Characterisation of Restrictive Horizontal Practices under Competition Law (Part 2)

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SUMMARY

It is settled in South African competition law that any conduct alleged to have contravened section 4(1)(*b*) of the Competition Act must be properly characterised in order to ascertain whether the conduct in question falls squarely within the ambit of section 4(1)(*b*). In other words, it must be ascertained whether the impugned conduct, properly characterised, is the kind of conduct that is to be prohibited *per se* under section 4(1)(*b*) and that there is no scope for justification. The main aim of this series of three articles is to review characterisation under section 4(1)(*b*) of the Competition Act, and to assess what it involves. Part 1 critically reviews the applicable South African framework and principles relevant to characterisation as emerged in *American Natural Soda Ash Corporation v Competition Commission (ANSAC)* and *Competition Commission v South African Breweries Ltd (SAB)*, and assesses the approach to whether conduct is anti-competitive by object or effect under article 101 of the Treaty on the Functioning of the European Union. Part 2 builds on Part 1 by reviewing and assessing key facets of characterisation that have further emerged from the South African case law since the *ANSAC* and *SAB* cases. Part 3 reviews and assesses the approach relevant to characterisation of restraints of trade developed in *Dawn Consolidated Holdings (Pty) Ltd v Competition Commission.* (Van Tonder "Characterisation of Restrictive Horizontal Practices under Competition Law (Part 1)" 2025 46(4) *Obiter* 872–886)

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1 INTRODUCTION

It is settled in South African competition law that any conduct alleged to have contravened section 4(1)(*b*) of the Competition Act 89 of 1998 (Competition Act) must be properly characterised in order to ascertain whether the conduct falls squarely within the ambit of section 4(1)(*b*). In other words, it must be ascertained whether the conduct in question, properly characterised, is the kind of conduct that is to be prohibited *per se* under section 4(1)(*b*) and that there is no scope for justification.

The Supreme Court of Appeal (SCA) in *American Natural Soda Ash Corporation v Competition Commission (ANSAC v CC)*[1] set out the approach for determining whether conduct falls within the scope of the prohibitions enacted by section 4(1)(*b*). The essential enquiry is to establish whether the character of the conduct complained of coincided with the character of the prohibited conduct. This process entails two key elements: one, the scope of the prohibition – a matter of statutory interpretation; the other, the nature of the conduct complained of – a factual enquiry. Conduct that on the face of it may seem to contravene section 4(1)(*b*) may be found not to do so after a proper process of characterisation. The process of characterisation was applied by the Competition Appeal Court (CAC) in *Competition Commission v South African Breweries Ltd (CC v SAB)*.[2] The CAC in *SAB* gave precise meaning to the characterisation required under section 4(1)(*b*). Most importantly, the CAC made it expressly clear that the characterisation requirement requires first a determination whether or not the parties are in a horizontal relationship, and if so, a second determination – whether the conduct complained of involves conduct within the meaning of section 4(1)(*b*).

The main aim of this series of three articles is to review the approach to characterisation under section 4(1)(*b*) of the Competition Act, and to assess what characterisation involves. Part 1[3] critically reviews the applicable South African framework and principles relevant to characterisation with particular reference to *ANSAC* and *SAB* and assesses the approach for determining whether conduct is anti-competitive by object or effect under article 101 of the Treaty on the Functioning of the European Union (TFEU). In addition to *ANSAC* and *SAB*, the CAC has more recently applied the principle of characterisation in, among others, notable cases such as *Aranda Textile Mills (Pty) Ltd v The Competition Commission of South Africa* (*Aranda v CC*),[4] *Tourvest Holdings (Pty) Ltd v Competition Commission (Tourvest v CC)*,[5] *Competition Commission of South Africa v Irwin & Johnson* (*CC v*

1 2005 (6) SA 158 (SCA).
2 [2015] ZACAC 1.
3 Van Tonder "Characterisation of Restrictive Horizontal Practices under Competition Law (Part 1)" 2025 46(4) *Obiter* 872–886.
4 [2021] ZACAC 1.
5 [2022] ZACAC 5.

