REPUBLIC OF SOUTH AFRICA

IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CASE NO: 181/CAC/Jan20

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

…22 October 2020……..

In the matter between:

COMPETITION COMMISSION OF SOUTH AFRICA **Appellant**

and

STUTTAFORDS VAN LINES GAUTENG HUB (PTY) (LTD) **First Respondent**

PICKFORD'S REMOVALS SA (PTY) LTD **Second Respondent**

A & B MOVERS (PTY) LTD **Third Respondent**

BRYTON'S REMOVALS (PTY) LTD **Fourth Respondent**

AMAZING TRANSPORT (PTY) LTD **Fifth Respondent**

KEY MOVES CC **Sixth Respondent**

BAYLEY WORLD CC **Seventh Respondent**

SELECTION CARTAGE (PTY) LTD **Eighth Respondent**

ELLIOT MOBILITY (PTY) LTD	**Ninth Respondent**
CROWN RELOCATIONS (PTY) LTD	**Tenth Respondent**
MAGNA THOMSON (PTY) LTD	**Eleventh Respondent**
NORTHERN PROVINCE PROFESSIONAL MOVERS ASSOCIATION	**Twelfth Respondent**

SUMMARY:

Collusive Conduct – s 4(1)(b)(i) of Competition Act - not sufficient for Tribunal to find that mere mention of prices, by representatives of furniture removal firms, during discussion at a meeting constituted a contravention of section 4(1)(b)(i) of the Act - Tribunal must find that there was consensus, among furniture removal firms, to be bound by the understanding which Commission alleged was reached at the meeting; that is that a levy of R350 would be added to the removal cost per quote or consignment to counter the excessive effects of e-tolling.

JUDGMENT

KATHREE-SETILOANE AJA:

[1] This is an appeal and cross appeal against a decision of the Competition Tribunal ("Tribunal") in which it held that although the respondents, all furniture removal firms, had agreed to fix prices in contravention of section 4(1)(b)(i) of the Competition Act ("the Act"),[1] by concluding an agreement with regard to the charging of Electronic Tolling ("e-toll") at the meeting of the Northern Region of the Professional Movers Association on 22 January 2014 ("Northern Region of the PMA") , they could not be held liable because the agreement was concluded more than three years prior to the initiation of the complaint by the Competition Commission of South Africa ("Commission"). The Tribunal accordingly held that the limitation provisions

[1] No. 89 of 1998.

in s 67(1)[2] of the Act applied and that the complaint against the respondents had prescribed.

[2] The Commission's appeal lies against the latter finding and the first, second, seventh and eleventh respondents' ("the respondents") cross-appeal lies against the former. The ninth respondent ("Elliot Mobility") opposes the appeal, but does not cross appeal.

Background

[3] On 22 January 2014, representatives of the twelve furniture removals firms ("respondents") attended a quarterly meeting of the Northern Province branch of the Professional Movers Association ("PMA") held in Isando, Gauteng.[3] The PMA is an association of removal firms constituted to protect the interests of industry members and the general public. The PMA is an affiliate of the Road Freight Association ("RFA"), another industry body. At the meeting, there was a discussion about the impact of the e-toll system, which was implemented on 3 December 2013 in Gauteng, on the furniture removals industry. E-toll fees were to be calculated according to the vehicle category and the number of gantries through which a vehicle passed.

[4] The quarterly meetings of the Northern Province PMA generally dealt with topics of interest or concern to the transport and removals industry as a

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[2] Section 67(1) of the Act provides:

(1) A complainant in respect of a *prohibited practice* may not be initiated more than three years after the practice has ceased.'

[3] The PMA establishes ethical standards for its members (including standards which preclude practices, independent or concerted, which prejudice consumers) and service delivery standards.

whole. The meetings were 'very casual and of a general nature', and 'really like a bit of a social thing', with food and drinks afterwards.

[5] The January meeting was attended by thirteen representatives of removal firms operating in Gauteng. The meeting was chaired by Mr Charl Pienaar ("Mr Pienaar"), the Chairperson of the Northern Province PMA. He also represented the first respondent ("Stuttafords") at the meeting. In the absence of the RFA secretary who usually took minutes at the quarterly meetings, Mr Pienaar's personal assistant, Ms Adele Vella ("Ms. Vella"), attended the meeting to take minutes.

[6] Mr Martin Oosthuizen ("Mr Oosthuizen") attended the meeting both as President of the PMA and as a representative of the second respondent (Pickfords). The meeting was also attended by: (a) Mr Graeme Logon of Pickfords; (b) Ms Marlene Bystydzienski of the third respondent (A&B Movers); (c) Mr Doug Fear ("Mr Fear") of the fourth respondent (Brytons Removals); (d) Mr Jody Riback of the fifth respondent (Amazing Transport); (e) Mr Dean Knezovich of the sixth respondent (Key Moves); (f) Mr Liam Bayley ("Mr Bayley") of the seventh respondent ((Bayley Worldwide); (g) Ms Adele Lawrence of the eighth respondent (Selection Cartage); (h) Mr Deon Small ("Mr Small") of the ninth respondent (Elliott Mobility); (i) Ms Carin Cronje of Elliott Mobility; (j) Mr Johan Wessels of the tenth respondent (Crown Relocations); (k) Mr Tony Halgreen ("Mr Halgreen") of the eleventh respondent (Magna Thomson); and Mr Ben Nienaber of British International, which was not a respondent in the complaint referral.

