

**INTERACTION BETWEEN CORRUPTION AND COMPETITION LAW
WITH SPECIFIC REFERENCE TO CARTELS COMPLAINT**

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DECLARATION

I Ngoako Peter Moropene, hereby declare that this dissertation is my own work. It is submitted in partial fulfilment of the requirements for the degree of Master of Law at the University of Pretoria. I further declare that this dissertation has not previously been submitted by me for any degree or examination at this or any other University, and that all material contained therein has been duly acknowledged.

NP Moropene

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CHAPTER 1

1. Introduction

In this paper the writer seeks to critically analyze and interrogate the interaction between corruption and competition law. Corruption and anti-competitive behavior have been found to be the most critical challenges that impact on the South African government's effort to enhance economic development. As part of the solutions to this problem, the competition legislation and policy together with the anti-corruption legislation are enforced to counter these social ills. These laws are effectively used to fight against various forms of corruption in both private and public sector.

David Lewis, the Executive Director of Corruption Watch¹ and former Chairperson of South Africa's Competition Tribunal (hereinafter referred to as 'the Tribunal') said he now sees anti-competitive conduct and corruption as at times indelibly interlinked, and that the best way for agencies to make a serious dent in either is the newest tool in the enforcer's kit, the sector inquiry.² A similar view was also shared by Mr Roger Jardine, a former CEO of the Aveng Group when he eloquently stated that "As I discovered the details of how these cartels worked I often asked myself what is the moral boundary between collusion and corruption. Collusion is broadly defined as a secret or illegal co-operation or conspiracy especially in order to cheat or deceive others. Corruption is broadly defined as lacking integrity, dishonest or fraudulent conduct, typically involving bribery, or the action of making something morally depraved. I believe that collusion is just a nice sanitized word for corruption."³

According to Corruption Watch, horizontal collusion proscribed by section 4(1)(b) of the Competition Act 89 of 1998, as amended ('the Competition Act') is the most significant of these cases of 'pure' private sector corruption insofar as it involves a conspiracy for private gain against the public.⁴

¹ Corruption Watch, <http://www.corruptionwatch.org.za> (accessed 25/02/2015).

² Pallavi Guniganti, Global Investigation Review, 'Lewis: Sector Inquiries Combat both Cartels and Corruption' 16 February 2015 (accessed 17/02/2015).

³ Roger Jardine, 'Rejecting Collusion and Corruption: Where to for the government and the private sector', public lecture, Wits Business School, 8 October 2013, page 5 of 12.

⁴ Corruption Watch, 'written comments to the Competition Tribunal in respect of the consent agreements in terms of section 49D of the Competition Act read with section 58(1)(a)(iii) and 58(1)(b) between the Commission and various construction companies' undated, page 2.

Collusion and corruption are distinct problems within public procurement, yet they may frequently occur *in tandem*, and have mutually reinforcing effect.⁵ They are best viewed, therefore, as concomitant threats to the integrity of public procurement.⁶ Public procurement comprises government purchasing of goods and services required for State activities, the basic purpose of which is to secure best value for public money. In both developed and developing economies, however, the efficient functioning of public procurement may be distorted by the problems of collusion or corruption or both.⁷

As defined in the OECD paper on Collusion and Corruption in Public Procurement, collusion generally involves a horizontal relationship between bidders in a public procurement, who conspire to remove the element of competition from the process.⁸ Bid rigging is the typical mechanism of collusion in public contracts: the bidders determine between themselves who should win the tender, and then arrange their bids – for example, by bid rotation,⁹ complementary bidding or cover pricing¹⁰ – in such a way as to ensure that the designated bidder is selected by the purportedly competitive process.¹¹ In most legal systems, bid rigging is a hard core cartel offence, and is accordingly prohibited by the competition law.¹² In many countries bid rigging is also a criminal offence.¹³

Corruption is defined as where public officials use public power for personal gain, for example, by accepting a bribe in exchange for granting a tender.¹⁴ While usually occurring during the procurement process, instances of post – award corruption also arise. Corruption constitutes a vertical relationship between the public official concerned, acting as buyer in the transaction, and one or more bidders, acting as

⁵ OECD, 'Round tables Collusion and Corruption in Public Procurement' 2010, page 9.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

⁹ Bid Rotation occurs when all potential competitors submit tenders but only one of them submits the lowest and winning tender at any one time. Mostly, the conspirators receive the agreed share of the value of the contracts.

¹⁰ Complementary Bidding occurs when some potential competitors agree to submit tenders that are too high or low to be accepted.

¹¹ OECD, 'Round tables Collusion and Corruption in Public Procurement' 2010, page 9.

¹² OECD, 'Round tables Collusion and Corruption in Public Procurement' 2010, page 9.

¹³ *Ibid.*

¹⁴ *Ibid.*

sellers in this instance.¹⁵ Corruption is generally prohibited by the national criminal justice rules, legislation on ethics in public office or by the specific procurement regulations.¹⁶ Collusion and corruption can arise in any procurement procedure, whether occurring in the public or private sectors. Yet, the distinctiveness of public procurement renders it particularly vulnerable to anti-competitive and corrupt practices, and magnifies the resultant harm. It is on this basis that the problems of collusion and corruption within the field of public procurement specifically merit individual attention.¹⁷

Economists have attempted to explore the correlation between competition and corruption and found that the low levels of competition correlate with high levels of corruption.¹⁸ The explanations proffered for this relationship suggest that because low levels of competition lead to higher rents, the potential returns from, and hence the incentive to engage in, corruption are increased.¹⁹

1.1. Competition Law

1.1.1 Evolution and History of the Competition Law in South Africa

Before the advent of the democratic dispensation in South Africa, competition was governed by various acts and policies which were aimed at regulating competition in the market. In order to understand the origins of the South African competition law regime, it is always apposite to highlight that the concept of competition law originated in North America. Approximately by 1985, most of the industrialized western countries adopted rules or laws which were aimed at preventing anti-competitive behavior which is similar to those rules or laws that are adopted in the United States of America.²⁰

In South Africa, between 1907 and 1924, competition was not regulated as there was no legislative framework promulgated to deal specifically with the promotion of

¹⁵ *Ibid.*

¹⁶ *Ibid.*, at page 10.

¹⁷ *Ibid.*

¹⁸ OECD, 'Fighting Corruption and Promoting Competition, 28-Jan-2014, at para 37, page 11.

¹⁹ *Ibid.*

²⁰ Neuhoff M *et al* 'A practical Guide to the South African Competition Act' (2006), page 12.

competition in the country.²¹ This triggered the government to direct the Board of Trade and Industry ('the Board') to conduct an enquiry and advise on the implications of competition policy and the Board of Trade and Industries Act 28 of 1923. The Board was reconstituted by the Board of Trade and Industries Act 19 of 1944.²²

In 1949, the Board was directed to investigate anti-competitive practices and monopolistic tendencies.²³ The government enacted the Undue Restraint of Trade Act 59 of 1949 ('Undue Restraint of Trade Act') prior to the Board embarking on the investigation of anti-competitive practices and monopolistic tendencies.²⁴ Upon conclusion of the investigation, the Board was required to report to the Minister of Economic Affairs ('the Minister') whether they uncovered anti-competitive practices in their investigation in order for the Minister to request such practices to be discontinued.²⁵ Furthermore, the Board released the eagerly awaited report in 1951 ('BTI Report 327'). This report criticized the Undue Restraint of Trade Act for vesting too much discretion on the Minister and the fact that the Act did not provide clear guidance to the Minister and the Board.²⁶ This led to the Undue Restraint of Trade Act being repealed by the Regulation of Monopolistic Conditions Act 24 of 1955, the first legislation that was dedicated to competition law in South Africa.²⁷ One of the key challenges that this Act had was the fact that it did not expressly deal with mergers, and although its wording could have been extended to cover horizontal and vertical merger, conglomerate mergers were outside its ambit.²⁸ In addition, the Act could not prevent mergers from taking place.²⁹

As a result, the Minister found that the Act achieved very little in terms of addressing competition challenges and introduced the Regulation of Monopolistic Conditions Amendment Bill No. 2513 ('the new bill') in order to extend the scope of the Act to

²¹ Sutherland P and Kemp K 'Competition Law of South Africa' (LexisNexis, Durban (2000) in chapter 3.2.1, page 3 - 26.

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid*, page 3 - 27.

²⁵ *Ibid.*

²⁶ Sutherland P and Kemp K, in chapter 3.2.1, page 3 – 27. See also Board of Trade and Industries Report 327 'Regulation of Monopolistic Conditions' (1951) 17 April 1951 (BTI Report 327), at pars 249 – 256.

²⁷ *Ibid.*

²⁸ Sutherland P and Kemp K, in chapter 3.2.1, page 3 - 29.

²⁹ *Ibid.*

amongst others include acquisitions and proposed acquisitions, but this never became law.³⁰ In 1979, new competition law legislation was promulgated in South Africa, called the Maintenance and Promotion of Competition Act 96 of 1979 ('the 1979 Act').³¹ The 1979 Act allowed for the adjudication of competition matters by the then Competition Board, which was appointed by the Minister of Trade and Industry and which could investigate matters at its own initiative.³² It further contained no explicit prohibitions, and while certain practices such as resale price maintenance, collusion on prices, trading terms and market division, as well as bid rigging, were subsequently declared outright illegal, there was no compulsory enforcement action or merger control.³³ In 1994, with the new political dispensation, the government made sure that it regulates the business conduct that prevented the efficient functioning of the domestic economy in South Africa, by doing away with the old competition law regime.³⁴ The motive behind this was to ensure that the South African competition law regime was brought in line with the international best practice for a proper functioning of the economy.³⁵

A new and progressive Competition Act was passed and became effective on 1 September 1999.³⁶ Although the South African Competition Authorities has gained a huge reputation globally due to the successes in enforcing the Competition Act, it still relies on the precedent of other jurisdictions such as Canada, Australia and Europe in its interpretation of competition law.³⁷ To date the Competition Act has been amended on three occasions in order to address the problems encountered in the early case law.³⁸ The Competition Amendment Act 1 of 2009 ('Amendment Act') was passed into law on 28 August 2009.³⁹ The 2009 Amendment Act seeks to increase the penalties that can be imposed in terms of the Competition Act by introducing criminal offences with respect to directors or managers of firms who whilst acting in management positions causes the firm to engage in a prohibited practice in terms of

³⁰ *Ibid*, page 3 - 29.

³¹ *Supra* fn 20.

³² Neuhoff M *et al* 'A practical Guide to the South African Competition Act' (2006), page 12.

³³ Neuhoff M *et al* 'A practical Guide to the South African Competition Act' (2006), page 12.

³⁴ *Ibid* at page 12.

³⁵ Neuhoff M *et al* 'A practical Guide to the South African Competition Act' (2006), page 12.

³⁶ Neuhoff M *et al* 'A practical Guide to the South African Competition Act' (2006), page 12.

³⁷ *Ibid*.

³⁸ *Supra* fn 21, page 3 – 45.

³⁹ *Ibid*. See also Bonakele T 'Amendments to the Competition Commission Act: A New Age Beckons' (Competition News Article (Edition 30 December 2008)), page 1 – 4.

section 4(1)(b) of the Competition Act.⁴⁰ It also introduced the market enquiry provision in order to allow the Competition Commission ('the Commission') to act within its function and on its own initiative or in response to a request from the Minister to conduct a market inquiry.⁴¹ It further introduced the complex monopoly conduct provision to prohibit complex monopoly conduct,⁴² and a provision regarding concurrent jurisdiction in order to clarify concurrent jurisdiction between the Competition Commission and other sector regulators.⁴³ At this stage, only section 6 of the Amendment Act has come into operation with effect from 1 April 2013.⁴⁴ The remaining provisions of the Amendment Act may come into operation at a date to be proclaimed by the President of the country.⁴⁵

1.1.2 The Purpose of the Competition Act

The primary and general purpose of the Competition Act is to promote and maintain competition in the Republic in order-

- “(a) to promote the efficiency, adaptability and development of the economy;
- (b) to provide consumers with competitive prices and product choices;
- (c) to promote employment and advance the social and economic welfare of South Africans;
- (d) to expand opportunities for South African participation in world markets and recognize the role of foreign competition in the Republic;
- (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
- (f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.”⁴⁶

⁴⁰ See Section 73A of the Amendment Act.

⁴¹ See Section 43A of the Amendment Act.