I&J)[6] and *Competition Commission v Waco Africa (Pty) Ltd* (*CC v Waco*).[7] In this light, Part 2 builds on Part 1[8] by reviewing and assessing key facets of characterisation that have further emerged from these cases since characterisation was established and applied in *ANSAC* and *SAB*. The main focus of Part 2 is to review and assess the principles that are relevant for answering the two central questions of characterisation. Part 3 reviews and assesses the approach pertinent to characterisation of restraints of trade as developed in *Dawn Consolidated Holdings (Pty) Ltd v Competition Commission*.[9]

This article begins, under heading 2, by determining whether parties are in a horizontal relationship. This is important because section 4 only applies to potentially harmful restrictive conduct if it is established that the conduct occurred between parties who can be described as "competitors" in terms of the Competition Act. Heading 3 assesses the determination of whether the conduct complained of coincides with the character of the prohibited conduct within the meaning of section 4(1)(*b*), with particular reference to the cases of *Aranda*, *I&J* and *Waco*. The CAC's decisions in these cases are important in assessing whether certain conduct falls within section 4(1)(*b*) or section 4(1)(*a*), respectively. Heading 4 provides a conclusion.

2 DETERMINING WHETHER PARTIES ARE IN A HORIZONTAL RELATIONSHIP

Section 4 of the Competition Act covers conduct between parties in a "horizontal relationship" and section 5 covers conduct between parties in a "vertical relationship". Determining horizontality involves two closely related elements: distinguishing a horizontal relationship from a vertical relationship and determining whether the parties are indeed in a "horizontal relationship".

2 1 Horizontal relationship distinguished from a vertical relationship

A horizontal relationship is defined by section 1 of the Competition Act simply as "a relationship between *competitors*". On the other hand, a vertical relationship is defined by section 1 as "the relationship between a *firm* and its suppliers, its customers or both".[10] The term "competitor" is not defined in the Competition Act. The terms "supplier" and "customer" in the definition of a vertical relationship are likewise not defined in the Competition Act. Generally speaking, competitors are rivals competing in a competitive situation to achieve the same goal or specific economic benefit.[11] A supplier provides goods or services to another party under the terms of a contract.[12]

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6 [2022] ZACAC 8.
7 [2024] ZACAC 3.
8 Van Tonder 2025 *Obiter* 872–886.
9 [2018] ZACAC 2.
10 According to s 1, a "firm" includes a person, partnership or a trust.
11 *CC v Waco supra* par 64.
12 *Ibid*.

A customer purchases goods or services from a supplier in exchange for consideration.[13]

An agreement can therefore be said to be "horizontal" when the parties to the agreement are "competitors" at the time that the agreement was made, and the agreement eliminates some avenue of competition among them. The second part is necessary because clearly, not every agreement between horizontally-related firms is necessarily a horizontal agreement. For example, in *SAB*,[14] the CAC was of the view that the relationship between South African Breweries and the authorised distributors was vertical in nature.[15] Although there were horizontal elements, these were incidental to, and flowed from, the vertical arrangement.[16] The conduct of the respondents, therefore, did not fall within the scope of section 4(1)(*b*) once characterisation had been applied.[17] Put differently, the agreements between South African Breweries and the authorised distributors were not agreements involving "dividing markets" as that term is used in section 4(1)(*b*).[18]

2 2 Actual or potential competitors

The term "competitors" includes both actual (existing) and potential competitors.[19]

In many cases, it will be obvious that the firms in question are competitors. In cases where it does become a contentious issue, it may be necessary to define the relevant market in order to determine whether the firms are in fact competitors. For these purposes, competition authorities have tended to rely on the concept of a relevant market.[20] Once the relevant market has been defined, the question is whether both parties fall within that market and whether the parties are active at the same level in that market (i.e., a horizontal rather than vertical relationship). In this regard, the European Commission emphasises that "[t]wo undertakings are treated as actual competitors if they are active on the same product market and geographical market".[21] The Competition and Markets Authority also states that "[t]wo undertakings are treated as *actual* competitors if they are active

13 *Ibid*.

14 *Supra*.

15 *CC v SAB supra* par 46.

16 *CC v SAB supra* par 45–46.

17 *CC v SAB supra* par 46.

18 *Ibid*.