[7] The issue of the e-toll system was discussed under item 4 of the meeting agenda. There were ten issues on the agenda. The discussion on the impact of the e-tolls lasted between 5 to 10 minutes.[4]

[4] Other issues discussed at the meeting included: membership of Accredited Movers of South Africa (AMOSA); the role of the PMA in respect of complaints against member firms; firms'

[8] Approximately two weeks after the January meeting, Mr Pienaar asked Ms Vella, who had taken handwritten notes of the proceedings at the meeting, to type up minutes and send them to the RFA before its meeting on 10 February 2014. It was standard practice for the minutes of the quarterly meetings to be sent to the RFA. Ms Vella drafted the minutes ("draft minutes") and sent them to the RFA.

[9] According to Mr Pienaar, he did not read the draft minutes before they were sent to the RFA, as he was very busy relocating to Cape Town at the time. Although Ms Vella could not recall whether Mr Pienaar had seen the draft minutes before she sent them to the RFA, she confirmed that it was a very busy time for him.

[10] Item 4 of the draft minutes reads as follows:

> '*4. E-TOLL*
>
> *THE E-TOLL SYSTEM WAS PUT INTO EFFECT OFFICIALLY ON THE 2ND OF DECEMBER 2013. CP ADVISED THAT THE SUBSIQUINT [SIC] EFFECTS ON THE REMOVAL/TRANSPORT INDUSTRY BE DISCUSSED. THIS WOULD NOT BE A COLLUSION ISSUE. THE HANDLING OF THESE COSTS ARE CRUSIAL [SIC] AS IT WILL HAVE A LASTING EFFECT ON THE INDUSTRY. CP MADE MENTION OF THE TRACKING OF VEHICLES THAT HAVE BEEN USED TO ESTABLISH THE COST OF E-TOLLS FOR A VARIATY [SIC] OF VEHICLES FROM OLIFANTSFONTEIN TO WILLIAM NICHOL, INCLUSIVE WITH THE EXECUTIVE SALES CONSULTANT ATTENDING TO THE SURVEY, IT WAS NOTED THAT A MINIMUM TOLL FEE OF R250 HAD TO BE APPLICABLE – STUTTAFORDS VAN LINES HUB.*

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accreditation for insurance purposes; and dates and arrangements for the PMA golf day and the PMA Congress.

MARLANE BYSTYDZIENSKI (MB) CONFIRMED THAT THEY HAVE BEEN ADDING AN AMOUNT OF R350 PER QUOTE FOR BOTH LOCAL AND LONG DISTANCE CONSIGNMENT TO COUNTER THIS COST – A&B MOVERS.

DOUG FEAR(DF) ALSO ADVISED THAT THEY HAVE BEEN IMPLEMENTING A FLAT RATE OF R350 JUST TO COVER THE BASIC COSTING – BRYSTONS REMOVALS.

DS ADVISED THAT THEY FORMULATED A PERCENTAGE CALCULATION TO ENABLE THEM TO COST THE TOLL FEES PER CONSIGNMENT MORE EFFECTIVELY – ELLIOTT MOBILITY. IT WAS AGREED THAT R350 SEEMS TO BE THE ACCEPTABLE AVERAGE.

IT WAS GENERALLY CONCURRED THAT A LEVIE [SIC] OF R350 WILL BE ADDED TO THE REMOVAL COST PER QUOTE/CONSIGNMENT TO COUNTER THE EXCESSIVE EFFECTS OF THE IMPLEMENTED E-TOLL SYSTEM IN GAUTENG.'

[11] The whole of item 4 of the draft minute was typed in uppercase and so too was item 3.

[12] On 10 February 2014, Mr Oosthuizen, in his capacity as President of the PMA, sent an email to Mr Pienaar in which he wrote:

'I wish to refer to the minutes being sent to Catherine for the recent Northern Provinces meeting that was hosted at the RFA premises.

The matter relates to a discussion that took place on the E-toll application and how to incorporate this as a line item on quotations. Kindly ensure that paragraph 4 of the minutes is amended prior to publishing it and reflect the following wording;

'We have taken advice on the matter and each party will act independently'

Please take the previous statement out of the minutes as it is in contravention with the Competition Act and place the RFA in accordance with the Articles of

Association at risk. Due to the nature of the concern, I have been advised that this incident will be reported to the RFA EXCO and in retrospect this has implications for the PMA as an Association.

Please include Sharmini into the revised wording of your minutes.'

[13] Mr Pienaar responded an hour later, writing as follows:

'This was a report and not circulated as yet. E-Toll will also not be a line item. The charges are based on factual information that is available to every citizen of this country. I will change the minutes to read accordingly before distributing.'

