



COMPETITION

Pricing the same as your competitors – unlawful or permissible?

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One often observes in the marketplace that prices of products advertised or sold by two competitors are the same or similar. Commentators (especially on social media) are then quick to condemn this as unlawful price fixing. But is it necessarily so? A recent decision of the South African Competition Tribunal ("Tribunal") shed some light on this issue.

On 25 June 2025, the Tribunal issued its reasons in the case of *Competition Commission v Casalinga Investments CC t/a Waste Rite and X-Moor Transport t/a Crossmoor Transport*. The case concerned a complaint referral brought before the Tribunal by the Competition Commission ("**Commission**"), alleging that Waste Rite and Crossmoor ("**Respondents**") contravened sections 4(1)(b)(i) and (iii) of the Competition Act 89 of 1998 ("**the Competition Act**") by entering into an agreement to fix prices and tender collusively when bidding for a tender to Pikitup for operation of various landfill sites. Notably, the Tribunal's reasons included a finding on whether similar or parallel pricing necessarily constitutes prohibited price fixing. Particularly, whether undisputed similar pricing constitutes collusion in breach of section 4(1)(b) of the Competition Act.

The Commission's Case

The Commission alleged that the Respondents entered into an agreement to tender collusively by discussing or agreeing on the prices of certain items used in landfill management (i.e. landfill compactors, bulldozers, excavators). The Commission further alleged that this discussion or agreement resulted in the Respondents submitting a price schedule to Pikitup that contained similar variable and fixed cost prices as well as identical hourly rates. This conduct, it alleged, is prohibited in terms of sections 4(1)(b)(i) (price fixing) and (iii) (collusive tendering) of the Competition Act.

Waste Rite admitted liability and reached a settlement with the Commission. Crossmoor also engaged in settlement discussions but failed to reach an agreement and denied the Commission's allegations.

At the hearing before the Tribunal, the Commission supported its case with evidence from Ms Christa Venter, the COO of Pikitup. Ms Venter's evidence indicated that the Respondents' tender submissions raised suspicions because:

- both Respondents collected the tender documents on the same day;
- their bid submissions appeared to have been printed by the same company;
- their fixed price quotations were identical to the cent for the entire three-year period (with the only difference being fuel costs); and
- there appeared to be a similar pattern in the completion and signing of the tender submissions.

Ms Venter submitted that it was highly improbable that both Crossmoor and Waste Rite would have identical pricing, unless they shared exactly the same variables, castings and an identical markup, right down to the last cent.

Using Ms Venter's testimony, the Commission based its case entirely on an inference of collusion drawn from the above mentioned similarities. The Commission did not provide any direct evidence that the Respondents had entered into a collusive agreement.

The Tribunal Hearing

Upon hearing submissions from the parties, the Tribunal decided to rely on the witness statement of a witness who did not testify, Mr De Lange, who had been involved in the matter on behalf of Waste Rite. Mr De Lange's witness statement indicated that he was involved in the preparation of Waste Rite's tender documents and that he and Mr Perumal, an employee of Crossmoor, had been present at the same time at the premises of Jetline (a printing company) to make copies of their respective tenders. Mr De Lange confessed that, while Mr Perumal had gone to buy lunch, he illicitly copied Crossmoor's quoted prices. He did this unilaterally, without the knowledge of Mr Perumal or Crossmoor.

At the close of the Commission's case, Crossmoor applied for absolution from the instance, submitting that the Commission had not made out a *prima facie* case that the Respondents had entered into a collusive agreement in contravention of sections 4(1)(b)(i) and (iii). In deciding this application, the Tribunal considered (a) whether an agreement had been concluded between the Respondents and (b) whether the undisputed similarities in pricing constituted collusion.

Was There an Agreement?

In deciding whether an agreement had been reached between the Respondents, the Tribunal cited two cases from the Competition Appeal Court ("**CAC**")^[1] and took into account Mr De Lange's witness statement.