19 *Competition Commission of South Africa v United South African Pharmacies* [2003] ZACT 4 8; European Commission Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2023) *OJ C* 259/01 (EC Guidelines) par 16.

20 Market definition is the conceptual framework used to identify a set of competitors that impose a competitive constraint on one another. See, for instance, European Commission Notice on the definition of the relevant market for the purposes of Union competition law (2024) *OJ C/2024/1645*.

21 EC Guidelines par 16.

on the same relevant (product and geographic) market(s)".[22] Similarly, Whish and Bailey define horizontal agreements as those that exist "between undertakings at the same level of the market".[23] Indeed, the CAC has found that "firms will be regarded as competitors if they compete in the same market in respect of the same or interchangeable or substitutable goods or services".[24]

When determining whether parties to an agreement are in a horizontal relationship, it may also be relevant to consider whether those parties are potential competitors, even if they are not actual competitors. In *Tourvest v CC*,[25] the CAC established the test for whether such firms are in a horizontal relationship. The CAC found that the accepted economic discipline employed in the determination of whether parties are potential competitors is to examine the relationship in the absence of the impugned agreement at the time that they entered into the impugned agreement.[26] It found that this economic approach is adopted in the European Union and United States guidelines on potential competitors, and that the application of this discipline enables an examination and comparison of the counterfactual position (where there is no agreement) to the existing factual position (where the agreement is in place).[27] The CAC stated that this is generally accepted as the appropriate method to determine whether the agreement itself resulted in harm to competition and, therefore, whether the conduct should fall into the type of economic activities for which no defence should be permitted.[28]

The CAC then summarised the key question-and-reasoning process of the counterfactual analysis as follows:

> "The question posed in this counterfactual analysis is whether the parties were potential competitors in the absence of the impugned agreement. If the answer to the question is in the affirmative, then competition may have been harmed as the agreement would then have removed a potential competitor from the market and therefore, itself, resulted in potential harm to competition. For instance, this would be the case in a situation of blatant market division.
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> However, if the answer to this question is in the negative – i.e. the two firms would not have been competitors absent the agreement – then the agreement itself did not remove a potential competitor from the market and, therefore, the agreement could not have harmed competition.
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> Put simply, where the firm in question is not a potential competitor in either the factual scenario or the counterfactual scenario, it follows that competition is the same in each scenario."[29]

The counterfactual analysis was also recognised and used by the CAC in the *SAB* case[30] in the characterisation of an agreement which, as in the

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22 Competition and Markets Authority Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements (2023) *CMA184* par 3.20.

23 Whish and Bailey *Competition Law* 8ed (2012) 122.

24 *American Soda Ash Corporation v Competition Commission of South Africa* [2002] ZACAC 5 par 24.

25 *Supra*.

26 *Tourvest v CC supra* par 46–47.

27 *Tourvest v CC supra* par 48.

28 *Ibid*.

29 *Tourvest v CC supra* par 49–51.

Tourvest case,[31] had both vertical and horizontal elements.[32] In *SAB*, following the approach in the European Union, the CAC found that if a firm would (absent the impugned agreement) not have competed, then the agreement itself cannot be said to have been entered into between horizontal competitors but rather stands to be classified as an agreement between an upstream manufacturer that is engaged in a new distribution strategy with its downstream suppliers.[33] In both cases, the interpretation by the CAC is in line with the wording of section 4(1)(*b*), which requires that the impugned agreement be between firms that are already in a horizontal relationship.

According to the European Commission (EC) and Competition and Markets Authority (CMA) guidelines on horizontal co-operation, a firm is considered a potential competitor if there are real, concrete possibilities for that firm to enter the market in question and compete with established firms.[34] A firm may thus be considered a potential competitor of another firm if, absent the agreement, a firm is likely, based on realistic grounds and not a mere theoretical possibility, within a short period of time, to undertake the necessary additional investments or other necessary switching costs to enter the relevant market in which the other firm is active.[35]

This assessment must have regard to the structure of the market and the economic and legal context in which it operates.[36] A hypothetical possibility, desire or wish to enter a market is not sufficient. On the other hand, there is no need to demonstrate with certainty that the firm will, in fact, enter the market concerned or that it will be capable of retaining its place.[37]

The EC and CMA set out, among other things, the following key factors for assessing whether a firm can be considered a potential competitor of another firm:[38]

- whether the firm has a set intention and an inherent ability to enter the market within a short period of time and does not face barriers to entry that are insurmountable;
- whether the firm has taken sufficient preparatory steps to enable it to enter the market concerned; and
- whether firms established in the market perceive a firm outside the market to be a potential entrant.

