – 10.

Leaf offered his services to assist Paragon on the tender with a view of a possible appointment as a consultant or subcontractor for this project in 2021, and that Paragon made use of his company's services in this regard.[33]

[76] Although the Commission contended that there was a so-called loser's fee, which is the subcontracting arrangement, this alleged loser's fee would benefit Wade Leaf Project as the subcontractor in question and not Fraser.[34]

[77] Read together, this evidence supports the conclusion that Mr Leaf was pursuing a personal business opportunity through Wade Leaf Projects, and that he used his position and knowledge to secure Paragon as a means of advancing that opportunity, rather than Fraser and Paragon having reached a collusive agreement. On this evidence, the scheme is more properly characterised as Mr Leaf's own initiative, rather than a company to company (i.e. Fraser to Paragon) arrangement.

[78] The evidence on a balance of probabilities points to a sub-contracting agreement being concluded between Paragon and Wade Leaf Projects.

[79] We are not persuaded by the Commission's submission that the letter furnished by Mr Leaf was fictitious. The Commission's witnesses did not dispute the authenticity or validity of the letter.

[80] Nor do we accept the submission that Paragon's failure to disclose the identity of its intended subcontractor in its tender submission amounted to an act of deception directed at Sibanye because of a cartel arrangement between Fraser and Paragon. It may well have involved a measure of concealment, but if so, that concealment may have been directed at Fraser, not at Sibanye, and it does not follow that that the subcontracting arrangement itself was a sham. As indicated above, Mr Svoronos submitted that it did not include subcontractor information on the basis that Mr Leaf remained employed at Fraser at the relevant time.[35]

[33] Transcript page 198 line 16 to page 199 line 8.
[34] Transcript page 244 lines 5 -10.
[35] Transcript lines 5 – 14, p231.

[81] During cross-examination, counsel for the Commission put it to Mr Kock that Paragon had not disclosed Mr Leaf's subcontracting arrangement because Mr Leaf was, at the time, still employed by Fraser, and it would not have been prudent for the arrangement to come to Fraser's attention. On this version, the non-disclosure was explained not by the fictitiousness of the arrangement, but by Paragon and Mr Leaf's desire to keep it from people in the know. Counsel for the Commission put the proposition to Mr Kock as follows:

"*The reason Paragon did not disclose that Mr Leaf is one of the subcontractors is because they knew Mr Leaf was still employed by Fraser. What would be your comment?*"

Mr Kock responded: "*Yes, that does make sense, unless the person that wrote this does not know anything about it either.*"[36]

[82] Thus, the case put forward by the Commission for non-disclosure of Wade Leaf Projects as subcontractor in the tender was that Mr Leaf was still employed by Fraser at the time and it would not have been good for it to come to the attention of those in the know. We have no evidence that the subcontract with Wade Leaf Projects was a fiction.

[83] On the facts before us, there is no sufficient evidence demonstrating that Fraser and Paragon as competitors agreed to tender collusively. The evidence indicates that Mr Leaf unlawfully appropriated confidential pricing and other information belonging to Fraser and thereafter engaged with Paragon. Such conduct, however, does not, without more, establish the existence of an agreement between Fraser and Paragon but rather shows industrial espionage by Leaf acting for his own personal gain.

[84] Furthermore, the evidence showed that Fraser took reasonable steps to protect its interests, including instituting criminal proceedings under PRECCA, which resulted in a finding of guilt.

[85] Having regard to the totality of the evidence before us, we are satisfied that a subcontracting arrangement was concluded between Paragon and Wade Leaf

[36] Transcript lines 13 – 18, p66.

Projects. However, such an arrangement, on the facts of this case, does not amount to collusive tendering between Fraser and Paragon as competitors in a horizontal relationship.

MR LEAF'S AUTHORITY TO ACT ON BEHALF OF FRASER.

[86] Paragon submitted that Mr Leaf lacked authority to act on behalf of Fraser and contended that, to the extent he engaged in any agreement or understanding with Fraser, he did so as a representative of Wade Leaf Projects and not on behalf of Fraser. Although it was common cause that Mr Leaf occupied a managerial position within Fraser, Paragon argued that this fact alone was insufficient to establish Fraser's liability.