⁴² See Section 10A of the Amendment Act.

⁴³ See Section 3A of the Amendment Act.

⁴⁴ South Africa (2013) 'Commencement of section 6 of Competition Amendment Act 1 of 2009' (Proclamation No.5) Government Gazette No.36221: April 1.

⁴⁵ Section(s) 73A, 43A, 10A and 3A of the Amendment Act.

⁴⁶ See Section 2 of the Competition Act.

The Competition Act seeks to achieve a number of goals,⁴⁷ the first one being the efficiency, adaptability, and development of the economy. This goal corresponds to the Department of Trade and Industry's (DTI) interest in competition policy based on economic analysis.⁴⁸ The second goal, relates to competitive prices and choices for consumers, and recognizes the foundation of an economics – based policy concerns about consumer welfare.⁴⁹ The other four sets of policy goals contained in section 12(A)(3)⁵⁰ represent other public interests that have been important to stakeholders. The preamble of the Competition Act, recognizes the problem of inefficiency and waste, but connects these too with equity, in noting not only that credible competition law and institutions to administer it are necessary for an efficient economy, but also that an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focused on development will benefit all South Africans.⁵¹

1.1.3 Application of the Competition Act

The Competition Act applies to all economic activity within, or having an effect within, the Republic and regulates the conduct described in chapter 2 and 3.⁵²

1.1.4 Conduct regulated by the Competition Act

The Competition Act regulates the following conduct:

- (a) Horizontal Practices i.e. relationship between competitors;⁵³

⁴⁷ OECD Peer Review 'Competition Law and Policy in South Africa' May 2003, page 17.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ Section 12(A)(3) of the Competition Act deals with circumstances under which a merger can or cannot be justified on public interest grounds such as employment, ability of national industries to compete in international markets, ability of small business, or firms controlled or owned by historically disadvantaged persons to become competitive and whether the merger will not have the effect to a particular industrial sector or region.

⁵¹ Competition Act 'Preamble', at page 2 - 3.

⁵² See section 3(1A)(a) of the Competition Act.

⁵³ See Section 4 of the Competition Act. See also *American Soda Ash Corporation v Competition Commission of South Africa and Others*, 12/CAC/Dec01 and SCA Case No. 554/03 on how the Court delineated Section 4(1)(a) from section 4(1)(b) of the Competition Act. In this matter the Supreme Court of Appeal set out the import of Section 4(1)(b) and held that "it is clear from its juxtaposition with s 4(1)(a) that s 4(1)(b) is aimed at imposing a 'per se' prohibition: one, in other words, in which the efficiency defence expressly contemplated by sub-para (b) is plain. Price-fixing is inimical to economic competition, and has no place in a sound economy. Adopting the language of United States anti-trust law, price-fixing is anti-competitive *per se*. All countries with laws protecting economic competition prohibit the practice without more. The fact that price-fixing has occurred is by itself sufficient to brand it incapable of redemption." According to Sutherland P and Kemp K, in chapter 5.3,

- (b) Restricted Practices i.e. Relationship between suppliers and their customer;⁵⁴
- (c) Abuse of dominance position i.e. behavior of firms with market power;⁵⁵
- (d) Pricing behavior of firms;⁵⁶
- (e) Mergers and Acquisitions;⁵⁷

1.1.5 Cartel Conduct

A Cartel is defined as an agreement or concerted practice among competing firms or a decision by an association of firms, to coordinate their competitive behavior, for instance through conduct such as price fixing, division or allocation of markets, and/or collusive tendering.⁵⁸ This conduct typically constitutes a *per se* prohibition in terms of section 4(1) (b) of the Act.⁵⁹

The Competition Appeal Court in *Macneil Agencies (Pty) Ltd v The Competition Commission*⁶⁰ (hereinafter referred to as '*Macneil*') held that: cartel conduct is the most egregious form of anti-competitive conduct. This view was also echoed by the Competition Commissioner of South Africa when he said that: "the contraventions of section 4(1)(b) of the Competition Act are regarded as the most egregious violations of competition law. Cartels are often equated with theft, and sometimes even 'day light robbery'".⁶¹

Cartel conduct is dealt with in terms of section 4(1)(b) of the Competition Act which provides as follows:

page 5 - 7, "Section 4 of the Competition Act applies to the conduct between parties in a horizontal relationship i.e. between competitors". In *Competition Commission v Pioneer Foods (Pty) Ltd*, CT Case No.15/CR/Feb07 and 50/CR/May08, the Tribunal held that "Section 4(1)(b), as opposed to Section 4(1)(a) defines the prohibited practices by reference to whether or not an agreement contains one or more features set out in the sub-sections of 4(1)(b) rather than by reference to their effect in a relevant market. Section 4(1)(b) constitutes an offence for which no justification grounds are admissible."

⁵⁴ See Section 5 of the Competition Act.

⁵⁵ See Section 8 of the Competition Act.

⁵⁶ See Section 9 of the Competition Act.

⁵⁷ See Section 12 of the Competition Act.

⁵⁸ South Africa (2004) 'Corporate Leniency Policy (Notice No. 195) Government Gazette No.25963: February 6. (accessed 12/03/2015).

⁵⁹ *Ibid* at page 4.

⁶⁰ 121/CACJul12, at par 64, page 25.

⁶¹ *Supra* fn 39, page 2.

“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 –

- (b) it involves any of the following restrictive horizontal practices;
 - (i) directly or indirectly fixing a purchase or selling price or any other trading condition;
 - (ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or
 - (iii) collusive tendering.”

Of particular importance to this paper is section 4(1)(b)(iii) of the Competition Act which prohibits collusive tendering. As already alluded above, bid rigging is the typical mechanism of collusion in public contracts: the bidders determine between themselves who should win the tender, and then arrange their bids – for example, by bid rotation, complementary bidding or cover pricing – in such a way as to ensure that the designated bidder is selected by the purportedly competitive process.⁶² In most legal systems, bid rigging is a hard core cartel offence, and is accordingly prohibited by the competition law.⁶³

1.2 Corruption

1.2.1 Definition of Corruption and Legislative Framework

The word “corruption” is derived from the Latin word *corruptus*, which means corrupt, and it invokes ranges of images of evil.⁶⁴ Corruption has been defined in many ways, one of which is abuse of public power for personal gain or for the benefit of a group to whom one owes allegiance.⁶⁵ Klitgaard has however used the ethical concept of utility as a basis of supporting the theory that corruption can be useful and beneficial to communities.⁶⁶

It is submitted that although Klitgaard’s argument was cogent, there are some difficulties in supporting his views because he has not recognized the emergent

⁶² *Supra* fn 11, page 9.

⁶³ *Supra* fn 12, page 9.

⁶⁴ Mavuso V and Balia D ‘Fighting Corruption: Invitation to Ethics Management’ (1999), page 182.

⁶⁵ *Ibid.*

⁶⁶ Klitgaard R ‘Controlling Corruption’ (1988), page 31 - 32.

black democracies.⁶⁷ In South Africa, for example it was found that corruption often undermines the economy and also hurts the political system.⁶⁸ Secondly, it was found that corruption often impacts on our country's economic development.⁶⁹

In South Africa, the relevant legislation used to fight corruption is the Prevention and Combating of Corrupt Activities Act⁷⁰ ('PRECCA'). This Act does however not define the meaning of "corruption". In its annual report, Corruption Watch defined corruption as "the abuse of public resources or public power for personal gain."⁷¹ However, the new shorter Oxford dictionary defines corruption as a "moral deterioration; depravity; an instance or manifestation of this. Perversion of a person's integrity in the performance of (especially official or public) duty or work by bribery etc... A change for the worse of an institution, custom, etc; a departure from a state of original purity."⁷²

There are various offences that are prohibited by PRECCA. However, for the purpose of this paper only the prohibitions in section 12 and 13 of PRECCA are relevant as these sections provide for 'offences in respect of corrupt activities relating to procurement and withdrawal of tenders'. Specifically section 12(1) of PRECCA provides that:

"Any person who, directly or indirectly-

- (a) accepts or agrees or offers to accept any gratification from any other person whether for the benefit of himself or herself or for the benefit of that other person or of another person; or
- (b) gives or agrees or offers to give to any other person any gratification whether for the benefit of that other person or for the benefit of another person
 - (i) in order to improperly influence in any way-

⁶⁷ *Supra* fn 64.

⁶⁸ *Ibid.*

⁶⁹ Mavuso V and Balia D 'Fighting Corruption: Invitation to Ethics Management' (1999), page 183.

⁷⁰ Act No. 12 of 2004.

⁷¹ Corruption Watch 'Annual Report' (2014), page 8.

⁷² Sangweni S and Balia D 'Fighting Corruption: South African Perspectives' (1999), page 60.

- (aa) the promotion, execution or procurement of any contract with a public body, private organization, corporate body or any other organization or institution; or
- (bb) the fixing of the price, consideration or other moneys stipulated or otherwise provided for any such contract; or
- (ii) as a reward for acting as contemplated in paragraph (a) is guilty of the offence of corrupt activities relating to contracts.”

On the other hand section 13(1) of PRECCA stipulates that:

“Any person who, directly or indirectly accepts or agrees or offers to accept any gratification from any other person whether for the benefit of himself or herself or for the benefit of another person as-

- (a) an inducement to, personally or by influencing any other person so to act-
 - (i) award a tender in relation to a contract for performing any work, providing any service, supplying any article, material or substance or performing any other act to a particular person or;
 - (ii) upon an invitation to tender for such contract make a tender for that contract which has as its aim to cause the tender to accept a particular tender or;
 - (iii) withdraw a tender made by him or her for such contract: or
 - (b) a reward for acting as contemplated in paragraph (a) (i), (ii) or (iii) is guilty of the offence of corrupt activities relating to procuring and withdrawing of tenders;
- (2) any person who directly or indirectly-
- (a) gives or agrees or offers to give any gratification to any other person whether for the benefit of that other person or the benefit of another person as-
 - (i) an inducement to, personally or by influencing any other person so to act, award a tender, in relation to a contract for performing any work providing any service, supplying any article, material or substance or performing any other act, to a particular person; or

(ii) a reward for acting as contemplated in subparagraph (i): or

(b) with the intent to obtain a tender in relation to a contract for performing any work, providing any service, supplying any article, material or substance or performing any other act, gives or agrees or offers to give any gratification to any person who has made a tender in relation to that contract, whether for the benefit of that tenderer or for the benefit of any other person as-

(i) an inducement to withdraw the tender; or

(ii) a reward for withdrawing or having withdrawn the tender, is guilty of the offence of corrupt activities relating to procurement and withdrawal of tenders.”

Any person found to have contravened section 12 and 13 of PRECCA can be liable to a fine and or an imprisonment as set out in section 26 thereof. In terms of section 26(1) of PRECCA “Any person who is convicted of an offence referred to in-

(a) Part 1, 2, 3 or 4, or section 18 of Chapter 2, is liable-

(i) in the case of a sentence to be imposed by a High Court, to a fine or to imprisonment up to a period for imprisonment for life;

(ii) in the case of a sentence to be imposed by a regional court, to a fine or to imprisonment for a period not exceeding 18 years;

(iii) in the case of a sentence to be imposed by magistrate’s court, to a fine or to imprisonment for a period not exceeding five years.”

Another act used to fight corruption in South Africa is Prevention of Organised Crime Act⁷³ (‘POCA’). Similarly to PRECCA there are various offences that are prohibited by POCA. However, for the purpose of this paper only section 5 of POCA is relevant which provides that:

“Any person who knows or ought reasonably to have known that another person has obtained the proceeds of unlawful activities, and who enters into

⁷³ Act No. 121 of 1998.

any agreement with anyone or engages in any arrangement or transaction whereby-

- (i) the retention or the control by or on behalf of the said other person of the proceeds of unlawful activities is facilitated; or
- (ii) the said proceeds of unlawful activities are used to make funds available to the said other person or to acquire property on his or her behalf or to benefit him or her in any other way, shall be guilty of an offence.”

Section 1 of POCA defines unlawful activity as “any conduct which constitutes a crime or which contravenes any law whether such conduct occurred before or after the commencement of this Act and whether such conduct occurred in the Republic or elsewhere.”