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30 *Supra*.

31 *Supra*.

32 See also *CC v Waco supra* par 59, summarising the counterfactual analysis with reference to *Tourvest v CC supra*.

33 *CC v SAB supra* par 41.

34 EC Guidelines par 16; Competition and Markets Authority Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements (2023) *CMA184* (CMA Guidelines) par 3.21.

35 EC Guidelines par 16; CMA Guidelines par 3.22.

36 EC Guidelines par 16; CMA Guidelines par 3.23.

37 *Ibid*.

38 See EC Guidelines par 16; CMA Guidelines par 3.24.

3 DETERMINING WHETHER THE CHARACTER OF THE IMPUGNED CONDUCT COINCIDES WITH THE CHARACTER OF THE PROHIBITED CONDUCT

3 1 *Aranda v CC*

The CAC's decision in *Aranda v CC*[39] emphasised the need for proper characterisation of both the relationship between the parties and the conduct alleged to have been collusive. The CAC also clarified what must be proved to establish a cartel case based on circumstantial evidence and inferential reasoning.

The Competition Commission referred a complaint to the Competition Tribunal against Aranda Textile Mills (Pty) Ltd (Aranda), a blanket manufacturer, and Mzansi Blanket Supplies Ltd (Mzansi), a blanket supplier. It was alleged that Aranda and Mzansi infringed section 4(1)(*b*) by reaching an agreement to fix prices and engage in collusive tendering with respect to a National Treasury tender for the supply of blankets and household textiles in 2015.[40] The Competition Commission alleged that Aranda and Mzansi were competitors (i.e., in a horizontal relationship) by virtue of their submitting simultaneous – but separate bids – for the same tender.[41] The Competition Commission further alleged that the parties discussed and agreed on how to bid on the tender because Aranda had shared its tender documents with Mzansi (including its pricing schedule), which the latter would use to prepare its own tender.[42]

The Competition Tribunal similarly held that for purposes of the 2015 tender, the parties' relationship was purely horizontal, and the only reasonable inference that could be drawn based on a) communication between the parties and assistance provided to Mzansi by Aranda for the tender, and b) the favourable pricing and terms given to Mzansi by Aranda compared to other bidders for the tender, was that the parties engaged in collusive tendering and price fixing.[43] The Competition Tribunal thus ultimately held that both Aranda and Mzansi contravened the Competition Act based on no direct evidence of collusion, but on inferential reasoning gathered from various pieces of circumstantial evidence.[44]

The CAC upheld the appeal by the respondents and dismissed the Competition Commission's complaint against them. The CAC found that the Competition Tribunal's failure to properly characterise the conduct and, more particularly, the relationship between Aranda and Mzansi as either a

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39 *Supra*.

40 At the time, Aranda was the only local producer of blankets that met the tender specifications. This meant that all of the bidders would need to get their supply through Aranda.

41 *Competition Commission v Aranda and Mzansi* [2020] ZACT 106 par 23.

42 *Competition Commission v Aranda and Mzansi supra* par 24.

43 *Competition Commission v Aranda and Mzansi supra* par 146–151 and 161.

44 See, for instance, *Aranda v CC supra* par 30 and 31.

horizontal or vertical one, was also fatal to its finding of an infringement. In this regard, the CAC stated:

> "The Tribunal accepted that Aranda and Mzansi were in a vertical relationship but, notably, so were all the other bidders as Aranda was the only manufacturer. All bidders would have had to engage with Aranda. The Tribunal however found that it did not matter much, as their relationship in relation to the 2015 tender was of importance. They were competing against each other and because they were vying for the same business, this amounted to a 'specific horizontal relationship'.
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> The Tribunal also found that 'it was therefore not axiomatic to confine themselves to that concept of horizontality but could view the conduct through section 5 of the Act'. The Tribunal did not explain how it concluded that restrictive verticality could apply in the absence of it being pleaded by the Commission. The only explanation provided by the Tribunal was the reliance placed on the case of *Berg River.* […] It simply asserted that properly characterised it was conduct designed to restrict competition. It found that characterisation did not assist them as both Aranda and Mzansi had submitted competitive bids. The failure by the Tribunal to properly characterise the conduct was fatal to their finding of a contravention."[45] (own emphasis added)