[14] Mr Pienaar testified that he had no sight of the draft minutes when he sent this email. On 14 February 2014, Mr Pienaar wrote a letter to Ms Sharmini Naidoo, the CEO of the RFA apologising for the circulation of the draft minutes and, among other things, said the following:

(a) It had not been his intention to have a discussion about price fixing to recover e-toll costs, but to highlight the costs involved and 'the bottom-line effect that e-tolls will have on the transport industry'.

(b) He had indicated to members the cost of traveling from Midrand to Bryanston as per the rates provided on SANRAL's webpage. This was only to illustrate what the extra expense would amount to and the effect on 'our very low margin industry'.

(c) It was for these reasons that he had sent his initial communication that 'the rates were available to every citizen of this country'. He had still been convinced, in his head, that it was 'a discussion on actual cost rather than an agreement on charges'.

(d) He only realised, after receipt of Mr Oosthuizen's letter and after actually reading the draft minutes, what its interpretation was and that it 'certainly said more'.

[15] Prior to writing this letter, Mr Pienaar had seen the draft minutes, as well as a legal opinion obtained by the RFA which indicated that the 'concurrence' recorded in the draft minutes would amount to a contravention of the Act.

[16] At the next meeting of the Northern Province PMA on 10 April 2014, a revised version of the draft minutes ("the amended minutes") was tabled, and adopted. Item 4 of the amended minutes reads as follows:

> 'The e-toll system came into effect on 2nd December 2013. This is an expense to the removal/transport industry that needs to be passed on to the consumer.
>
> It was suggested that each company decides to charge or not to charge and to calculate based on their own costs how much they need to recover. Obviously the respective companies operate different fleet sizes and overheads are different.'

[17] On 10 May 2014, Ms Catherine Larkin of the RFA sent an e-mail to all the members of the Northern Province PMA, to which she attached a letter, dated 9 May 2014, from Mr Nico van der Westhuizen, the Chairman of the RFA. The letter read as follows:

> 'We are addressing this letter to you on behalf of the Board of the Road Freight Association.
>
> We acknowledge receipt of your letter of apology by Mr Charl Pienaar, and accept such apology.
>
> The purpose of this letter is to share our concern with regard to the discussions that took place at the Northern Region Meeting on 22 January 2014.
>
> You have already been provided with a copy of the legal opinion that we have obtained, which points to the risks of certain discussions at your regional level.

> This letter therefore serves to remind all relevant parties, not to make themselves guilty of any acts of collusion or otherwise [sic]. This includes decisions on the pricing of toll gates, as well as any other matter which may constitute collusion or any breach of the Competition Act, 89 of 1998. Please note that such conduct also constitutes a breach of the RFA's Code of Ethics, signed by all members.
>
> We trust that you will appreciate the seriousness of this matter.'

A copy of the draft minutes; and a copy of the legal opinion obtained by the RFA in respect of what was recorded in the draft minutes was also attached to this email.

The Complaint Referral

[18] A complaint against the respondents was initiated on 8 February 2017[5], alternatively 8 March 2017[6]. The Commission referred the complaint to the Tribunal on 12 September 2017 in which it described the conduct which was the subject of the complaint as follows:

> 'The Respondents are alleged to have entered into an agreement and / or engaged in a concerted practice to fix the rate to be levied to customers that transport furniture using e-tolled Gauteng highways. The information further indicates that the Respondents agreed that average levy of R350 would be added to the removal costs per quote to counter the effects of [the] e-toll system in Gauteng in contravention of section 4(1)(b)(i) of the Competition Act 89 of 1998 as amended.'

[19] The Commission alleged that the conduct was ongoing.

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[5] The date recorded in manuscript on the Commission's form CC1 as the date of filing of the Commission.

[6] The date recorded in the date stamp on the Commission's form CC1.

The Findings of the Tribunal

[20] The Commission referred the complaint to the Competition Tribunal on 12 September 2017.[7] It sought an order in the following terms:

> '1. Declaring that the respondents have contravened section 4(1)(b)(i) of the Competition Act in that on or about 22 January 2014 the respondents, being parties in a horizontal relationship, engaged in price fixing.
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> 2. Declaring that the respondents be liable for the payment of an administrative penalty equal to 10% of their its turnover in terms of section 58(1)(a)(iii) read with section 59 (2) of the Act.'

[21] The Commission argued, at the Tribunal hearing, that an agreement was reached at the meeting of 22 January 2014 to recover e-tolls and it was subsequently implemented. The respondents, contended, to the contrary that no agreement had been reached at the meeting. Even if it had, it was never implemented; thus the Commission's jurisdiction to refer the case was ousted by the limitation of action provisions contained in section 67 (1) of the Act.