1.2.2 The Causes of Corruption

Corruption in South Africa is rooted in the bureaucratic traditions, political development, and social history of the country.⁷⁴ According to Pillay, corruption has flourished as a result of institutional weaknesses, undesirable social controls, antiquated laws, excess demand, entrepreneurial politics, bureaucratization, excessive discretion and administrative arrangements.⁷⁵

1.2.3 Offices Tasked to Investigate Corruption in the Public Sector

The main offices tasked to investigate corruption in South Africa are the National Prosecuting Authority (NPA), Independent Police Investigative Directorate (Previously known as ICD), Special Investigation Unit, Public Protector’s office, Auditor General and the South African Police Services Anti-Corruption Unit.⁷⁶

1.3 The Scope of the Dissertation

1.3.1 The aim of this dissertation is to critically analyze and interrogate the interaction between corruption and competition law, and determine whether it is

⁷⁴ H Kroukamp ‘The solution to end corruption in the South African public sector’ Vol 5, No 8, page 1415.

⁷⁵ S Pillay ‘Corruption – the challenge to good governance: a South African Perspective’ (2004) Vol 17 *Australia International Journal of Public Sector Management* 586 – 605.

⁷⁶ Sangweni S and Balia D ‘Fighting Corruption towards a National Integrity Strategy’ (1999), page 89.

necessary for the Competition Act to be aided by PRECCA in fighting against collusive tendering conduct in both the private and public sector or *vice versa*.

1.3.2 The dissertation will further examine the potential impact of section 73A of the Amendment Act and to see what effect this provision would have on the Commission's Corporate Leniency Policy (CLP Policy), the practical challenges that may arise therefrom, and to eventually make recommendations on how these problems can be resolved.

1.3.3 The study will also analyze the practical challenges that may arise in a case where both Competition Act and PRECCA are simultaneously invoked with regard to the firm(s) found to have engaged in a collusive tendering conduct.

1.3.4 The study will further seek to determine whether it is appropriate for the construction firms found to have contravened section 4(1)(b) of the Competition Act⁷⁷ to be blacklisted from doing business with government regardless of having paid administrative penalties to the Commission, and to examine whether in doing so the government will not be biting off what it cannot chew i.e. to look at the effect that this may have on the country.

1.3.5 Finally it will be determined how the Commission intends to implement the provisions of the Amendment Act as soon as the Amendment Act comes in to operation.

⁷⁷ Competition Commission v Aveng (Africa) Ltd, CT Case No. 016931, Competition Commission v Murray and Roberts Limited, CT Case No. 017277, Competition Commission v Vlaming (Pty) Ltd, CT Case No. 017053, Competition Commission v Basil Read Holdings (Pty) Ltd, CT Case No. 016949, Competition Commission v Norvo Construction (Pty) Ltd, CT Case No. 017004, Competition Commission v WBHO Construction (Pty) Ltd, CT Case No. 017061, Competition Commission v Esorfranki Ltd, CT Case No. 016956, Competition Commission v Raubex (Pty) Ltd, CT Case No. 017012, Competition Commission v G Liviero and Son Building (Pty) Ltd, CT Case No. 016964, Competition Commission v Rumdel Construction Cape (Pty) Ltd, CT Case No. 017020, Competition Commission v Guiricich Bros Construction (Pty) Ltd, CT Case No. 016972, Competition Commission v Stefanutti Stocks Holdings Ltd, CT Case No. 017038, Competition Commission v Haw and Inglis Civil Engineering (Pty) Ltd, CT Case No. 016980, Competition Commission v Tubular Technical Construction (Pty) Ltd, CT Case No. 017046, Competition Commission v Stefanutti Stocks Holdings Ltd, CT Case No. 017475, Competition Commission v Hochtief Construction AG, CT Case No. 016998.



1.4 Chapterization

This dissertation is divided into the following chapters:

Chapter One - Background to the study.

Chapter Two - This chapter will deal specifically with the examples of recent construction cartel cases in South Africa, and how they were dealt with by the Competition Authorities.

Chapter Three - This chapter will deal with the interaction between Corruption and Competition Law with specific reference to cartels in South Africa.

Chapter Four - This chapter will consist of conclusion and recommendations.

CHAPTER 2: EXAMPLES OF RECENT CONSTRUCTION CARTEL CASES IN SOUTH AFRICA

2.1 Introduction

In South Africa, there are few cartel cases that have been decided on their merits by the Competition Authorities and the courts. Most cartel cases were resolved by way of consent agreements concluded in terms of section 49D read together with section 58 of the Act⁷⁸ (including collusive tendering cases). As a result thereof, jurisprudence has not been developed adequately as certain areas of cartels conduct are still yet to be tested.

In this chapter, the writer will deal specifically with cartel cases and place more emphasis on those cartel cases which involves collusive tendering in the construction industry which were dealt with on their merits by the Competition Authorities and the courts. In addition, the writer will deal with the Commission's fast track settlement invitation in the construction industry, the construction cartel settlements, and lastly determine whether it is appropriate for the construction firms found to have contravened section 4(1)(b) of the Act to be blacklisted from doing business with government regardless of having paid administrative penalties to the Commission, and further examine whether in doing so, the government will not be biting off what it cannot chew i.e. to look at the effect that this may have on the country's economy.

2.2 *The Competition Commission v RSC Ekusasa Mining (Pty) Ltd*⁷⁹ (herein after referred to as 'RSC')

The above matter is a seminal case relevant to cartel conduct which involves collusive tendering.

⁷⁸ Section 49D(1) of the Act provides that "If, during, on or after completion of the investigation of a complaint, the Competition Commission and the respondent agree on the terms of an appropriate order, the Competition Tribunal, without hearing any evidence, may confirm that agreement as a consent order in terms of section 58(1)(b), whilst section 58(1)(b) of the Act states that "In addition to its powers in terms of this Act, the Competition Tribunal may confirm a consent agreement in terms of section 49D as an order of the Tribunal.

⁷⁹ The Competition Commission v RSC Ekusasa Mining and Others, CT Case No. 65/CR/Sep09.

2.2.1 Facts

This case concerns the allegation of a cartel between four firms who manufacture roof bolts for the mining industry. On 30 September 2009, the Commission referred the complaint to the Tribunal⁸⁰ for adjudication pursuant to the information it received from one of the respondents as part of a leniency application.⁸¹ The firm in question was RSC, the first respondent which received corporate leniency from the Commission through its CLP Policy.⁸² The second respondent, Aveng (Africa) Limited ('Aveng'), which trades as Duraset ('Duraset'), reached a settlement agreement with the Commission prior to the matter being heard by the Tribunal.⁸³ The Commission pursued the complaint against the remaining two respondents who are the third respondent, Dywidag-Systems International (Pty) Limited ('DSI') and the fourth respondent, Videx Wire Products (Pty) Limited ('Videx').⁸⁴

The Commission alleged that the four respondents had tendered collusively and engaged in allocation of customers in the market for the supply of roof bolts for the mining industry, and that this conduct contravened section 4(1)(b)(ii) and (iii) of the Act.⁸⁵

The Commission's allegations against DSI were that DSI was involved in bid rigging in respect of two reverse auction tenders put out by Anglo Platinum in 2004 and 2005, it attempted to collude with Duraset in respect of allocating the business of Sasol and Xstrata, it was involved in an agreement to bid very low prices for a tender from Goldfields in a bid to punish Duraset, it attended a meeting in respect of an Anglo Coal tender in 2006 in which it allegedly agreed to collude and assist RSC to increase its margins at Anglo Coal and that in June 2008 DSI was involved in a cover pricing arrangement in respect of a Goldfields tender involving RSC and Videx.⁸⁶

⁸⁰ *Ibid* at par 9 page 3.

⁸¹ *Ibid* at par 7.

⁸² The CLP was filed by Murray and Roberts Limited on behalf of RSC which was its wholly owned subsidiary.

⁸³ This settlement agreement was confirmed as an order of the Tribunal on 25 August 2010. In terms of the settlement agreement, Aveng agreed to pay an administrative penalty of R21 900 000 which was equivalent to 5% of Duraset's total turnover for the financial year ending 2008.

⁸⁴ The Competition Commission v RSC Ekusasa Mining and Others, CT Case No. 65/CR/Sep09, at par 4 page 2.

⁸⁵ *Ibid* at par 5 page 2.

⁸⁶ *Ibid* at par 14 page 4.

With regard to Videx, the Commission alleged that, Videx was involved in bid rigging in respect of two reverse auction tenders put out by Anglo Platinum in 2004 and 2005, it approached Duraset in an attempt to get an agreement on prices to be quoted for a tender put out by Lonmin in May 2004, it was involved in an agreement to bid very low prices for a tender from Goldfields in a bid to punish Duraset, it attended a meeting in respect of an Anglo Coal tender in 2006 in which it allegedly agreed to collude and assist RSC to increase its margins at Anglo Coal, it was alleged to have put in a sham bid, it attempted, albeit unsuccessfully to fix prices with RSC on a bid for a tender from Harmony in October 2005 so that it (Videx) could win the bid, and finally, it was involved in a cover pricing arrangement in respect of a Goldfields tender RSC and DSI.⁸⁷

2.2.2 The argument

DSI and Videx challenged the Commission's case and argued that;

- (a) Whilst they admit many of the contraventions, these practices ceased more than three years before the initiation of the complaint in this matter by the Commission and hence they are subject to the limitation on bringing an action set out in section 67(1) of the Act;⁸⁸
- (b) In relation to one of the contraventions, alleged to have occurred within three years of the initiations, they were not involved and, alternatively, that as a matter of fairness, this aspect of the Commission's case was not initially brought against them in the referral, but against the two other respondents. Although the Commission sought to amend its referral to include them, it did so only at the close of the case. The respondents argued that the Commission was not entitled to amend its referral at such a late stage.⁸⁹

2.2.3 The Tribunal's decision

In this case, the Tribunal had to determine whether or not DSI and Videx were liable for contravention of section 4(1)(b)(ii) and (iii) of the Act, whether or not the complaint referral against DSI and Videx has prescribed in terms of section 67(1) of

⁸⁷ *Ibid* at par 15 page 5.

⁸⁸ Section 67(1) states that "a complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased".

⁸⁹ *Supra* fn 84, at par 6 page 2.

the Act,⁹⁰ and also had to rule on the Commission's late filing of the amendment application.⁹¹

In addition to the above arguments, DSI argued that the collusive tendering took place sometime in 2004 and then again in mid to late 2005, but thereafter it did not continue and hence it ceased more than three years prior to the cut-off date. It further argued that collusive tendering is a once-off event, that the practice is the collusive tender and that once the collusion has occurred it ceases, and that the practice does not subsist for the period during which it has effect.⁹²

In dealing with amongst others, the DSI's arguments, the Tribunal held that "in price fixing and market allocation, as with the collusive tender, an agreement may also be a moment in time. All three species of *per se* horizontal practice under section 4(1)(b) should be treated in same way. Collusive tendering produces the same outcome as customer allocation (section 4(1)(b)(ii)). The Tribunal further indicated that, if DSI was correct about its "moment in time" argument, enforcement action against bid rigging would grind to a halt, because most of these practices operate covertly and may only emerge more than three years after the agreement that founded them had "ceased". Yet we know from experience that the fruits of collusive tendering can persist well after the agreement that founded them had occurred."⁹³

The Tribunal opined that the implication of DSI's argument was that if a customer calls for a tender for a period exceeding three years – say 10 years – and the tender is awarded to a firm as a result of a rigged bid, but is only detected by the Commission three years and one day after the date of the tender being accepted, no complaint can validly be initiated against it, even though the tainted tender is still in operation through continual purchases in terms of the tender contract, for seven years hence.⁹⁴ It is indicated that this cannot be correct. Further, given that the customer can only recover damages from the bidders if there is a prior finding of a

⁹⁰ The Competition Commission v RSC Ekusasa Mining and Others, CT Case No. 65/CR/Sep09, at par 22 page 7.

⁹¹ *Ibid* at par 12 page 4.

⁹² *Ibid* at par 141 page 39.

⁹³ *Ibid* at par 144 page 40.