Although the CAC did not make a finding on whether the relationship in this case was horizontal or vertical, the CAC noted that a characterisation enquiry should be done for any alleged cartel conduct, irrespective of whether it is a section 4(1)(*a*) or 4(1)(*b*) infringement, as this makes for a constitutionally compliant approach.[46]

In considering the Competition Tribunal's approach to inferential reasoning, the CAC appreciated that while it may be difficult for the Competition Commission to secure direct evidence in cartel cases, thereby forcing reliance on inferences and probabilities, judicially accepted rules relating to inferential reasoning must apply.[47] The CAC confirmed that the approach to inferential reasoning in competition law is the same as in other areas of the law.[48]

The CAC recognised that it is possible to prove a cartel case relying wholly on circumstantial evidence and inferential reasoning, but emphasised that inferential reasoning must be based on a cautious, fact-sensitive approach:

> "A cautious and fact sensitive approach must be adopted when relying wholly on circumstantial evidence in order to conclude that there has been a contravention."[49] (own emphasis added)

The CAC further held that to reach such a conclusion, the evidence has to be assessed holistically and not in a vacuum.[50] No one piece of circumstantial evidence would be sufficient on its own to prove an

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45 *Aranda v CC supra* par 84–85.
46 *Aranda v CC supra* par 82.
47 *Aranda v CC supra* par 26.
48 *Aranda v CC supra* par 45 and 90.
49 *Aranda v CC supra* par 34.
50 *Aranda v CC supra* par 38.

agreement or collusion.[51] The inference sought to be drawn must be consistent with all the proven facts. If it is not, then the inference cannot be drawn, or it must be the "more natural, or plausible, conclusion from amongst several conceivable ones when measured against the probabilities".[52] In instances where there is no proof of objective facts from which to infer, the method of inference fails, and what is left is mere speculation or conjecture.[53]

3 2 *CC v I&J*

The CAC in *CC v I&J*[54] dismissed the Competition Commission's appeal of the Competition Tribunal's finding that a manufacturing agreement concluded between Irvin & Johnson Ltd (I&J) and Karan Beef (Pty) Ltd (Karan) did not contravene section 4(1)(*b*) of the Competition Act. In its complaint referral against I&J and Karan, the Competition Commission alleged that the respondents, being competitors in the market for the supply of processed beef products, entered into a manufacturing agreement that amounted to market division by allocating specific types of goods or services in this market in contravention of section 4(1)(*b*)(ii) of the Competition Act.[55]

In this case, the Competition Tribunal approached characterisation as follows:

> "We first consider what the true nature of the Manufacturing Agreement was because notwithstanding the express provisions of clause 3.13 and clause 3.15, which suggest that Karan had ceded all of its third party contracts to I&J, this was disputed by I&J. After reviewing the evidence on this issue, and arriving at a conclusion as to the true nature of the agreement between the parties we then consider whether the agreement (conduct) would be such as to fall within the scope of section 4(1)(*b*)(ii) as stated by the SCA and CAC."[56]

The Competition Tribunal's characterisation approach[57] included key elements concerning a) the purpose and rationale of the agreement;[58] b) the

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51 *Ibid*.

52 *Aranda v CC supra* par 39.

53 *Aranda v CC supra* par 43.

54 *Supra*.

55 *Competition Commission v Irwin & Johnson Ltd* [2020] ZACT 103 par 10. Under the manufacturing agreement in question, Karan would cease the production of a schedule of frozen beef products for its own account and use its production capacity to produce processed frozen beef for I&J. At the time of concluding the manufacturing agreement, both parties manufactured and supplied frozen beef produce to retailers such as Pick 'n Pay. In addition, the respondents agreed that Karan would not manufacture, market or produce any products similar to the contract products.