[22] The Tribunal handed down its decision on 20 December 2019 ("Tribunal Decision"). In relation to the first issue, which is whether the discussion that took place amounted to an unlawful agreement in contravention of the Act, the Tribunal found that the respondents had agreed to price fix in contravention of s 4(1)(b)(i) of the Act by reaching an understanding, at the

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[7] Only the first, second, fourth, seventh, ninth and eleventh respondents were represented in the hearing. The Commission had concluded settlement agreements with the third, sixth and tenth respondents in terms of which they undertook to provide evidence and testify at the hearing of the complaint referral. The Commission, however, elected not to call representatives of any of those respondents to testify at the hearing.

January meeting, that they would pass on the costs of e-tolls by the implementation of a general "administration type of fee" that did not reflect the true cost of the e-tolls for the service". The Tribunal also found that the respondents had sounded each other out at the meeting and that the fee "hovered in the amount of R350".[8] In this regard it stated that:

> That it was not an agreement to fix a price in precise terms, does not detract from the conclusion that there was an agreement. When competitors reach an understanding to raise prices to consumers, whether by reference to an agreed price or an agreed price raising form of conduct, consumer welfare is adversely affected.
>
> In the present case the competing firms were not even obliged to pass on the cost of E-tolls to consumers. The decision to do so by agreement, is, on its own, a contravention of the Act, because such a decision excluded independent action by firms, which in a competitive market may have led to different responses.
>
> Second, it is also clear that the firms reached agreement to pass on the cost not by the actual amount incurred, but by way of a general fee. Third, the firms signalled to one another what the range of the fee might be, albeit that we have not found they agreed on a precise amount, contrary to what the Commission alleged in the referral… .'[9]

[23] Yet, in relation to the second issue for determination, namely whether the prohibited practice ceased by the date of initiation of the complaint, on the basis that it took place three years prior to the date of initiation of the complaint, the Tribunal held that the respondents could not be held liable for their conduct because the claim had prescribed by virtue of section 67(1) of the Act. The Tribunal added that the Commission could have avoided the

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[8] *Competition Commission v Stuttafords Van Lines Gauteng Hub (Pty) Ltd and Others*, Competition Tribunal of South Africa, Case No. CR164Sep17 (20 December 2019) paras 74, 81, 84, and 93. ("*Tribunal Decision*").

[9] *Tribunal Decision* at paras 72-74.

limitation of action problem if it had led evidence of the implementation of the agreement, which it had not done. The Tribunal concluded:

'Although the respondents may well have concluded an agreement with regard to the charging of E-Tolls at the meeting of 22nd January 2014, they cannot be held liable because the agreement was concluded more than three years prior to the initiation of the complaint and the limitation or action in terms of section 67 (1) applies. Put more colloquially the claim for this count has prescribed.

Second, the Commission could have avoided the limitation problem had it established that the agreement had not 'ceased' and was in existence within the three-year period after initiation. On the facts this has not been shown. The case must be dismissed against all the respondents.' [10]

Was an Agreement Reached at the January Meeting?

[24] Since the determination of the appeal is dependent on a positive finding on the question for determination in the cross appeal, I will turn to the cross-appeal first.

[25] The respondents contend, in the cross appeal, that the evidence presented to the Tribunal established that no agreement in contravention of s 4(1)(b)(i) of the Act was reached at the January meeting, hence the Tribunal erred in concluding as much. The Commission's counter argument is that the Tribunal was correct in concluding, on the evidence of Mr Pienaar of Stuttafords, Mr Oosthuizen of Pickfords, and Mr Small of Elliot Mobility specifically, that the respondents' discussions at the January meeting resulted in them reaching an understanding in contravention of s 4(1)(b)(i) of the Act.

[10] *Tribunal Decision* at paras 112-113.

The Law

[26] The conduct relied upon by the Commission in its referral is an agreement amounting to price fixing in contravention of section 4(1)(b)(i) of the Act. Section 4 of the Act prohibits the following restrictive horizontal practices:

> '(1) 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 –
>
> (a) …
>
> (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;
>
> ….'

[27] An agreement is defined in s 1 of the Act as including 'a contract, arrangement or understanding, whether or not legally enforceable'.[11] The essential components of the 'agreement' prohibited by s 4(1)(b)(i) of the Act are that the parties reach consensus in respect of an arrangement which they regard as binding upon themselves and one another. Thus, as held in *Netstar (Pty) Ltd and Others v Competition Commission of South Africa and Another*:[12]

> '[A]n agreement arises from the actions of and discussions among the parties directed at arriving at an arrangement that will bind them either contractually or

[11] Section 1(1)(ii) of the Act.

[12] *Netstar (Pty) Ltd v Competition Commission of South Africa and Another [2011] 1 CPLR 45 (CAC) ("Netstar")* at para 25.

by virtue of moral suasion or commercial interest. It may be a contract, which is legally binding, or an arrangement or understanding that is not, but which the parties regard as binding upon them. Its essence is that the parties have reached some kind of consensus.'[13]

[28] Although this Court, in *Netstar*, recognized that the definition of an agreement extends the concept beyond a common law contractual arrangement, it emphasized that "what it requires is still a form of arrangement that the parties regard as binding upon both themselves and the other parties to the agreement" and that "absent such an arrangement there is no agreement even in the broader sense embodied in the definition".[14]

[29] Thus, in determining whether an agreement is established, the court must evaluate whether 'consensus sufficient to constitute a "contract, arrangement or understanding" has been proved on a balance of probability' by the Commission.[15] Where such conduct is not expressly confirmed by the parties concerned, an inference may be drawn from the discussion itself where one of the parties commits to act in a particular way and the conduct of the other parties demonstrates an agreement to be bound. The proved facts from which the inference is to be drawn must objectively establish that at least one party assumes an obligation or gives an undertaking or assurance that it will act in accordance with what was discussed at the

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[13] *Netstar* at para 25; *MacNeil Agencies* at para 56.