⁹⁴ *Ibid* at par 145.

prohibited practice by the Tribunal, civil claimants too would be without a remedy. Nor, it seems, could the contract be voided on this ground either.⁹⁵

In addition, the Tribunal held that “it is highly unlikely that the legislature would have intended such a limited meaning to the phrase the “practice has ceased”. It remarked that quite clearly the legislature contemplated the practice as having ceased when its effects have ceased.⁹⁶ That interpretation is not only more consistent with the language of section 67(1) but is a more sensible one as well.⁹⁷ The reason the limitation exists is to avoid the pointless prosecution of practices that have ceased some time before the initiation of the complaint.⁹⁸ This consideration does not arise if their effects remain alive and well at the time of initiation. The Tribunal stated that one must consider further the use of the term “practice has ceased”. It was of opinion that the choice of the term “ceased” in preference to a word that might have otherwise been used, like “occured”, suggests a practice that is ongoing or continuous in nature, and that has ended, and not an act which occurred only in a moment in time.”⁹⁹

In its conclusion, the Tribunal relied on the United States’ Supreme Court decision in the *Zenith*¹⁰⁰ case wherein it was stated that: “in the context of a continuing conspiracy ... each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover damages caused by that act and as to those damages, the statute of limitations runs from the commission of the Act.”¹⁰¹ It also relied on the passage from *Areeda* in terms of which it is stated that a private plaintiff therefore may bring a treble damages action long after the inception of an antitrust conspiracy, as long as it can prove that “...its damages were proximately caused by an overt act occurring within the statutory time period. The overt act could be a price-fixing conspirator’s elevated price...”¹⁰²

⁹⁵ *Ibid* at par 145 page 40.

⁹⁶ *Ibid* at par 146 page 41.

⁹⁷ *Ibid*.

⁹⁸ *Ibid*.

⁹⁹ *Ibid* at par 146 page 41.

¹⁰⁰ *Zenith Radio Corp v Hazeltine Research* (1971), 401 US 321.

¹⁰¹ *Ibid*.

¹⁰² *Areeda P et al Anti-trust Law: An Analysis of Anti-trust Principles and their applications* (1978), at par 160 page 112.

The Tribunal held further that it might be different if the tender was itself a once-off purchase, but where the tender has set the price for subsequent purchases over a period of time, all those subsequent purchases are tainted by the prohibited practice of collusive tendering, because the prices have not been obtained by competitive market conditions, but rather are the fruit of the collusion.¹⁰³ It remarked that this practice of collusive tendering must be conceived of not as a single moment in time, but one that has an initial agreement to conspire, followed, if the relevant facts show this, by subsequent acts of execution, each time goods are purchased pursuant to the tainted agreement.¹⁰⁴ Even if the initial agreement precedes the cut-off date, if the subsequent acts of execution have effects that succeed it, the practice has not ‘ceased’ but is continuing after the cut-off date and therefore is not barred in terms of section 67(1). Whether there are effects, and what constitutes ‘effects,’ is a matter for evidence in each case.¹⁰⁵

2.2.4 The Tribunal’s findings

In a nutshell, the Tribunal found that the prescription defence raised by both DSI and Videx had failed and concluded that they have contravened section 4(1)(b)(iii) of the Act, in respect of the Anglo Platinum reverse tender 2005.¹⁰⁶ With regard to the Commission’s late amendment application, the Tribunal dismissed such application on the basis that the Commission offered scant justification of its lateness in filing the amendment application.¹⁰⁷

2.3 *The Competition Commission v Aveng (Africa t/a Steeldale and Others (hereinafter referred to as ‘Aveng’)*¹⁰⁸

The next case to be discussed in which the Tribunal was faced with a cartel case in the construction industry is Aveng decision. This case will not be discussed in great detail due to page constraints but the writer will attempt to touch base on the key aspects of the case.

¹⁰³ *Supra* fn 90 at par 150 page 42

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *The Competition Commission v RSC Ekusasa Mining and Others*, CT Case No. 65/CR/Sep09, at par 153 page 43.

¹⁰⁷ *Ibid* par 83 and 88.

¹⁰⁸ *The Competition Commission v Aveng (Africa) t/a Steeledale and Others*, CT Case No. 84/CR/Dec09.

2.3.1 Facts

In this case, four firms were alleged to have colluded to fix prices and allocate customers in the market for the supply of reinforcing wire mesh products over a period between 2001 and 2008. The first respondent, Aveng (Africa) Limited trading as Steeledale (“Steeledale”) concluded a settlement with the Commission in terms of a consent agreement.¹⁰⁹ The fourth respondent, BRC Mesh Reinforcing Limited (“BRC”) was granted conditional immunity by the Commission in terms of its Corporate Leniency Policy. The two remaining firms, Reinforcing Mesh Solutions (Pty) Ltd (“RMS”), being the second respondent, and Vulcania Reinforcing (Pty) Ltd (“Vulcania”), being the third respondent defended themselves on various grounds.

The Commission’s case was that the respondents had contravened sections 4(1)(b)(i) and (b)(ii) of the Act. The contraventions comprised agreements between the respondents and at times other firms on the following matters:¹¹⁰

- (a) A price list for reinforced mesh products;
- (b) The level of discounts offered to particular categories of customers, i.e. the allocation of customers;

2.3.2 The Argument

The Commission alleged that the agreements came about as a result of meetings that initially took place under the auspices of an industry association, the South African Fabric Reinforcing Association (“SAFRA”) and later as a result of informal meeting involving some or all of the respondents.¹¹¹

2.3.3 The Tribunal’s findings

The Tribunal found that RMS and Vulcania had contravened sections 4(1)(b)(i) and (b)(ii) of the Act. Vulcania was therefore ordered to pay administrative penalty of

¹⁰⁹ This consent agreement was confirmed as an order of the Tribunal on 6 April 2011. The settlement agreement relates to two contraventions by divisions of Aveng Limited, one in respect of wire mesh and thus relevant to the present case and the other in relation to rebar (reinforcing bar) which is the subject of a separate complaint. The penalty agreed was R128 904 640 and represents 8% of Steeledale’s turnover for the 2008 financial year.

¹¹⁰ *Supra* fn 108 at par 2 page 2.

¹¹¹ *Ibid* at par 3.

R5.6 million whilst RMS was on the other hand ordered to pay an administrative penalty of R21.6 million.¹¹²

2.4 *The Competition Commission v DPI Plastics (Pty) Ltd and Others (hereinafter referred to as ‘DPI Plastics’)*¹¹³

2.4.1 Facts

This complaint was triggered by amongst others, the findings from the Commission’s merger investigation wherein, it was found that DPI Plastics (Pty) Ltd (‘DPI’) and certain of its competitors were involved in bid rigging and allocation of contracts in contravention of the Act. DPI Plastics decision concerned the alleged involvement of 10 manufacturers in agreements to fix prices, allocate markets and collude in tenders in the supply of various types of plastic pipes, namely polyvinylchloride (PVC) and high density polyethylene (HDPE) pipes. The Commission’s case was that the respondents had contravened section 4 (1) (b) (i), (ii) and (iii) of the Act.¹¹⁴

The first respondent DPI applied for and was granted conditional leniency by the Commission on 27 February 2008 in terms of the Commission’s Corporate Leniency Policy.¹¹⁵ No relief was thus being sought by the Commission against it. Three other respondents had entered into consent orders with the Commission namely: Marley Pipe Systems (Pty) Ltd¹¹⁶ (‘Marley’), Swan Plastics CC¹¹⁷ (‘Swan’) and Flo-Tek Pipes and Irrigation (Pty) Ltd (‘Flo-Tek’).

2.4.2 The Argument

Five of the respondents did not reach agreement with the Commission and they pursued the case before the Tribunal. Two of them accepted liability for cartel involvement, but differed with the Commission over the extent of their involvement which had a bearing on their liability. These firms were the second respondent,

¹¹² *Ibid* at paras 1 to 4 of the order page 45.

¹¹³ *The Competition Commission v DPI Plastics (Pty) Ltd and Others*, CT Case No. 15/CR/Feb09. Due to page constraints an in depth discussion is not appropriate.

¹¹⁴ *Ibid* at par 13 page 5.

¹¹⁵ *Ibid* at par 2 page 2.

¹¹⁶ Marley agreed to pay an administrative penalty in the amount of R31 078 213.02. This amount represents 6% of Marley’s 2007 financial year, less the turnover attributable to speciality products.

¹¹⁷ Swan paid an administrative penalty of R7 649 414.40. The amount also represented 6% of Swan’s total turnover in the 2007 financial year, whilst Flo-Tek paid an amount of R5 049 433.26, representing 6% of its total turnover in the 2007 financial year.

Petzetakis Africa (Pty) Ltd ('Petzetakis') and the fifth respondent, Amitech South Africa (Pty) Ltd ('Amitech'). The four remaining respondents contested their liability. They were the seventh respondent Macneil Moulding (Pty) Ltd ('Macneil'), the eighth respondent, Andrag (Pty) Ltd ('Andrag'), and the ninth and tenth respondents Gazelle Plastics (Pty) Ltd and Gazelle Engineering (Pty) Ltd ('collectively referred to as ('Gazelle'))).

2.4.3 The Tribunal's findings

The Tribunal found that the case against Gazelle fell to be dismissed, the case against Macneil succeeded that it was liable for contravening section 4(1)(b)(i) of the Act and a penalty of R2 million was imposed.¹¹⁸ The case against Andrag succeeded, it was liable for contravening section 4(1)(b)(i) of the Act, but no penalty was imposed on it.¹¹⁹ The case against Amitech, in which liability for contravening sections 4(1)(b)(i),(ii) and (iii) of the Act was admitted, led to the imposition of an administrative penalty of R11.1 million.¹²⁰ The case against Petzetakis in which liability for contravening sections 4(1)(b)(i),(ii) and (iii) of the Act was admitted, led to the imposition of an administrative penalty of R9.92 million.¹²¹ The case against Gazelle (the ninth and tenth respondents) was dismissed.¹²²

¹¹⁸ *Supra* fn 113 at par 3 of the order page 57.

¹¹⁹ See paras 101 to 106 of the judgment wherein the Tribunal indicated the grounds for not imposing the administrative penalty against Andrag. According to the Tribunal imposing administrative penalty was not appropriate due to the following; firstly the duration of the period in which competitors would have reasonably believed that Andrag was party to the agreement was relatively short, secondly Andrag attended the August meeting innocently and that it had no prior involvement with the cartel, thirdly Andrag was pricing more aggressively than the other firms and may well, as it asserts, not have implemented the agreement, fourthly the pricing evidence adduced by Andrag suggests that its discounts did not follow the discounts formula by Le Riche at the meeting, which corroborates the other evidence that Andrag did not implement the proposed discount, fifthly Andrag has never been found to have contravention the Act before, and Lastly Andrag seems not to have analysed the pricing information that was discussed during the cartel meeting when pricing its products.

¹²⁰ *Supra* fn 113 at par 202 page 49.

¹²¹ *Supra* fn 113 at par 234 page 56.

¹²² *Supra* fn 113 at par 156 page 39. See also para 1 of the order page 56 of the judgment.

2.5 The Competition Commission of South Africa's fast track settlement invitation

The Commission initiated two major investigations relating primarily to contracts in the construction sector.¹²³ The first investigation was initiated on 1 February 2009 regarding tenders for the construction of 2010 FIFA World Cup stadia against a variety of industry players.¹²⁴ The scope of the investigation covered mostly the main tenders as well as subcontracts. The second investigation was initiated on 1 September 2009 and covered all big and small tenders for construction projects.¹²⁵

Following the initiation and investigation of these cases, the Commission received about 150 marker applications and 65 CLP applications which implicated the majority of medium and large firms in the construction industry in bid-rigging conduct.¹²⁶ The Commission's investigation and processing of these CLP applications revealed that bid-rigging conduct is rife in the construction sector. In fact, from the evidence obtained, it was apparent that bid-rigging conduct has been the culture of doing business in the construction sector.¹²⁷ This led to the Commission to develop and launch a Fast Track Settlement Procedure (CSP) in order to expedite resolution of these bid-rigging cases and to rid the industry of this egregious conduct.

On 1 February 2011, the Commission launched an invitation to firms in the construction sector to settle bid-rigging cases.¹²⁸ The Commission's aims in pursuing CSP were amongst other things to:

2.5.1 incentivise firms to admit their anti-competitive conduct by proposing settlement on financially advantageous terms;

¹²³ Mohlala M 'Commission's investigation in the Construction Sector' (Competition News Article (Edition 38 March 2011), page 1 2 available at: <http://www.compcom.co.za/wp-content/uploads/2014/09/comp-comm-newsletter-38-March-2011.pdf> (accessed 13/04/2015).

¹²⁴ The first initiation was against the firms referred to in par 2.1 of the settlement agreement cited in fn 71 above.