56 *Competition Commission v Irwin & Johnson Ltd supra* par 47.

57 In addition, the Competition Tribunal assessed whether the arrangement or relationship between parties could be described as vertical or horizontal in nature.

58 The Competition Tribunal indicated that the "central concern" lies in whether "the arrangement amounts to collusion with the purpose of limiting output and raising prices in an identified market". See *Competition Commission v Irwin & Johnson Ltd supra* par 42, and also par 43, 52, 103 and 113.

context in which the agreement was concluded;[59] c) market functioning and outcomes;[60] and d) whether the features of the agreement are consistent with those of collusion.[61] These elements are consistent with the European Union's approach under article 101 of the TFEU discussed in Part 1.[62]

The Competition Tribunal approached the conduct through a process of characterisation in terms of which it scrutinised the true nature of the agreement, its key features, purpose, its terms, the context in which it was formed, and the circumstances and past conduct of the parties. The Competition Tribunal emphasised that, given the seriousness of cartel conduct, it "must be treated with the appropriate attention and sanction by competition agencies".[63] Therefore, given the serious implications of a section 4(1)(*b*) infringement finding, the more serious the allegation, the more cogent will be the evidence that is required, and the Competition Commission bears the burden to prove on a balance of probabilities that conduct falls within the ambit of section 4(1)(*b*).[64] After the Competition Tribunal assessed the nature of the agreement and evaluated whether the conduct properly characterised constituted cartel conduct as contemplated under section 4(1)(*b*)(ii), the Competition Tribunal dismissed the Competition Commission's complaint.[65]

On appeal, the CAC upheld the Competition Tribunal's overall approach to the characterisation of the agreement in question.[66] The CAC engaged

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[59] In order to understand the true nature of the agreement, the Competition Tribunal stated that "some regard must be had to the context in which it was concluded" (par 48). To gain an understanding of the context in which the agreements were concluded, the Competition Tribunal relied on factual evidence regarding the investment and commercial performance of I&J and Karan's businesses and the plans that they had immediately before entering the agreement (par 49–69). Indeed, the Competition Tribunal considered the nature of the agreement within the legal and economic context in which it was concluded. In this regard, the Competition Tribunal criticised the Competition Commission for not providing context in its pleadings, with its case "being premised only on the provisions of the agreements themselves" (par 48).

[60] The Competition Tribunal referred to several economic and market analyses dealing with market conditions and outcomes that should form part of characterisation. For example, the Competition Tribunal stated that the Competition Commission's analysis provided very little detail on "the nature of competition in that market (for e.g., were there other firms competing in that market) or the closeness of competition between the respondents (for e.g., whether they competed on price, quality or customer type)" (par 38). The Competition Tribunal also stated that "[w]here a company divides the market or customers for anti-competitive reasons, empirical evidence may evince that such behaviour leads to a reduction in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers" (par 95). The Competition Tribunal went on to state that "[n]o evidence was put up by the Commission that the agreements impacted adversely on competition in any segment of the market, such as increased prices to customers or improved volumes for I&J's own brands" (par 105).

[61] The Competition Tribunal also considered whether the conduct of the two respondents displayed typical features of collusion, such as secretive arrangements or meetings (par 106). In this regard, the Competition Tribunal indicated that the conduct in question did not accord with that usually associated with cartel conduct (par 106).

[62] Van Tonder 2025 *Obiter* 872–886.

[63] *Competition Commission v Irvin & Johnson Ltd supra* par 114.

[64] *Competition Commission v Irvin & Johnson Ltd supra* par 117.

[65] *Competition Commission v Irvin & Johnson Ltd supra* par 116–117 and 119.