[14] *Netstar*, above, para 25. See also *Reinforcing Mesh Solutions (Pty) Ltd and Others v Competition Commission and others* [2013] 2 CPLR 455 (CAC) ("*Reinforcing Mesh"*) paras 18 and 19.

[15] *MacNeil Agencies (Pty) Ltd v Competition Commission* [2013] ZACC 3 para 56 ("*MacNeil*"); *Competition Commission v Primedia (Pty) Ltd t/a Ster Kinekor Theatres* para 38 ("*Primedia*").

meeting. A mere expectation that a party will act in that way is insufficient.[16] As contemplated in s 4(1)(b)(i) of the Act, conduct that conforms with a binding arrangement must be shown to exist. Expressed differently, the adoption of a uniform approach by the parties concerned must be shown to be present.

[30] The Court may also have regard to the subsequent conduct of the parties in determining whether an agreement has been concluded. Although the steps taken by the parties to implement the agreement or arrangement may be considered,[17] s 4(1)(b)(i) of the Act does not impose an onus on the Commission to prove that the agreement has been implemented. The conclusion of an agreement *sans* implementation, suffices to constitute a contravention of the Act.[18]

What is the Commission's Complaint?

[31] Based on the concluding paragraph of the draft minutes,[19] the Commission alleged in its complaint referral, that the respondents had 'entered into an

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[16] Cf: *Australian Competition and Consumer Commission v CC (NSW) (Pty) Ltd* (1999) 92 FCR 375 at 408 cited in *Videx Wire Products (Pty) Ltd v Competition Commission* [2017] 2 CPLR 589 (CAC) para 14 ("*Videx*").

[17] In *Novartis SA (Pty) Ltd and Another v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) at para 35, the SCA held held as follows in relation to whether the parties concerned intended to bind themselves contractually:

> '*That inevitably requires an examination of the factual matrix – all the facts proven that show what their intention was in respect of entering into the contract: the contemporaneous documents, their conduct on negotiating and communicating with each other, and, importantly, the steps taken to implement the contract.'*

[18] *Reinforcing Mesh Solutions (Pty) Ltd and Another v Competition Commission* [2013] ZACC 4 paras 30-31.

[19] As quoted earlier in the judgment, the concluding paragraph of the draft minutes read: 'It was generally concurred that a levie (sic) of R350 will be added to the removal costs per quote/consignment to counter the excessive effects of the implemented e-toll system in Gauteng'.

agreement and/or engaged in a concerted practice to fix the rate to be levied to customers that transport furniture using e-tolled Gauteng highways' and that 'this conduct amounted to price-fixing in contravention of section 4(1)(b)(i) of the Act'.

[32] The case which the Commission relied on in its founding affidavit to its complaint referral is that:

> 'An agreement was reached in the [22 January 2014] meeting that the First to the Eleventh Respondents must add an average levy of R350 on each quote produced by the Respondents when transporting furniture along the Gauteng e-toll roads".
>
> It further alleged that:
>
> The purpose of the agreement was to pass on to consumers the added costs incurred when transporting furniture using highways in the province of Gauteng because of the e-tolls'.

[33] During the Tribunal hearing, the Commission relied on two agreements in the alternative. These are an agreement to charge customers a fixed fee of R350 to pass on e-toll costs to customers ("the alleged R350 levy agreement"); alternatively an agreement to recover e-toll costs from customers ("the alleged e-toll recovery agreement").

[34] At the hearing of the appeal there was considerable debate on the question of the exact nature of the Commission's case. The Commission submitted that its case is, and has always been, that the respondents reached a so called "broader agreement" to "pass on or recoup" e-tolls costs from the customer. It sought support for this from the words "to counter the effects of the implemented e-toll system" which appear in the concluding paragraph of the draft minute.

[35] However, as shown by the respondents, this is not the case which the Commission relied on in its founding affidavit to its complaint referral. Its

case, as embodied there, is that "the respondents reached an agreement to add an average levy of R350 on each quote produced by them when transporting furniture along the Gauteng e-toll roads". The Commission's case was built upon the recordal in the draft minutes that the respondents' representatives, at the January meeting, agreed that a levy of R350 would be added to the removal costs per quote to counter the effects of the e-toll systems. That the Commission had alleged, in its founding affidavit, that "the purpose" of the alleged R350 levy agreement was "to pass on to the consumer the added costs incurred…because of the e-tolls" does not mean that it was open to the Commission to rely on a so called broader agreement to recoup e-toll costs from the consumer generally. Nor does the use of words "to counter the effects of the implemented e-toll system" suggest this.