¹²⁵ The second initiation was against the firms referred to in par 2.2. of the settlement agreement cited in fn 71 above.

¹²⁶ *Supra* fn 93 page 2.

¹²⁷ Mohlala M 'Commission's investigation in the Construction Sector' (Competition News Article (Edition 38 March 2011), page 2 available at: <http://www.compcom.co.za/wp-content/uploads/2014/09/comp-comm-newsletter-38-March-2011.pdf> (accessed at 13/04/2015).

¹²⁸ *Ibid* at page 2.

2.5.2 ensure that all firms truthfully and comprehensively disclose their anti-competitive conduct;

2.5.3 strengthen the Commission's evidence against those firms that were not taking advantage of this settlement process;

2.5.4 minimise the legal costs associated with, and speedily resolve, the complaints and cases arising from these complaints; and

2.5.5 set the construction industry on a new competitive trajectory, which would promote the efficiency, adaptability and development of the construction sector and the economy as a whole.¹²⁹

Subsequent to the settlement invitation, the Commission received responses from twenty one firms which revealed over 300 instances of bid-rigging.¹³⁰ These responses further revealed various ways in which firms historically determined, maintained and monitored collusive agreements.¹³¹ These included meetings to divide markets and agree on margins, different combinations of firms coordinating tenders over different projects, firms colluding to create the illusion of competition by submitting sham tenders ("cover pricing") to enable a fellow conspirator to win a tender, in other instances firms agreed that whoever won a tender would pay the losing bidders a "loser's fee" to cover their costs of bidding, and that sub-constructing was also used to compensate losing bidders.¹³²

2.6 Construction cartel settlements

Pursuant to the CSP process, the Commission settled the matter with 15 construction firms for collusive tendering, in contravention of section 4(1)(b)(iii) of the Act.¹³³ The below mentioned firms have agreed to pay administrative penalties

¹²⁹ South Africa (February 2011) 'Invitation to firms in the Construction Industry to Engage in Settlement of Contraventions of the Competition Act', page 2. available at: <http://www.comptrib.co.za/assets/Uploads/Collusive-Tendering/Annexure-A.pdf> (accessed at 22/03/2015).

¹³⁰ *Infra* page 1.

¹³¹ South Africa 'construction firms settle collusive tendering cases with R1.5 billion in penalties' 24 June 2013, page 1. available at: <http://www.compcom.co.za/wp-content/uploads/2014/09/Construction-Fast-Track-Settlement-Process-Media-Release.pdf> (accessed at 13/04/2005).

¹³² *Ibid.*

¹³³ *Ibid.* Construction firms such as Group Five, Construction ID and Power Construction did not use the opportunity to disclose or settle contraventions from the CSP and will therefore be investigated and prosecuted in the normal course of events.

collectively totaling R1.46 billion.¹³⁴ The settlement agreements were reached only with respect to projects that were concluded after September 2006, before which transgressions were beyond the prosecutorial reach of the Competition Act. The breakdown of penalties per firm is as follows:

Firm	Settlement amount (ZAR)
Aveng	306 576 143
Basil Read	94 936 248
Esorfranki	155 850
G Liviero	2 011 078
Giuricich	3 552 568
Haw & Inglis	45 314 041
Hochtief	1 315 719
Murray & Roberts	309 046 455
Norvo	714 897
Raubex	58 826 626
Rumdel	17 127 465
Stefanutti	306 892 664
Tubular	2 634 667
Vlaming	3 421 662
WBHO	311 288 311
Total	1463 814 392

In determining the penalties, the Commission relied on paragraph 19 of the settlement invitation, and imposed penalties based on the basket of the rigged projects, the projects on which the firm was not granted immunity, in other words, where the firm was not the first one to disclose the project to the Commission.¹³⁵ It also relied on the guidelines provided by the legislation and precedent.¹³⁶

2.7 Whether construction firms found to have contravened section 4(1)(b) of the Act should be blacklisted

¹³⁴ *Ibid.*

¹³⁵ *Supra* fn 127 page 2. Also see para 19 of the settlement invitation.

¹³⁶ In determining administrative penalty, the Commission took into account the factors set out in section 59(3) of the Act, and was also guided by the previous settlement agreements and Tribunal decisions on cartel cases.

Following the confirmation of construction settlement agreements by the Tribunal, there has been a flood gate of mixed reactions from various commentators and criticisms on the appropriateness of the penalties levied against the implicated firms. Some commentators felt that the administrative penalty imposed was a slap on the wrist. David Lewis said that “in a sense, while we support the confirmation of the settlement by way of administrative penalties amounting to R1.4 billion, we also sympathise with the sentiment that the deterrence is too low relative to the possible profits generated.” He advocated for bigger fines in the future and for the criminal prosecution of construction bosses.¹³⁷ In addition, he further commented that “[B]ut it is up to those who think the deterrence is too low or that they have been insufficiently compensated to take further action. Admission of guilt means the damaged parties can sue”.¹³⁸

On the same vein, in an article authored by Mark Allix it was echoed that “the multimillion-rand fines have been called a slap on the wrist by some observers, and that there has been calls for construction companies to be banned from tendering for state contracts and for executives to be jailed”. The article also indicated that the Congress of South African Trade Unions laid a criminal charge with the Hawks against the 15 construction groups fined by the Tribunal.¹³⁹

Although the majority of commentators felt that the penalties were insufficient, others felt that they were appropriate and reasonable to deter the firms from engaging on a similar conduct in future.¹⁴⁰

Of particular importance to this discussion is the call for the firms found to have contravened section 4(1)(b)(iii) of the Act to be blacklisted from doing business with

¹³⁷ De Wet P ‘Construction cartels: Carrot-and-stick approach needed’ 19 Jul 2013 Available at: <http://mg.co.za/article/2013-07-19-00-construction-cartels-carrot-and-stick-approach-needed> (accessed at 13/04/2015).

¹³⁸ *Ibid.*

¹³⁹ Allix M ‘Construction collusion ‘was almost entrenched’ 11 March 2014 available at: <http://www.bdlive.co.za/business/industrials/2014/03/11/construction-collusion-was-almost-entrenched> (accessed at 13/04/2015).

¹⁴⁰ Visser A ‘Cartels blamed on white men in dark suits’ 23 October 2013 available at: <http://www.bdlive.co.za/business/industrials/2014/03/11/construction-collusion-was-almost-entrenched> (accessed at 13/04/2015). In this article Mr Michael Hausfeld, one of the commentators agreed that penalties were insufficient and stated that: “When one adds private (person) enforcement, one can put the individual in jail. One can impose a penalty on the firm that is not an insignificant amount of money and can make the company return all the money it unlawfully stole from its victims. Then, at least one presents the strongest measure of deterrence and enforcement”.

government in future. It is submitted that this suggestion is not appropriate at all, and it is believed that it was made without taking into cognizance the contribution that these firms have made towards the development of the economy, the creation of employment, ability to transfer skills to the younger generation or graduate in the engineering field, assisting government to improve infrastructure development in line with the National Development Plan ('NDP') (11 November 2011) and to improve service delivery.

Jardine warned against the suggestion to blacklist firms from doing business with government and pointed out that "in November 2011, the government published the National Development Plan, outlining its vision to make meaningful, rapid and sustained progress in reducing poverty and inequality¹⁴¹ over the next two decades.¹⁴² He congratulated the Minister of planning, Mr Trevor Manuel, and the National Planning Commission for mapping out a solid trajectory for the country in the years to come. All South Africans should find ways to put this plan into action. Infrastructure development is a cornerstone of these plans, with the goal of increasing Gross Fixed Capital Formation to about 30% of GDP by 2030 (from 17%). As part of this plan, government has budgeted to spend R827 billion on infrastructure development over the next three years, by building roads, hospitals, dams, schools, electricity plants and ports and rail systems. The value of major infrastructure projects in progress or under consideration in the public sector totals R3.6 trillion, with R2.0 trillion being in the electricity sector and R820 billion in the transport sector. Several private sector projects have also been identified in the 18 Strategic Integrated Projects (SIPs) of the Presidential Infrastructure Coordination Commission (PICC), bringing the total value of projects being considered to over R4 trillion.¹⁴³ How will the roll-out of these very ambitious and laudable plans be managed so that we learn from the past and reject collusion and corruption in the bidding and awarding process?"

¹⁴¹ Roger Jardine, 'Rejecting Collusion and Corruption: Where to for the government and the private sector', public lecture, Wits Business School, 8 October 2013, page 10 of 12.

¹⁴² National Development Plan: Vision for 2030, (2011) available at: http://www.gov.za/sites/www.gov.za/files/devplan_2.pdf (accessed at 13/04/2015).

¹⁴³ 2013 Budget Speech, Chapter 7: Infrastructure, available at: https://www.westerncape.gov.za/text/2013/February/national_budget_speech_2013.pdf (accessed at 13/04/2015)

He further explained that the government treaded carefully about how to balance the policy dilemma with the call blacklisting the implicated firms.¹⁴⁴ He indicated that “the country and the government in particular, will also have to grapple with this dilemma, and that key Ministers voiced their concerns on how to move forward. Last week, speaking at the master Builders annual congress, the Minister of Public Works Minister Thembelani Nxesi said that “the findings of the Commission left the government with a dilemma as wrong-doers had to be held accountable but that government is also dependent on construction as a vital sector of the economy”. Earlier this year, the Minister of Economic Development, Minister Ebrahim Patel, emphasized the importance of having an appropriate balance between taking actions necessary to stamp out collusion and price fixing in the construction industry, and ensuring that South Africa has an industry that can deliver on the mandate of the infrastructure build programme.”¹⁴⁵

Mr Jardine indicated several reasons why the government is understandably cautious about what to do next.¹⁴⁶ One of the reasons is that the construction industry is cyclical and has been in a protracted slump since the World Cup; more than 109 000 jobs have been shed since 2008 and today the civil construction industry employs 105 522 people, less than half of what it did just 5 years ago. Furthermore, the construction industry is a significant contributor to South Africa’s overall economy, for the most recent 4 quarters (ended Q2 2013), the construction Industry contributed 3.7% (R119bn) to South Africa’s total GDP.¹⁴⁷

Pursuant to the above, it is agreed with Jardine that all of the above goals will not be achievable without the participation of the implicated firms. Without intending to undermine other smaller construction players’ capabilities, it needs to be pointed out that it is common knowledge that the projects outlined above requires reputable and bigger firms with good track record and capacity in order to assist the government to fulfil its mandate. It is clear that there are no other firms that can sufficiently carry out this mammoth task other than these firms. All that needs to be observed is whether

¹⁴⁴ *Supra* fn 141 page 6 of 12.

¹⁴⁵ *Ibid* page 6 of 12.

¹⁴⁶ *Ibid* page 6 of 12.

¹⁴⁷ Gross Domestic Product Second Quarter 2013, Statistics Release P0441, Stats SA, available at: <http://www.statssa.gov.za/publications/P0441/P04412ndQuarter2013.pdf> (accessed at 13/04/2015).

these firms will change how they have done their business in the past and comply with the terms of the settlement as well as the Competition Act.

It is therefore submitted that blacklisting these firms should not be undertaken as this will not allay the problem, but instead will worsen the situation in that without contracting with government these firms will retrench more employees due to lack of business, will not be able to transfer skills to young engineers and will not be able to pay the administrative penalty in accordance with the settlement reached with the Competition authorities. In addition, this will not help government to achieve its goals set out in the NPD and section 2 of the Competition Act.¹⁴⁸ It is submitted that the fact that these firms voluntarily approached the Commission to disclose their involvement in a cartel conduct should weigh in their favour. It is clear that these firms are prepared to correct their behavior and comply with the Act unlike those who are still pursuing their case before the Tribunal, and those who are still engaging in a cartel but cannot be traced and brought to book due to the secretive nature of their conduct.

2.8 Conclusion

Whilst accepting that cartels deserve the most severe punishment as it is regarded as the most egregious conduct detrimental to the development of the economy, it is submitted that, when sanctioning the offending firms, one should not lose sight of the purpose for which the Competition Act was enacted, as well as other government policy objectives such as Competition, Economic and Employment Policies. A balance needs to be struck between the impact that the decisions of the Competition authorities may have against the benefit that may be created for the people of this country. It is also submitted that the administrative penalties imposed against these firms and the fact that this exposes them to civil damages claim is sufficient to discourage them from engaging in similar conduct.