[66] See *CC v I&J supra*.

with the importance of characterisation in identifying prohibited cartel conduct. While the restrictive horizontal practices described in section 4(1)(*b*) of the Competition Act constitute *per se* offences, the CAC emphasised that this does not remove or avoid the need to consider whether the impugned conduct has the character of conduct sought to be prohibited under section 4(1)(*b*).[67]

In its characterisation of the manufacturing agreement, the CAC emphasised that the synergies between the parties at the time of concluding the manufacturing agreement and the fact that it was the product of the parties bringing their respective capacities together must not be overlooked.[68] In this regard, the CAC stated that "[t]o ignore these aspects of the Manufacturing Agreement would be to misconstrue the true nature of the parties' relationship and the subsequent Manufacturing Agreement".[69]

In rejecting the Competition Commission's contention that such characterisation process should not form part of the interpretation and application of section 4(1)(*b*), the CAC appears to have clarified the importance of conducting a "consideration of the true agreement between the parties and a proper interpretation of the context, language, purpose, the undisputed facts, and the conduct of the parties when implementing the impugned agreement".[70] Similar to the Competition Tribunal, the CAC took an expansive approach in engaging with contextual evidence in order to ascertain whether the impugned conduct was truly of the type prohibited by section 4(1)(*b*). The approach undertaken by the CAC works to ensure that the provisions of the Competition Act are employed to address genuine instances of prohibited cartel conduct that have been discovered through a detailed and rigorous assessment of the relevant evidence.

3 3 *CC v Waco*

While the CAC's decision in *Waco*[71] has arguably provided clarity on when submitting multiple bids amount to collusive tendering,[72] the CAC again underscored the relevance and importance of characterisation. The CAC also provided important clarity on the analytical approach that should be used when faced with real difficulty in determining whether the impugned conduct falls under section 4(1)(*b*) or section 4(1)(*a*).

In setting out its analytical framework, the CAC started by reiterating the characterisation enquiry and its two constituent elements as set out by the SCA in *ANSAC*. With regard to the first element of characterisation – that is, the scope of the prohibition – the CAC stated that the wording of section 4(1)(*b*), though concise and clear, requires "fuller exegesis with reference to the context, the purpose of the prohibitions and the intention of

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67 See *CC v I&J supra* par 52 *et seq* and par 100 *et seq*.

68 *CC v I&J supra* par 70.

69 *Ibid*.

70 *CC v I&J supra* par 5.

71 *CC v Waco supra*.

72 *See for example, A'Africa Pest Prevention CC v Competition Commission of South Africa [2019] ZACAC 2; Aranda v CC supra; Tourvest v CC supra.*

the legislature".[73] However, for procedural and jurisdictional reasons, the CAC noted that the SCA did not provide precise guidance on what the second element of the process, the mandatory factual enquiry, should entail.

The CAC confirmed that evidence of the nature, purpose and effects of the agreement (beyond its terms) as well as evidence of the impact of the impugned conduct on competition may be relevant and admissible in determining whether the impugned conduct falls within the scope of a *per se* prohibition. In this regard, the CAC stated:

> "The reasoning of the SCA in *ANSAC* indicates that it accepted that evidence of the nature, purpose and effects of the agreement (beyond the terms of the agreement) may be relevant and admissible in determining whether the impugned conduct falls within the scope of a *per se* prohibition. There is accordingly no basis for restricting the relevant evidence in the factual inquiry solely to the terms of the impugned agreement or practice. Evidence of the impact of the impugned conduct on competition (obviously relevant to the evaluation of the efficiency defence under section 4(1)(*a*) of the Act) may also be relevant and admissible in characterising conduct for the purposes of section 4(1)(*b*) of the Act."[74] (own emphasis added)

Relying on research by Moodaliyar and Weeks,[75] the CAC, therefore, supported the contention that evidence of impact is relevant in characterising *per se* prohibitions. However, the CAC warned that allowing evidence on effects could lead to blurring the line between the *per se* and rule-of-reason standard. Conscious of this danger, and consistent with the research by Moodaliyar and Weeks, the CAC indicated that it is possible to perform "initial characterisation" on the limited facts descriptive of the impugned conduct, as well as the court's "experience and knowledge regarding a broader class of cases".[76]

In conducting an initial characterisation, and in order to give effect to the advantage of the *per se* process, the CAC stated that the decision-makers (i.e., courts and tribunals) must rely on a common-sense understanding about price-fixing, dividing markets and collusive tendering.[77] Therefore, any evidence on effects relied on for the purpose of characterisation should be limited to only "low cost information that clearly contradicts the general experience and knowledge about the broader class of conduct or judicial notice of notorious legal, social and economic aspects".[78]

On this basis, the CAC stated:

> "a court may then elect a summary disposition of the case based on initial characterisation that the complained of conduct can be presumed to be of such a nature that it should be prohibited *per se*. Only where there is uncertainty regarding evidence of the purpose and impact of the conduct, should consideration be given to fuller evidence supplementing and refining

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73 *CC v Waco supra* par 81.

