

If firms with common members bid for a tender, is it collusion?

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In a recent case before the Competition Tribunal, the Tribunal considered whether different firms with common members could argue they were a "single economic entity" to avoid claims of collusion.



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In 2015, bees invaded the Magistrates court in Hertzogville and the respondents, A' Africa Pest Prevention CC and Mosebetsi Mmoho Professional Services CC, both submitted tenders to the Department of Public Works for bee removal ("Bee Tender"). The Department complained to the Competition Commission as the respondents' pricing schedules were almost identical. Both bids were signed by a Ms Labuschagne, a member common to both CC's.

The Commission concluded that there was an unlawful agreement to fix prices and rig the Bee Tender. The respondents argued that they were firms in a single economic entity and were not competitors to each other. The Tribunal investigated and found that Labuschagne had founded A' Africa and later, Mosebetsi, and together with another common member had run both respondents. Later on, to improve the BEE score of Mosebetsi, she offered a 52% membership of that CC to a Mr Maleho. Maleho became the day-to-day manager of the Mosebetsi business. However, the business did not take off and in 2015, Maleho left Mosebetsi to go to a competitor, remaining a registered member of the CC.

The Tribunal considered the exclusion of "single economic entities" from the ambit of the Competition Act and held that in terms of section 4(5)(b) of the Act, these can be "similar" in structure to a parent and wholly owned subsidiary relationship. On the facts, structurally, the respondents were not in a wholly owned parent-subsidary relationship but they argued that the common membership of both respondents was enough to be similar to a parent-subsidary relationship. The Tribunal noted, however, section 4(2) of the Act states that two or more firms with at least one director or "substantial shareholder" in common are presumed to have an agreement to engage in restricted practices, concluding there is general discouragement against competitors holding interests in each other.

The Tribunal held that, although the parent-subsidiary relationship does not require full ownership, it cannot be far removed from such. The CC's could not claim that they were a single economic entity as the common members held only partial control of both firms. Maleho remained as a 52% member for the BEE advantages and was not removed when the Bee tender was submitted.

The Tribunal found that the submission of two bids undermined the competitive bidding process. The Department was led to believe it had competing bids, and Labuschagne's actions were aimed at increasing her winning chances. In a final sting the Tribunal held that both respondents had contravened section 4 of the Act.

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