As for the call for blacklisting them, it is submitted that will be the harshest sanction that has ever been imposed upon those who contravened section 4(1)(b) before the construction settlement. For the reasons set out above, I therefore conclude that by

¹⁴⁸ Certain of the objectives of the Act as set out in a section 2 are to create employment, to promote and provide small medium sized business with opportunities to become competitive, and to provide consumers with competitive prices and product choices.

blacklisting these firms, the government will be biting off what it cannot chew, mainly because without the participation of these firms in the construction industry, the government will not be able to fulfil its mandate, particularly in respect of the infrastructure development and job creation that is envisaged by the NPD.

CHAPTER 3: INTERACTION BETWEEN CORRUPTION AND COMPETITION LAW WITH SPECIFIC REFERENCE TO CARTELS IN SOUTH AFRICA

3.1 Introduction

As already alluded to in chapter one above, corruption and collusion in public procurement are intertwined. It is submitted that they are two sides of the same coin by virtue of their similar effect on the poorest of the poor. Speaking during a Freedom Day seminar of the Competition Commission, the Public Protector Adv. Thuli Madonsela, said the biggest losers in corrupt and collusive dealings were the public, particularly the poor.¹⁴⁹ She eloquently stated that “collusion and corruption are related and sometimes intertwined crimes of dishonesty.” When focusing on the discussion around the link between the two practices she said “they yield undeserved benefits for perpetrators at the expense of innocent third parties.”¹⁵⁰ She further explained that “a business environment where corruption and collusion are prevalent, left fair trade and commerce undermined.”¹⁵¹

It is submitted that competition law and corruption law are essentially premised on the notion that cartels inflict serious damage on a country’s productivity and economic growth. In this chapter the writer will determine whether there is a correlation between corruption and competition law with specific reference to cartels, and determine whether it is necessary for the Competition Act to be aided by PRECCA in fighting against collusion in both the private and public sector or *vice versa*. The potential impact of section 73A of the Competition Amendment Act will also be examined to see what effect this provision is likely to have on the Commission’s CLP Policy, the practical challenges that may arise therefrom, and to eventually make recommendations on how these problem can be resolved. In this regard it will be determined how the Commission intends to implement section 73A of the Amendment Act when it comes into operation, and the practical challenges that may arise will be analyzed in case where both the Competition Act and PRECCA are simultaneously invoked and applied to the firm(s) found to have engaged in collusive tendering conduct.

¹⁴⁹ Public Protector Adv Thuli Madonsela Speech (2015): On ill-gotten benefits, page 1, available at: <http://www.gov.za/speeches/subject-ill-gotten-benefits-should-be-paid-back-%E2%80>... (accessed on 11/05/2015).

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

3.2 Correlation between corruption and competition law with specific reference to cartels

According to David Lewis, bid rigging often operates in tandem with corruption.¹⁵² Lewis stated that “as a result of these offences, the society is thus hit with a double whammy of criminality or law breaking – on the part of the private sector players pursuing their private interests through collusion, and then by the extension of this criminality and self-interested conduct into the ranks of those public servants entrusted precisely with protecting the interest of the public.”¹⁵³

As indicated above, collusion in public procurement entails a relationship between bidders which restricts competition and harms the public purchaser.¹⁵⁴ Through bid rigging, the price paid by the public administration for goods or services is artificially raised, and thus these practices have a direct and immediate impact on public expenditures and taxpayers.¹⁵⁵ Corruption involves a vertical relationship between one or more bidders and the procurement official.¹⁵⁶ It is first and foremost a principal-agent problem where the agent (the procurement official) enriches himself at the expense of his principal, the government purchaser (or the public more generally).¹⁵⁷ Corruption arises in procurement when the agent of the procurer in charge of the procurement is influenced to design the procurement process or alter the outcome of the process in order to favour a particular firm in exchange for bribes or for other rewards.¹⁵⁸

Collusion and corruption affects the efficient allocation of public contracts. By definition, they involve an allocation of contracts which would have been obtained through the competitive process.¹⁵⁹ Collusion implies that public contracts are allocated to the firm chosen by the cartel. Corruption leads to the allocation of the contract to the firm who has offered the bribe¹⁶⁰ whilst on the other hand it implies a

¹⁵² OECD, ‘Round tables Collusion and Corruption in Public Procurement’ 2010, para 2 at 409.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid* OECD, ‘Round tables Collusion and Corruption in Public Procurement’ 2010, at 24.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

distortion of competition.¹⁶¹ While fighting collusion and fighting corruption are separate policy challenges, they are often highly complementary.¹⁶² This may occur in cases where the procurement official is paid to organize and monitor a bid rigging conspiracy. In both vertical collusion¹⁶³ and horizontal collusion¹⁶⁴, public contracts are awarded not on the merits, not on the basis of the quality and price of the good or service in question, but in consequence of an allocation administered by a private vertical or horizontal arrangement.¹⁶⁵

3.3 Overlap between anti-corruption legislation and competition law legislation

In South Africa the general crimes relating to corruption are governed by PRECCA whereas the anti-competitive practices are governed in terms of the Competition Act. Cartel conduct and in particular collusive tendering, falls within the ambit of PRECCA, and in particular section 12 and 13 thereof. Section 12 of PRECCA sets out offences in respect of corrupt activities relating to contracts.¹⁶⁶

According to Corruption Watch, individuals who manipulate a tender process by way of cover pricing¹⁶⁷ or any form of collusion in contravention of the Competition Act are in fact also in contravention of section 12 of PRECCA and liable to be prosecuted under this statute.¹⁶⁸ In order for one to contravene section 12 of PRECCA, there must be an exchange of a form of gratification.¹⁶⁹ Corruption Watch further explained that “where firms through their agents, participate in a bid-rigging cartel and engage in cover pricing to favour one or more firms in exchange for, for example a ‘loser’s fee,’ this amounts to an offence under PRECCA, and therefore

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ Vertical collusion allocates contracts to the firm which has offered or agreed to pay a bribe to a decision maker on the purchasing side.

¹⁶⁴ Horizontal collusion allocates contracts to the firm chosen by the cartel.

¹⁶⁵ Corruption Watch, ‘written comments to the Competition Tribunal in respect of the consent agreements in terms of section 49D of the Competition Act read with section 58(1)(a)(iii) and 58(1)(b) between the Commission and various construction companies’ undated, at 4.

¹⁶⁶ Section 12 of PRECCA has been dealt with earlier and therefore will not be reproduced due to pages 13-14 in chapter 1, par 1.2.1.

¹⁶⁷ Cover pricing occurs when some potential competitors agree to submit tenders that are too high or low to be accepted.

¹⁶⁸ *Supra* fn 165, para 23 at 8.

¹⁶⁹ Gratification is defined in section 1 of PRECCA and details a non-exhaustive list of what amounts to gratification, including gifts, donations, money, avoidance of loss or liability, any service, favour, privilege or advantage of any description to name a few.



those individuals who participated in this corrupt activity can and should be charged with a criminal offence.¹⁷⁰ Section 13 of PRECCA provides for the offences in respect of corrupt activities relating to procuring and withdrawal of tenders.¹⁷¹ In terms of this section, any person who accepts any gratification as an inducement to make, award or withdraw any tender for any work, may be found to have contravened section 13 of PRECCA. Where an individual participates in a bid rigging cartel and it is agreed that his/her firm will engage in cover pricing so that a rival can win the tender in exchange for a sub-contract, this will amount to corrupt activity under section 13 of PRECCA. Should this person be found guilty of the conduct described above, he/she will be liable on conviction to a fine and or imprisonment from between five years to life, depending on the Court in which the conviction is secured or a further fine of up to five times the value of the gratification involved in the offence.¹⁷² It is clear from the above that section 12 and 13 of PRECCA replicates section 4(1)(b) of the Competition Act.

Section 34 of PRECCA also places an obligation on the part of persons holding positions of authority to report any corrupt activity or suspected corrupt activity involving in excess of R100 000.00 to the police. Failure to report this corrupt activity in instances where the person in authority ought reasonably to have known about the corrupt activity will amount to a criminal offence.¹⁷³

The difference between PRECCA and the Competition Act is that, PRECCA deals with criminal activities relating to corruption whereas the Competition Act deals specifically with amongst others matters referred to in chapter 2 of the Competition Act.¹⁷⁴ Unlike PRECCA competition matters are quasi-civil in nature.¹⁷⁵ In relation to punishment for non-compliance with the provisions of PRECCA, only an individual

¹⁷⁰ *Supra* fn 65, para 25 at 8.

¹⁷¹ Section 13 of PRECCA has been dealt with earlier and therefore will not be reproduced due to pages 14-15 in chapter 1, par 1.2.1.

¹⁷² See section 26 of PRECCA.

¹⁷³ See section 34 of PRECCA.

¹⁷⁴ Part A of chapter 2 deals with prohibited restrictive practices, Part B with abuse of a dominant position and Part C with exemption applications. Of particular relevance to this paper is section 4(1)(b) of the Competition Act which falls under Part A.

¹⁷⁵ Lopes N et al (2013) "Cartel enforcement, the CLP and criminal liability – are competition regulators hamstrung by the Competition Act from co-operating with the NPA, and is this a problem for competition law enforcement?" Seventh Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy in South Africa, 5 and 6 September 2013, page 8. available at: <http://www.compcom.co.za/wp-content/uploads/2014/09/Cartel-Enforcement-Paper-Final-2013-08-20.pdf> (accessed 20/05/2015).

can be fined a particular amount of money and sentenced to imprisonment. No penalty or sanction can be imposed against the firm which benefitted from the conduct referred to in section 12 and 13 of PRECCA. However, with regard to the Competition Act, a firm found to have contravened section 4(1)(b) of the Competition Act can be fined an administrative penalty in terms of section 59(1)(a) of the Competition Act.¹⁷⁶ No criminal liability can as yet (due to section 73A not being in operation) be imposed against the person except in instances where such person may have been found to have contravened section 71 and 72 of the Competition Act arising from section 49A¹⁷⁷ proceedings and section 73 of the Competition Act for failure to comply with the Act.¹⁷⁸ Any person convicted of these offences will be liable to a fine not exceeding R500 000 or imprisonment for a period not exceeding 10 years or both, in case of a fine not exceeding R2000.00 he will be liable for imprisonment for a period not exceeding 6 months or both.¹⁷⁹ However, this is likely to change immediately when section 73A comes into operation, because this section introduces a criminal liability for a director of a firm, or a person having management authority within the firm, if such a director or a person causes the firm to engage in a prohibited practice in terms of section 4(1)(b) or knowingly acquiesces the firm to engage in a prohibited practice in terms of section 4(1)(b).

3.4 Is it necessary for the Competition Act to be aided by PRECCA in fighting against collusion in both the private and public sector or *vice versa*?

In South Africa, unlike other jurisdictions, collusion and corruption are mostly investigated and sanctioned by separate national agencies. Collusion is dealt with by

¹⁷⁶ In terms of section 59(1)(a), the Competition Tribunal may impose an administrative penalty only for a prohibited practice in terms of section 4(1)(b), 5(2) or 8(a), (b) or (d).

¹⁷⁷ Section 49A(1) enjoins the Commission with the power to summon any person who is believed to be able to furnish any information on the subject of the investigation, or having possession or control of any book, document or other object that has a bearing on that subject to appear before the Commissioner or a person authorised thereof to be interrogated, and or deliver or produce to the Commissioner or a person authorised by the Commissioner such books, documents or objects.

¹⁷⁸ Section 71 provides that a person commits an offence who having been summonsed in terms of section 49A or directed or summonsed to attend a hearing fails without sufficient cause to appear, or attends but refuses to be sworn in or make an affirmation or fails to produce a book or document or other item as ordered. Section 72 makes it an offence for a person who, having been sworn in or made an affirmation subject to section 49A(3) or 56 fails to answer any question fully and to the best of his ability or gives false evidence knowing or believing it to be false. Section 73 on the other hand makes it an offence for a person to contravene or fail to comply with an interim or final order of the Competition Tribunal or the Competition Appeal Court.