In *Netstar v Competition Commission of South Africa* ("**Netstar**"), the CAC explained that an "*agreement arises from the actions of and discussions among parties directed at arriving at an arrangement that will bind them either contractually or by virtue of moral suasion or commercial interest. It may be a contract, which is legally binding, or an arrangement or understanding that is not, but which the parties regard as binding upon them. The parties have reached consensus*". In light of this, the Tribunal found that there was no evidence demonstrating that the Respondents had reached an agreement to tender collusively. The Tribunal held that one possible explanation for the similar tenders was that one of the parties (Waste Rite) had obtained access to and had unilaterally copied the other party's tender.

Does Similar Pricing Constitute Collusion?

In considering whether the undisputed similarity in pricing constituted collusive tendering, the Tribunal accepted the Commission's acknowledgment that parallel pricing in itself is not inherently unlawful. However, the Commission argued that additional evidence, also known as "plus factors", could demonstrate a contravention of the Competition Act. It submitted that an inference of collusion could be made from the circumstantial evidence in this case, which, it said, suggested a pre-existing arrangement to submit similar prices.

The Commission relied on an article by William E. Kovacic, an American antitrust scholar and former Commissioner of the Federal Trade Commission, which stated that in "*antitrust cases, courts permit the effect of an agreement to be established by circumstantial evidence, but they required that economic circumstantial evidence go beyond parallel movement in price to reach a finding that the conduct of firms potentially violates Section 1 of the Sherman Act*"^[2].

The Commission also quoted a journal article by antitrust lawyer Michael K Vaska, that the "*plus factor most often considered by courts in determining whether parallel behaviour is the result of an agreement, is the business justifications test. Under this test a price fixing agreement may be inferred from parallel conduct if firms cannot show legitimate independent business reasons for engaging in such practices. Once conscious parallelism, sufficient to establish an agreement has been found, the practices are deemed illegal per se, without an inquiry into whether the practices are equally anticompetitive*"^[3].

In Crossmoor's submissions, it acknowledged the identical nature of the prices contained in its own tender and that of Waste Rite. However, Crossmoor submitted that the Commission presented no evidence showing that the circumstantial indicators between the parties and the subsequent submission of identical prices manifested an agreement to collude. Relying on *Netstar*, Crossmoor further submitted that the mere fact that competitors may have agreed to adopt certain standards does not, itself, infer the existence of a collusive agreement. In any event, Crossmoor submitted, the identical pricing in this matter goes well beyond what was contemplated in *Netstar*.

The Tribunal echoed Crossmoor's submissions and indicated that it was not convinced that conscious parallelism was reached on the part of Crossmoor as there was no evidence presented which showed this. Conscious parallelism was reached only on the side of Waste Rite, as clearly depicted by Mr De Lange's witness statement. This means that the similar pricing contained in the tender documents, on the evidence presented, does not constitute collusion.

Furthermore, the Tribunal was not persuaded that the Commission had established an effective answer to Crossmoor's application for absolution, so much so that if Crossmoor had closed its case after the Commission presented its evidence, the Tribunal would have ruled in favour of Crossmoor.

Conclusion

This case illustrates that parallel pricing alone does not automatically mean that an agreement to collude was reached between the parties. Parallel pricing can exist for various reasons and is capable of many explanations, which might or might not be collusion.

^[1] *Netstar v Competition Commission of South Africa* 2011 (3) SA 171 (CAC) at para 25 and *Competition Commission of South Africa v Stuttafords Van Lines Gauteng Hub (Pty) Ltd and Others* [2020] 2 CPLR 548 (CAC) at para 28-29.

^[2] William E Kovacic (2011) "*Plus Factors and Agreement in Antitrust Law*" 110 MICH. L. REV 393.

^[3] Michael K Vaska (1985) "*Conscious Parallelism and Price Fixing: Defining the Boundary*" University of Chicago Law Review: Vol. 52 Iss. 2, Article 10.



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