74 *Ibid*.

75 Moodaliyar and Weeks "Characterizing Price-Fixing: A Journey Through the Looking Glass With ANSAC" 2008 11(3) *SAJEMS NS* 337–353.

76 *CC v Waco supra* par 83.

77 *Ibid*.

78 *Ibid*.

> the initial characterisation, especially in more complicated cases where an initial characterisation may not be straightforward."[79]

At this point, the CAC stated that the court must avoid moving too fully into the territory of a rule-of-reason analysis by ensuring focus on the effects of the impugned conduct merely to characterise it, rather than a full-blown justification analysis.[80] Indeed, moving into a fully-fledged effects analysis will blur the line between the *per se* and rule-of-reason standards and will have implications for the "front loading" of costly information by firms, thereby undermining the effectiveness of the *per se* standard.

4 CONCLUSION

Characterisation requires a decision-maker to scrutinise the particular conduct in issue by assessing the true nature of the relevant agreement(s), including identifying its key features, terms, purpose and the context in which it was formed. South African case law appears to support precisely such an approach as reflected in *ANSAC*, *SAB*, *Aranda v CC*, *Tourvest v CC, CC v I&J* and *CC v Waco*, among other cases.[81] Some of the key facets of characterisation that have further emerged from *Aranda v CC*, *Tourvest v CC, CC v I&J* and *CC v Waco* include the following.

- The CAC has underscored and reiterated the need for proper and careful characterisation in the face of allegations of collusion. This includes characterisation of both the relationship between the parties (as either horizontal or vertical) and the conduct alleged to have been collusive (price-fixing, market division or collusive tendering) through a detailed and rigorous assessment of the relevant evidence.
- The CAC has clarified that in cartel cases pursued on the basis of circumstantial evidence and inferential reasoning, a cautious and fact-sensitive approach must be adopted in order to conclude that there has been a contravention. This approach must be based on a holistic assessment of evidence.
- The CAC has explained that determination of whether the parties are in a horizontal relationship involves an assessment of whether the parties were actual or potential competitors in the absence of the impugned agreement. Horizontality should be assessed at the time that the parties entered into the impugned agreement. Methodologically, the question of whether firms are potential competitors involves an examination and comparison of the counterfactual position (where there is no impugned agreement in place) to the existing factual position (where the agreement is in place) to determine whether the agreement itself resulted in harm to competition. The question posed in this counterfactual analysis is whether the parties were potential competitors in the absence of the

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79 *CC v Waco supra* par 84.

80 *Ibid*.

81 *Dawn Consolidated Holdings (Pty) Ltd v Competition Commission supra* is discussed in Part 3 (forthcoming).

impugned agreement. If the answer to the question is positive, then competition may have been harmed. If the answer is negative (that is, the parties would not have been competitors in the absence of the agreement), then the agreement could not have harmed competition and would not fall within the scope of the *per se* prohibition in question.

- The CAC has indicated that one must consider whether the type of agreement in question is consistent with hardcore collusion. The CAC's approach confirms that, in the face of real uncertainty about whether the agreement in question could have pro-competitive effects, the agreement should rather be assessed under section 4(1)(*a*).
- The CAC has repeatedly underscored the importance of assessing whether or not the features of the agreement are consistent with hardcore collusion. The CAC confirmed that evidence of the context, rationale, purpose and conduct of the parties when implementing the agreement may be relevant and admissible in determining whether the impugned conduct falls within the scope of a *per se* prohibition.
- The CAC has indicated that when determining whether the nature of the impugned conduct falls within the scope of the *per se* prohibitions of section 4(1)(*b*), this should not amount to a full-blown rule-of-reason or effects-based analysis. Once the assessment starts moving too fully into the territory of rule-of-reason analysis, it becomes self-evident that the conduct concerned does not fall within the scope of a *per se* prohibition. Such factors may be considered as part of the explanation to characterise the conduct, but not to justify the conduct as an efficiency defence.