¹⁷⁹ See section 74(1)(a) and (b) of the Competition Act.

the competition authorities whereas corruption is dealt with by the criminal justice system (NPA) and pursued by the public prosecutors or specialized anti-corruption agencies.¹⁸⁰ Due to the mutually reinforcing nature of collusion and corruption plus the likelihood that such offences occur in tandem, it is submitted that the most effective approach to protecting the integrity of the public procurement process requires co-operation between the various enforcement agencies, whether by means of a formal memorandum of understanding, notification requirements or other mechanism.¹⁸¹ In order to give effect to this co-operation, the Commission can conclude a memorandum of understanding (MOU) with the NPA or any relevant industry or sector or any specialized anti-corruption agency in terms of section 3(1A)(a) of the Competition Act in order to co-ordinate and harmonize the exercise of jurisdiction over competition matters to ensure the consistent application of the principles of the Competition Act.¹⁸² It is submitted that the coordination between the NPA (or any relevant sector or any relevant agency) and the Commission will yield great benefits particularly in terms of sharing evidence of collusion obtained during a corruption investigation.

According to the OECD, evidence sharing, where compatible with the national evidentiary rules, can assist enforcement agencies (such as competition authorities) that have more limited evidence gathering powers than the public prosecutor or other criminal justice agencies to collate valuable evidence to be used in their respective investigation.¹⁸³

It should be noted that by law, there is nothing that inhibits the criminal justice system to prosecute individuals who were the masterminds behind firms which

¹⁸⁰ OECD, 'Round tables Collusion and Corruption in Public Procurement' 2010, at 11.

¹⁸¹ Section 3(1A)(a) of the Competition Act provides that "in so far as this Act applies to an industry, or sector of an industry, that is subject to the jurisdiction of another regulatory authority, which authority has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 of this Act, this Act must be construed as establishing concurrent jurisdiction in respect of that conduct. Subsection (b) sets out the manner in which the concurrent jurisdiction is exercised in terms of this Act and any other public regulation and that it must be managed to the extent possible in accordance with any applicable agreement concluded in terms of section 21(1)(h) and 82(1) and (2)."

¹⁸² Section 3(1A) (a) provides that "in so far as this Act applies to an industry, or sector of an industry, that is subject to the jurisdiction of another regulatory authority, which authority has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 of this Act, this Act must be construed as establishing concurrent jurisdiction in respect of that conduct. Subsection (b) provides the manner in which the concurrent jurisdiction must be managed and exercised in terms of this Act and any other public regulation, to the extent possible, in accordance with any applicable agreement concluded in terms of section 21(1)(h) and 82(1) and (2).

¹⁸³ *Supra* fn 180, at 11.

engaged in cartel conduct with regard to a public procurement wherein section 4(1)(b) of the Competition Act and section 12, and 13 of PRECCA were contravened. It is submitted that the criminal prosecution under these circumstances does not depend on whether or not this conduct was investigated by the Commission or prosecuted by the Tribunal. It is further submitted that pursuing criminal charges against these individuals would be most effectively conducted if prosecuted under PRECCA rather than section 73A of the Competition Amendment Act. The hurdle to this approach is however that the fine under section 26 of PRECCA is R250 000.00 which is less than the R500 000.00 envisaged by section 73A of the Competition Amendment Act and this amount may appear to be less of a deterrent than the higher fine under the Competition Amendment Act. In essence where both the Competition Act (i.e. once section 73A of the Amendment Act comes into operation) and PRECCA are simultaneously invoked, this will amount to double punishment on the part of an implicated person from two distinct legislations arising from the same conduct. It is however submitted that there is a need for the Competition Act to be aided by PRECCA to criminally charge and prosecute individuals holding positions of authority or in the management authority of the firm(s) which are engaged in a cartel conduct in the public procurement. It should be noted that, there is no absolute bar for the Competition Act to be aided by PRECCA, the only challenge is how this arrangement will be co-ordinated between the Competition Authorities and the NPA or other Anti-Corruption Agencies.

It is further submitted that this double punishment problem can be resolved through the cooperation between the NPA and the Commission (i.e. NPA should exercise its prosecutorial discretion to criminally prosecute the individual under either section 73A of the Competition Amendment Act or section 12 and 13 of PRECCA for engaging in a collusion on public procurement), and thus avoid invoking both legislations simultaneously from the same conduct.

3.5 Impact of section 73A of the Competition Amendment Act.

Section 73A seeks to criminalize cartel conduct and establishes what has been termed in other jurisdictions, a cartel offence.¹⁸⁴ In terms of section 73A a director of

¹⁸⁴ See, for example Part 6 of the Enterprise Act 2002 in the United Kingdom and the Trade Practises amendment (Cartel Conduct and Other Measures) Act 2009 in Australia.

a firm, or a person having management authority within the firm, commits an offence where he or she causes the firm to engage in a prohibited practice in terms of section 4(1)(b) or knowingly acquiesces the firm to engage in a prohibited practice in terms of section 4(1)(b).¹⁸⁵ In order to secure a conviction of the offence created by section 73A, the State must prove the following requirements: that the person was a director of a firm or was engaged or purporting to be engaged by a firm in a position having management authority within a firm, and that such person caused the firm to engage in a prohibited practice or knowingly acquiesced¹⁸⁶ in the firm engaging in such a practice. In essence what this entails is that nobody other than a director or a person having management authority can commit this offence. Any such director or person found to have contravened section 73A will be liable to a fine not exceeding R500 000.00, to imprisonment for a period not exceeding 10 years, or to both a fine and such imprisonment.

3.5.1 Impact on protection against providing self-incriminating evidence

The criminalization of cartel conduct and the subsequent passing of the Competition Amendment Act triggered a number of criticisms from the South African society. As a result of this development, Gauntlet, in a paper which she co-authored with Lopes and Seth, asked a question whether individuals who voluntarily submit information to the Commission in terms of the CLP are exposed to criminal prosecution, or whether individuals at rival firms who are summonsed to provide evidence by the Commission on the strength of the evidence provided by whistle-blowers in terms of the CLP are immune from criminal prosecution on the basis of section 49A(3) of the Act?¹⁸⁷ She further remarked that “the impact of this provision has potential drastic and seemingly iniquitous results.”¹⁸⁸

Section 49A(3) of the Act provides as follows:

“No self-incriminating answer given or statement made to a person exercising any power in terms of this section is admissible as evidence against the person who gave the answer or made the statement in criminal proceedings,

¹⁸⁵ See section 73A(1)(a) and (b) of the Competition Amendment Act.

¹⁸⁶ For the purpose of subsection (1)(b), ‘knowingly acquiesced’ means having actual knowledge of the relevant conduct by firm.

¹⁸⁷ *Supra* fn 175, at 5.

¹⁸⁸ *Ibid.*



except in criminal proceedings for perjury or in which that person is tried for an offence contemplated in section 72 or section 73(2)(d), and then only to the extent that the answer or statement is relevant to prove the offence charged.”

Broadly what this section entails is that, any person summoned in terms of section 49A of the Act to provide evidence to the Commission, who has made a self-incriminating statement as regards his or her conduct, is afforded protection from criminal prosecution or enforcement arising from the statement in question, as it is entirely inadmissible in any criminal proceedings as a result of the aforementioned provision.¹⁸⁹ This section gives effect to a fundamental constitutional right i.e. the right not to be compelled to give self-incriminating evidence,¹⁹⁰ without compromising the ability of the Commission to gather evidence against and prosecute a firm engaged in cartel conduct in terms of the Competition Act.¹⁹¹

Self-incriminating information provided by directors or employees of firms under summons from the Commission during the course of an investigation thus cannot be used by the NPA in the prosecution of criminal wrongdoing. There would therefore appear to be a lacuna as regards information freely and voluntarily provided to the Commission during the course of settlement negotiations or in terms of the CLP.¹⁹² It is submitted that, this places the CLP applicant in an invidious position as he will not be protected against the use of self-incriminating information voluntarily submitted under the CLP in criminal proceedings that are subsequently instituted.

Due to the Commission’s inability to grant immunity from criminal prosecution, a proposed pragmatic approach tendered by Lopes may well be one in which the leniency applicant submits a marker application to the Commission in terms of the CLP, but only makes the disclosure of the cartel activity in question on the condition that the Commission issues a summons compelling the applicant to furnish the information.¹⁹³ In this respect, the leniency applicant and whistle-blowing individuals

¹⁸⁹ *Ibid*, at page 4.

¹⁹⁰ Section 35(3)(j) of the Constitution of the Republic of South Africa 1996 provides that “every accused person has a right to a fair trial which includes the right not to be compelled to give self-incriminating evidence”.

¹⁹¹ *Supra* fn 185, at 4.

¹⁹² *Supra* fn 185, at 9.

¹⁹³ Lopes N (2013) at 13.



who are “compelled” to submit information are effectively able to claim the protection afforded by section 49A(3) both before the Commission and the Tribunal, as well as immunity from competition law prosecution in terms of the CLP.¹⁹⁴ Although this does not guarantee the individual involved in cartel conduct that he will not be prosecuted for criminal activity, such individual cannot be prosecuted on the basis of the statements made to the Commission or the Tribunal.¹⁹⁵ It is submitted that, should the Commission decide to use such statements in any subsequent criminal proceedings, the statements will be inadmissible evidence and therefore violate the right against self-incrimination. Concomitantly, the Commission cannot cooperate with the NPA in prosecuting individuals for their involvement in cartel conduct, as all statements made to the Commission or the Tribunal under summons would be inadmissible in any criminal proceedings (this is a problem for purposes of coordination between the Commission and NPA under these circumstances).¹⁹⁶ However, this would certainly advance the policy objectives of the Competition Act to *inter alia* promote and maintain competition in the economy, as it would seemingly be likely to retard the chilling effect that personal criminal liability is likely to have on the CLP.¹⁹⁷

3.5.2 Problems associated with certification of persons deserving of leniency against criminal liability

Despite the Competition Amendment Act’s introduction of the criminal law sanctions into South African competition law and possible involvement of a different authority, namely the NPA, in the enforcement of such sanctions, the Commission’s prerogative to investigate and prosecute substantive issues of competition law remains unaltered.¹⁹⁸ It should however be noted that, the authority to conduct criminal prosecution of a director under section 73A of the Competition Amendment Act is vested in the NPA.¹⁹⁹ As other observers have already noted, the NPA has

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

¹⁹⁸ Munyai P and Jordaan L “*The Constitutional Implications of the New Section 73A of the Competition Act 89 of 1998*” (2011) 23 SA Merc LJ par 3.1, at 201.

¹⁹⁹ *Ibid.*

been given exclusive jurisdiction over the enforcement of section 73A.²⁰⁰ This is reinforced by the Constitution and the National Prosecuting Authority Act (NPA Act),²⁰¹ which stipulates that “there is a single national prosecuting authority in the Republic enjoined with the power to institute all criminal prosecutions on behalf of the State.”²⁰²

One of the critical challenges created by the Competition Amendment Act as pointed out by Kelly, is the fact that the legislature in South Africa did not implement a framework that either gave greater investigative and prosecutorial powers to the Commission in respect of section 73A, or a framework that includes more detail with respect to the manner in which the NPA and the Commission are to coordinate case management.²⁰³ Another hurdle created by section 73A relates to the CLP.²⁰⁴ As section 73A vests the final discretion for leniency relating to criminal charges in the NPA, Kelly argues that the efficacy of the CLP stands to be eroded.²⁰⁵ In terms of section 73A(4)(a) of the Competition Amendment Act the Commission is prevented from requesting the NPA to prosecute an individual if the Commission has certified that the individual is deserving of leniency. In terms of section 73A(4)(b) the Commission may make submissions to the NPA in support of leniency for an individual prosecuted for an offence in terms of section 73A.²⁰⁶ It is submitted that these submissions are non-binding on the NPA as they may or may not be accepted by the NPA at its own discretion.

The consequences of these subsections are that the Commission has no ultimate authority in terms of granting leniency from criminal prosecution.²⁰⁷ Although the Commission is tasked with implementing the CLP, it is ultimately at the mercy of the NPA in respect of a decision to prosecute in terms of section 73A.²⁰⁸ In practice Kelly submits that it might be the case that the NPA will heed the request from the Commission to grant leniency, but there is absolutely no guarantee that this will be

²⁰⁰ Kelly L (2010) ‘The Introduction of a “Cartel Offence” into South African Law 21 Stellenbosch Law Review’, at 328.

²⁰¹ Act No 32 of 1998.

²⁰² See Section 179(1) and (2) of the Constitution and ss 2 and 20(1) of the NPA Act.

²⁰³ See Kelly (2010) at 329.

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*, at 330.