[36] Crucially, nowhere in the draft minutes is reference made to a broader agreement to pass on or recoup e-toll costs from the customer. That the Commission's pleaded case is founded squarely on the concluding paragraph of the draft minutes is consistent with its contention, during argument in the appeal, that the recordal there is fatal to the respondents' cross appeal. It sought support for this argument in the finding of the Tribunal that Mr Pienaar did not question the correctness of the contents of the draft minutes or distance himself from it. The Commission accordingly contended that the contents of the draft minutes reliably reflect the understanding or arrangement reached by the respondents in contravention of s 4(1)(b)(i) of the Act.

Is there a Collusive Agreement on the Evidence?

[37] As concerning this question, the Court must consider whether the evidence, viewed as a whole, supports the finding of the Tribunal that the respondents reached an agreement, at the January meeting, to engage in the prohibited practice envisaged in s 4(1)(b)(i) of the Act.

[38] The Tribunal correctly found, based on the evidence of the Commission's own witness, Mr Oosthuizen, that the Commission had not established with

sufficient certainty whether the agreement was reached on the specific amount. It however, found based on the Commission's alternate case (not pleaded in its founding affidavit) that the respondents had reached an understanding at the meeting that: "The new [e-tolls] cost should be passed on to the consumer possibly as either a flat rate or percentage… Second, the sums mentioned gave each an indication of the ballpark of what this amount was. …What appears to have happened is that Pienaar had sounded them out at the R250 mark and that others had suggested a higher amount closer to R350".

[39] Apart from the fact that this finding is not based on the Commission's case as pleaded in its founding affidavit, there is also a clear lack of specificity in the finding that the respondents entered into an "understanding" as required by our jurisprudence. This Court has repeatedly held that for an "agreement, understanding or arrangement" to constitute a collusive agreement as contemplated in s 4(1)(b)(i) of the Act, it must be proved on a balance of probabilities that the parties concerned had reached consensus on the subject matter of the understanding, and that that they regarded such understanding as binding upon themselves or on each other. Consensus is of the essence in demonstrating that firms have engaged in a prohibited practice in the form of a cartel agreement as contemplated in section 4(1)(b)(i) of the Act.

[40] The Commission, however, failed to present any reliable evidence demonstrating that those present, at the January meeting, reached any consensus on an understanding or arrangement which they regarded binding upon themselves (or their principals), or that they agreed upon a uniform approach to the recovery of e-toll costs. To the contrary, the evidence established that different individuals drew different conclusions from the discussion that took place at the meeting, and none regarded themselves, the firms they represented, or the other firms represented at the meeting as being bound by any uniform approach to recoup or recover costs.

[41] All of the witnesses,[20] who testified at the Tribunal hearing about the discussion that took place at the January meeting, were unanimous that it highlighted the impact that e-tolls would have on the removals industry, and the 'bottom line' of removal firms. The only suggestion made at the meeting was, along the lines, recorded in the amended minute that: "[E]ach company decides to charge or not to charge and to calculate based on their own costs how much they need to recover".

[42] Mr Oosthuizen, in particular testified that the discussion lasted between five to ten minutes and was open and transparent, and no-one was instructed to keep it confidential or secret. The undisputed evidence of Mr Pienaar (Stuttafords) and Mr Fear (Brytons Removals) was that their mentioning of e-toll rates (R250 and R350 respectively) associated with specific hypothetical journeys, was based on their own calculations and research. According to Mr Pienaar, one attendee (Ms. Bystydzienski) blurted out, "out of the blue", the amount of R350 which her firm was charging, and another (Mr David Small of Elliot Mobility) mentioned his firm's method of costing. Mr Pienaar accepted that, at this point, he ought to have stopped the discussion, and subsequently regretted having not done so.

[43] It is manifest from the evidence that none of the respondents' representatives, present at the meeting, sought to sum up the outcome of the discussion, and even though they left with a similar understanding of the substance of the discussion, they drew different conclusions from it. As indicated, Ms. Vella, the personal secretary to Mr Pienaar, attended the meeting to take the minutes in the absence of the customary minute taker. According to her testimony, she was inexperienced at taking minutes at the time and, consequently, had provided her own conclusion of the discussion (as she was taught at an executive PA course she had attended), in the last

[20] Mr Oosthuizen for the Commission, Mr Fear for Bryton Removals, Mr Bayley for Bayley Worldwide, Mr Small for Elliot Mobility and Mr Halgreen for Magna Thomson.

paragraph of the draft minutes, in circumstances where no one had summed up what the outcome of the discussion was. Ms. Vella's evidence was not disputed by the Commission.