[87] The Commission, by contrast, submitted that Mr Leaf's position of management authority vested him with the requisite authority to bind Fraser. In support of this contention, the Commission relied on section 73A of the Act, which recognises liability arising from the conduct of individuals occupying positions of management authority within a firm. The Commission further relied on *Competition Commission v DPI Plastics (Pty) Ltd and Others*,[37] where the Tribunal held a firm liable for cartel conduct arising from the conduct of its employee, notwithstanding the firm's lack of knowledge of the collusive arrangement.

[88] The Commission also relied on *Competition Commission v Gralio (Pty) Ltd*,[38] in which the CAC confirmed that a company may act only through individuals vested with express, implied, or ostensible authority, and that such authority may be inferred from the individual's position within the firm and the conduct of the firm.

[89] The Commission also referred us to Whish and Bailey where the authors address factors that do not affect the existence of a cartel agreement. They identify

[37] [2012] ZACT 47.
[38] *Competition Commission of South Africa v Gralio (Pty) Ltd* [2011] ZACAC 7; [2011] CPLR 225 (CAC) (20 October 2011).

several such factors, one being that "*the individual who participated in, or concluded, the agreement lacked the authority to bind the firm*".[39]

[90] Relevant European case law supports the proposition that the authority of the individual acting on behalf of an undertaking does not, in itself, determine whether the undertaking may be held responsible for anti-competitive conduct. In *BPB plc v Commission*, Case T-53/03, the Court rejected, at paragraph 360, BPB's contention that its participation in the infringement would have ceased had its CEO complied with the instructions of the Board of Directors. The Court emphasised that an undertaking constitutes an economic unit and is directed through its corporate organs. Accordingly, the fact that an individual acting on behalf of an undertaking may have acted contrary to internal instructions does not, of itself, relieve the undertaking of responsibility for the conduct. Similarly, in Case C-68/12, *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa a.s., EU:C:2013:71*, the Court held that it is not necessary to establish that the partners or principal managers of an undertaking themselves participated in, or were aware of, the conduct. It is sufficient that the conduct was undertaken by a person authorised to act on behalf of the undertaking. the Court observed "*…that, for Article 101 TFEU to apply, it is not necessary for there to have been action by, or even knowledge on the part of, the partners or principal managers of the undertaking concerned; action by a person who is authorised to act on behalf of the undertaking suffices*"[40] (emphasis added).

[91] We concur with the Commission that generally an alleged lack of authority of an employee of a firm implicated in cartel conduct is not a proper defence for cartel conduct.

[92] Having concluded, for the reasons set out in paragraph 85 above, that no collusive tendering existed between Fraser and Paragon as competitors in a horizontal relationship, it is not necessary for us to deal with the issue of Mr Leaf authority.

[39] R Whish & D Bailey *Competition Law* 11 ed (Oxford University Press 2024) 105–106 and Transcript, p 253, lines 15 – 20, and p254, lines 1 – 20.
[40] Para 25.

DECLARATORY ORDER

[93] As indicated above, having found that the Commission failed to establish, on a balance of probabilities, that Fraser and Paragon entered into an agreement or engaged in a concerted practice amounting to collusive tendering in contravention of section 4(1)(b)(iii) of the Act, it is unnecessary to deal with the arguments raised by Fraser regarding declaratory relief.

CONCLUSION

[94] In the circumstances, the Commission's complaint against the respondents is dismissed.

ORDER

1. The Commission's complaint against the respondents is dismissed.
2. There is no order as to costs.

Signed by:Andiswa
Signed at:2026-08-21 10:24:26 +02:00
Reason:Witnessing Andiswa

Andiswa

21 August 2026

Ms Andiswa Ndoni | **Date**

Ms Mondo Mazwai and Mr Andreas Wessels concurring

Tribunal Case Manager:	Nomkhosi Mthethwa-Motsa
For the Commission:	Adv Katlego Monareng instructed by Cheadle Thompson & Haysom Inc
For the first respondent:	Adv Andrew Molver instructed by Bowmans Inc
For the second respondent:	Adv Johan Du Toit SC instructed by Tony Miguel Attorneys