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*

the case.²⁰⁹ The NPA may exercise its independent prosecutorial discretion to prosecute a person regardless of the Commission's request. As a result, a director of a company would have to think twice before approaching the Commission for leniency without guarantees that his own liberty is not at risk.²¹⁰ Kelly thus validly remarks that it seems likely that when drafting this section of the Competition Amendment Act, the legislature inadvertently discounted the incentive that drives the CLP.²¹¹

3.5.3 The Section 73A(5) problem

The Competition Amendment Act creates the presumption that a firm has engaged in cartel conduct if it has admitted this in a consent order or has been found to have done so by the Competition Tribunal or Competition Appeal Court.²¹² The use of presumptions in establishing a reverse onus in statutes is however controversial.²¹³ This is due to the fact that the accused would be denied the right to be heard before the criminal court.²¹⁴ It is submitted that, the problem with this presumption is that the outcome of the criminal proceedings would have been predetermined by the admission already made in the consent order or by the findings of the Tribunal or the Competition Appeal Court. In essence this will limit the possible defences that can be raised by the individual facing prosecution.²¹⁵

It is further submitted that section 73A(5) infringes upon the constitutional right contained in section 35 of the Constitution which guarantees the accused a right to a fair trial including the right to be presumed innocent.²¹⁶ In this case, the accused would be confronted with evidence which can be taken as *prima facie* proof of an essential element of the offence.²¹⁷ As a result thereof, the accused may not have

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

²¹² See section 73A(5).

²¹³ See Kelly (2010) at 331.

²¹⁴ Section 73A(5) makes it impossible for the accused to argue that he has not contravened section 4(1)(b). In case where the accused might have settled the matter to avoid protracted litigation, the accused would not be able to argue that he admitted to have contravened the Act solely for the purposes of settlement and not because he contravened section 4(1)(b).

²¹⁵ *Supra* fn 213, at 331.

²¹⁶ See section 35(3)(h) of the Constitution, 1996.

²¹⁷ See section 73A(5).

the opportunity to challenge that evidence in the first instance.²¹⁸ It is further submitted that this will put the accused in an invidious position as he will not be able to challenge evidence in the criminal proceedings brought against him.

According to Kelly, the presumption in question has been included to alleviate the burden on the NPA to re-establish an infringement of section 4(1)(b) of the Competition Act.²¹⁹ Kelly explains that “section 73A(5) creates a presumption that the firm did engage in this conduct so that in effect the individual facing prosecution cannot argue that section 4(1)(b) is not infringed.”²²⁰ Kelly further states that “as the onus of proving causation or knowing acquiescence beyond a reasonable doubt lies with the NPA, it is unlikely that a constitutional challenge to this section will succeed.”²²¹

When dealing with the aforementioned presumption, Munyai eloquently stated that, section 73A provision creates a presumption that requires proof of a basic fact.²²² He remarked that the basic fact that needs to be proved by the State is that an acknowledgement in a consent order by the firm or a finding by the Competition Tribunal or the Competition Appeal Court that the firm has engaged in a prohibited practice, constitute *prima facie* proof of the fact that the firm engaged in that conduct.²²³ He further explains that once this basic fact has been proved, the presumption is triggered in the criminal proceedings against the director or a manager of the firm.²²⁴ He also pointed out that this may raise questions as to whether the offence created by section 73A infringes the constitutional rights of the director or manager to a fair trial as guaranteed to an accused person in section 35(3) of the Constitution, in particular the right, mentioned in section 35(3)(h), ‘to be presumed innocent, to remain silent, and not to testify during the proceedings’.²²⁵

Munyai also relied in *S v Zuma* in terms of which the Court held that the presumption of innocent requires that the state bear the burden of proving the guilt of the accused

²¹⁸ This is due to the fact that, the acknowledgement in a consent order in section 49D referred to in section 73A(5) is regarded as a *prima facie* proof to the contravention of section 4(1)(b) in any court proceedings.

²¹⁹ See Kelly (2010) at 331.

²²⁰ *Ibid.*

²²¹ *Ibid.*

²²² Munyai P (2011), at 206.

²²³ *Ibid.*

²²⁴ *Ibid.*

²²⁵ *Ibid.*

person and that the proof must be beyond reasonable doubt.²²⁶ Based on the above, Munyai concluded that this guarantee will be infringed if there is a possibility that a person may be convicted despite the existence of reasonable doubt.²²⁷

3.6 Conclusion

As discussed in this paper, it is clear that corruption and collusion are interlinked. However, in order to dismantle these offences in the context of public procurement, the Commission will have to establish a relationship and conclude a memorandum of understanding setting out guidelines as to how these cases can be managed between itself, the relevant anti-corruption agencies and the NPA.

Obviously when the Competition Amendment Act was introduced, the main idea was to strengthen the powers of the competition agencies through criminalization of cartel conduct. The criminalization of cartel is considered by some to be the most viable option to deter firms from engaging in cartel behavior, whilst others believe that it will seriously impact on the CLP Policy. The critical challenge that the Competition Amendment Act raises is the fact that it may not pass constitutional muster due to the unconstitutionality of certain provisions of section 73A. It is however submitted that section 73A of the Competition Amendment Act will lead to unintended consequences and may in fact have the effect of weakening rather than strengthening the powers of the competition agencies.

²²⁶ *Ibid*, at 207.

²²⁷ *Ibid*.

CHAPTER 4: CONCLUSION AND RECOMMENDATIONS

4.1 Conclusion

The prevalence of corruption and collusion in public procurement are the most critical challenges that impede the government's effort towards the development of the economy. In essence the firm(s) that engages in collusive behavior in public procurement becomes wealthier from the illegal dealings in the same way as the individuals involved in corrupt activities gain in the public procurement. In order to curb the scourge of collusive behavior and corruption in public procurement, the government enacted PRECCA, POCA and the Competition Act.

As already enunciated above, this dissertation has pointed out that corruption and collusion are intertwined. These practices have similar rippling effects on the development of the economy and results in the welfare effect to the entire society. The most vulnerable victims of these practices are the poorest of the poor as is evident from price fixing in the case of stable food such as bread.²²⁸

With regard to corruption, the government sometimes gets duped by corrupt officials and service providers who inflate costs for rendering services or sale of goods in exchange for kick-backs. This makes it virtually impossible for government to fulfil its mandate (i.e. to deliver services to the people). In certain instances, corruption in the public procurement lead to the service providers doing shoddy work and sometimes not completing government projects on time. Ultimately, poor people who depend on government for services become the most affected victims of corrupt activities.

However, with regard to collusion in the public procurement, the prices for certain goods or services are inflated to such an extent that the government ends up buying those goods or services at highly exorbitant prices not knowing that the prices were inflated as a result of collusive conduct. Generally, this collusive behavior is mostly engaged in by competing firms with the intent to maximize profit or retard competition in the market. This seriously impacts on government's budget, and

²²⁸ See the Competition Tribunal Notification of Complaint Referral (in Government Gazette 33126 of 23 Apr 2010). See also *Competition Commission v Tiger Consumer Brands Ltd* (2008) 1 CPLR 71 (CT); *Competition Commission v Pioneer Foods (Pty) Ltd* (2009) 2 CPLR 323 (CT); and *Competition Commission v Foodcorp (Pty) Ltd* (2009) 1 CPLR 82 (CT).

makes it virtually impossible for government to fast track service delivery to the poorest of the poor.

In order to prevent or reduce corruption and collusion in both public and private procurement, the Competition Authorities and the Anti-Corruption Agencies must work together and ensure that competition legislation and anti-corruption legislation are effectively and meticulously applied within the prescripts of the Constitution.

As indicated above, certain parts of the Competition Act were modified by the Competition Amendment Act in order to give the competition authorities more powers to fight against cartel behavior. Section 73A of the Competition Amendment Act seeks to increase the penalties for cartel conduct that can be imposed by introducing criminal offences with respect to directors or managers of firms who whilst acting in management positions causes the firm to engage in a prohibited practice in terms of section 4(1)(b) of the Competition Act.

However many loopholes and much uncertainty has emanated from the Competition Amendment Act. There are considerable amount of concerns that certain provisions of the Competition Amendment Act are unconstitutional. It has been argued above, that criminalization of cartel conduct will negatively impact on the CLP policy, it will make it difficult for the Commission to uncover cartel as whistle blowers (particularly the directors or managers of a firm acting in management authority) and or CLP applicant(s) will be dis-incentivized to come forward to disclose the cartel conduct. This is because whistle blowers or the CLP applicant(s) will be exposed to criminal prosecution by the NPA in cases where the Commission's recommendations or submissions for them to be regarded as persons deserving of leniency are rejected by the NPA. CLP applicant(s) or whistle blowers will not be protected against self-incriminating evidence where summonses were not issued and served on them when they volunteered to provide the Commission with the information during investigation.

Given the complexity and uncertainty surrounding the above loopholes, it is highly probable that the Commission will not escape constitutional challenges as soon as

all provisions (especially section 73A) of the Competition Amendment Act come into operation.²²⁹

It should also be noted that where the NPA decides not to prosecute the whistle blowers and the CLP applicant, the whistle blower or CLP applicant may still be exposed to private criminal prosecution.

4.2 Recommendation

It is submitted that in order to reduce or prevent collusion and corruption in public procurement, the anti-competitive legislation and anti-corruption legislation will have to be applied appropriately and within the prescripts of the Constitution. In addition, these legislation should be enforced in order to give effect to harsher criminal sanctions and hefty penalties that it imposes upon the perpetrators of these practices.

It is submitted that the following recommendations can serve as the best and efficient remedies to discipline the potential cartel offenders in the public and private procurement:

- Intensifying the use of civil damages claims against the companies and people who have caused loss to other parties through the corrupt conduct of their employees and directors;
- Companies or entities who are implicated or who suffered a loss as a result of cartel conduct in the public procurement must claim back the money lost from the culprits who were engaged in cartel conduct;
- The Commission should make provision in future settlement agreement(s) or consent agreement(s) for naming and shaming of individual perpetrators;
- Where both agencies i.e. NPA and Commission intends to invoke their respective provisions to deal with the individual that contravened section 12,13 of PRECCA and 4(1)(b)(i) of the Competition Act, the two agencies must agree which legislative framework should be enforced between PRECCA and the Competition Act, and not apply them simultaneously for the same conduct in the public procurement;

²²⁹ Due to these anticipated challenges, section 73A has not come into operation despite the fact that the Competition Amendment Act was passed into law in 2009.

- The anti-corruption agencies and Competition authorities must conclude an MOU setting out the guidelines and how they will coordinate their relationship where there is concurrent jurisdiction;
- Each of the agencies must therefore be allowed to exercise its statutory mandate without any hindrances. However, in case where one agency requests assistance or information from the other, such assistance or information should be provided within the bounds of the law;
- Where a CLP applicant or whistle blower approaches the Commission with the intent to voluntarily disclose the information relating to collusive behavior, the Commission must first advise the CLP applicant or whistle blower to withhold the information and thereafter disclose such information after receiving the summons in order for them to be protected against self-incriminating evidence.

4.3 Final Remarks

In this dissertation, the writer had considered whether there is an interaction between corruption and collusion. It is evident from the findings of this dissertation that both collusion and corruption are intertwined. Thus, it is important for the Competition Act to be aided by PRECCA in order to effectively and efficiently curb corruption in the public procurement. It is submitted that the cooperation between the Commission and NPA or any other Anti-Corruption Agencies will yield some great benefits in fighting against the scourge of corruption in the public procurement. However, the only challenge that the Commission and the NPA may be faced with, is the fact that the Competition Amendment Act doesn't set out the guidelines of how the cooperation between the Commission and NPA would be managed.

The dissertation further examined the potential impact of section 73A of the Competition Amendment Act. Whilst the introduction of criminal sanctions for cartel conduct was found to be the right step in the right direction to prevent cartel conduct, it is submitted that the criminalization of cartel conduct will discourage the CLP applicant or the whistle blower to come forward to disclose their involvement in a cartel activity in exchange for immunity from prosecution.

The critical challenge that the Competition Amendment Act raises is the fact that it may not pass constitutional muster due to the unconstitutionality of certain provisions



of section 73A. It is however submitted that section 73A of the Competition Amendment Act will lead to unintended consequences and may in fact have the effect of weakening rather than strengthening the powers of the competition agencies.

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“Great works are performed not by strength but by perseverance” – Samuel Johnson

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