[44] Her testimony that the concluding paragraph of the draft minutes was inaccurate is consistent with the evidence of the other witnesses who testified on their recollection of the discussion that took place, at the January meeting, on the subject of e-tolls. Significantly, none of them recalled an agreement, 'general concurrence' or any consensus among those present that all the firms would charge a specific levy, of R350 or any other amount, to recover e-tolls costs. They steadfastly maintained that there was no such consensus. Pertinently, Mr Oosthuizen, the Commission's own witness, was adamant that no agreement was reached at the January meeting, and that the concern which he raised, at the time, related to the general discussion about "rates" which he assumed to be in contravention of the Act.

[45] As the evidence reveals, the respondents took diverse approaches to the question of recovering e-toll costs. Stuttafords, Pickfords, Brytons Removals, and Magna Thomson recovered e-toll costs from customers, while others such as Elliot Mobility and Bayley Worldwide did not. Since Bayley Worldwide incurred no such costs, there was no reason to recover them. Conversely, Stuttafords, Pickfords, Magna Thomson and Brytons Removals recovered e-toll costs consequent upon decisions taken, independently of each other, before the January meeting.[21] Notably, none of them followed a common approach. Stuttafords imposed a charge of R300 per move from early April 2014. Pickfords did not charge a particular

[21] Stuttafords decided during the latter part of 2013 that it would recover e-toll costs and implemented the decision to charge an input cost from April 2014. Pickfords decided to recover e-tolls before 3 Decemeber 2013, and decided at a meeting of 19 March to implement an input cost. Brytons Removals decided in September 2013 to apply an input cost. Magna Thomson decided before 16 January 2014 to recover e-toll costs from cutomers, and by 1 March 2014 decided to apply an input cost.

amount but rather a percentage (2% of the value of the transport costs), with a discretionary R100 minimum cost. Brytons Removals imposed a charge of R230 per move which it determined in September 2013. And Magna Thomson imposed a charge of R290 per day, erratically between 19 June 2014 and September 2014, and thereafter more consistently. The charge was eventually changed to R290 per move.

[46] Considering the significant differences, among the respondent firms, relating to their size, areas of operation, fleet size, vehicle types, routes travelled, operational requirements, costs structures, overheads, service offering and customer preferences, the probabilities suggest that there could have been no consensus on the adoption of a common approach in relation to the recovery of e-toll costs. In this respect, Mr Pienaar testified that the e-tolls costs recovered by Stuttafords would have no application to any of the other removal firms in the industry, as it redeployed the biggest removal fleet in South Africa and focused on domestic removals in affluent areas in Johannesburg and Pretoria. Equally, Mr Fear testified that Brytons Removals incurred different costs to a removal firm such as Stuttafords, because it is a single-branch, one-person company, involved exclusively in international travel. He said that Brytons Removals, in contrast to Stuttafords, operated a very small fleet because its business involved mainly packing and not transporting. He added that e-toll costs are insignificant on a move-by-move basis but have a significant effect on a firm's bottom line over a year. Similarly, Mr Bayley testified that Bayley Worldwide operated a small fleet of vehicles specifically designed for storage and international moves.

[47] Mr Naik who determined Pickfords approach to the recovery of e-toll costs from its customers, was not present at the January meeting. He testified that when the e-tolls were implemented on 3 December 2013, he evaluated what impact e-toll costs would have on Pickfords by considering the different sizes of the vehicles it operated (light, medium, and heavy) and compared them with typically routes travelled by its vehicles. He said that there was

"no one easy fix." Mindful of these differences, Mr Oosthuizen, Mr Pienaar and Mr Fear agreed it would have made no commercial sense for all the removal firms, represented at the January meeting, to have adopted a uniform approach to e-toll costs, particularly because the amounts to be recovered by each of the firms represented, were dependent on the variables mentioned above including the effect on a firm's bottom line.

[48] The respondent's subsequent conduct strongly supports the inference that no consensus was reached at the January meeting on their approach to the recovery of e-toll costs. And that those that elected to recover the costs of e-tolls from their customers, did so independently of any discussions which took place at the January meeting. This much is clear from the range of different approaches adopted by them. Bearing in mind the distinct and different features of each of the respondents, it would have made no commercial sense for them to adopt a uniform approach to e-tolls, in circumstances where such an approach would serve no business rationale whether legitimate or anti-competitive. The evidence of the respective operations of the respondents strongly supports this conclusion.

[49] Accordingly, the Tribunal erred in concluding that the respondents "replaced their independent action – in this case how to deal with a new expense – with interdependent action reached as a result of an understanding with competitors" and that "this is the only credible explanation for why the discussion took place in the first place and why the amounts and the mechanisms for recovering were mentioned". The Tribunal erred in arriving at this conclusion for the further reason that that it suggested no basis for rejecting the evidence of Mr Pienaar (and the other witnesses who supported his decision) that the purpose of the discussion was to highlight the impact of e-tolls on the removals industry and on the business of the removals firms.

[50] The Tribunal also erred in finding that what the respondents did at the January meeting, by mentioning the rates R250 and R350 respectively, constituted "classic price signalling to competitors at what level they might

pass on costs". Once again, the Tribunal made this finding without indicating any basis for rejecting the evidence of both Mr Pienaar and Mr Fear that the amounts which they mentioned were the product of their own research and desktop calculations of the e-toll costs associated with hypothetical journeys. Though unwise, the mere mention of these rates does not translate into an agreement as contemplated in terms of s 4(1)(b)(i) of the Act without a showing of consensus as understood in our jurisprudence.

[51] It is important to bear in mind that the neither the contents of the draft minutes nor the amended minute constitute proof in themselves that the respondents reached an understanding or agreement in contravention of s 4(1)(b)(i) of the Act. I reiterate that what had to be established by the Tribunal, before it could make a finding that the respondents contravened s 4(1)(b)(i) of the Act, was not merely that certain prices/rates were bandied around during the discussion by the respondents' representatives present at the January meeting, but that the evidence showed that there was consensus, among them, to be bound by the understanding which they purportedly reached at the meeting; that is that a levy of R350 would be added to the removal cost per quote or consignment to counter the excessive effects of e-tolling. The evidence of both the Commission's witness, Mr Oosthuizen and the respondents' witness was unequivocal on this point – no such agreement had been reached.

[52] That ought to have resulted in the dismissal of the complaint, but regrettably the Tribunal went outside the Commission's pleaded case to find that the respondents reached an agreement to recoup costs which "hovered in the R350 mark".

[53] The Tribunal's reliance on this broader agreement to recover e-toll costs was based entirely on the testimony of Mr Small of Elliot Mobility who agreed, in answer to a leading question in his interrogation by the Commission (and in cross-examination at the Tribunal hearing) that the representatives at the January meeting "agreed to recoup e-toll costs". Since the leading question put to Mr Small embodied a legal conclusion to

the effect that there was a cartel agreement (as contemplated in s 4(1)(b)(i) of the Act), the Tribunal was required to treat it with caution and view it in the context of the totality of the evidence.[22] As might be expected, it did not do so.

[54] On consideration of Mr Small's evidence as a whole, it is clear that he left the meeting with the impression that e-toll costs were going to impact heavily on the removal firms and that they ought to be recovered. However, what is readily apparent from his testimony is that no consensus had been reached that all the firms present at the meeting were bound to recover those costs. Mr Small testified that, although he assumed "in his head", while in the meeting, that everybody would have to recover e-tolls from their customers, he left the meeting not thinking that his firm was under any obligation to recover e-tolls, and did not view the discussion as an agreement. This is borne out by his further testimony that he did not understand himself, as Elliot Mobility's representative at the meeting, to have any obligation after the meeting about the recovery of e-tolls. He consequently took no steps to give Elliot Mobility an instruction in respect of the recovery of e-tolls. On the whole, Mr Small did not consider Elliot Mobility or any of the other firms that were represented at the meeting, to be bound by any consensus to recover e-tolls.

[55] By and large, Mr Small's evidence on this aspect was consistent with the overall evidence of Mr Bayley of Bayley Worldwide and Mr Halgreen of Magna Thomson, who testified that there was no agreement that the e-toll costs had to be recovered from the customer.

[56] Mr Pienaar testified that "the only understanding reached at the meeting was that the firms would have to determine how they would recoup e-toll costs from their customers". In this regard, the amended minute which he drafted reads: "The e-toll system… is an expense to the removal/transport industry that needs to be passed onto the customer". The Commission

[22] *Videx* at para 20.

contends, on the basis of these two statements, that the respondents reached an agreement to collude as contemplated in s 4(1)(b)(i) of the Act by passing or recouping e-toll costs from the customer. This contention is unsustainable for two reasons. The first, as testified to by Mr Bayley, is that: "That may be Charl Pienaar's personal opinion, but it certainly wasn't agreed to by the members at the meeting. Secondly, an "understanding", as described by Mr Pienaar, cannot "without more" constitute an agreement to collude in the sense required by section 4(1)(b)(i) of the Act. Absent a finding of consensus that the parties regard as binding upon themselves and one another, there can be no agreement within the meaning of s 4 (1) (b) of the Act.

[57] Thus on consideration of the evidence as a whole, the Tribunal erred in finding that the respondents had agreed to fix prices in contravention of s 4(1)(b)(i) of the Act by reaching an understanding, at the January meeting, to pass on the costs of e-tolls to their customers by imposing a fee in the "R350 mark". The Tribunal erred both in evaluating the evidence that the parties presented to it, as well as in its application of the legal test, as enunciated by this Court, on the question of what constitutes an agreement to collude as envisaged in section 4(1)(b)(i) of the Act.

[58] For all these reasons, the appeal falls to be dismissed and the cross appeal is upheld.

Costs

[59] Costs should follow the result in the appeal and the cross appeal.

Order

[60] In the result, I make the following order:

1. The appeal is dismissed with costs, including the costs of two counsel.

2. The cross appeal is upheld with costs, including the costs of two counsel.

3. The order of the Competition Tribunal is confirmed.

F KATHREE-SETILOANE AJA

Davis JP and Mnguni JA concur

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Seventh Respondent represented by Mr Bayley in person

Date of Hearing: 29 June 2020

Date of Judgment: 22 October 2020