



COMPETITION TRIBUNAL OF SOUTH AFRICA

In the matter between:

Case No.: CR067May17

The Competition Commission

Applicant

And

Thembekile Maritime Services (Pty) Ltd

First Respondent

Silverbuckle Trade 21 CC t/a Yacoob Yacht

Second Respondent

Nauticat Charters (Pty) Ltd

Third Respondent

Ferry Charters (Pty) Ltd

Fourth Respondent

Heritage Charters CC

Fifth Respondent

Panel	: Norman Manoim (Presiding Member) : Enver Daniels (Tribunal Member) : Yasmin Carrim (Tribunal Member)
Heard on	: 26,27 June 2018 and 21, 22 May 2019
Last submission received on	: 24 June 2019
Order issued on	: 14 August 2019
Reasons issued on	: 14 August 2019

REASONS FOR DECISION

Introduction

[1] This case concerns a complaint referral by the Competition Commission (“the Commission”) against Thembekile Maritime Services (Pty) Ltd (“Thembekile”), Silverbuckle Trade 21 CC (“Silverbuckle”), Nauticat Charters (Pty) Ltd (“Nauticat Charters”), Ferry Charters (Pty) Ltd (“Ferry Charters”) Heritage

Charters CC (“Heritage Charters”). Heritage Charters was also known and cited as Tigger 2 Charters (Pty) Ltd.¹

[2] The Commission alleges that on or about 22 September 2015, the respondents met at Cape Town Fish Market (coffee shop meeting), discussed and agreed to increase their prices when responding for a tender issued by Robben Island Museum (“RIM”) under Tender No: 01-2015/2016. In summary, the specific allegations against the respondents are as follows:

2.1. Thembekile, Nauticat Charters and Ferry Charters agreed to increase prices to R18 000 per trip for 140 passengers. Ferry Charters did not alter its price of R18 000 per trip for 140 passengers;

2.2. Thembekile and Nauticat Charters also agreed to charge R80 per person for any additional persons as their vessels take more than 140 passengers;

2.3. Silverbuckle and Tigger 2 agreed to increase their prices but did not increase to the level of the other respondents as their vessels are smaller. Silverbuckle agreed to increase its price from R7 750 to R8 775 per trip for its 65-passenger vessel and Tigger 2 increased its price from R11 500 to R12 650 for a 65-passenger vessel per trip.

[3] The Commission alleges that the respondents’ conduct is in contravention of sections 4(1)(b)(i) and (iii) of the Competition Act, 89 of 1998, as amended (“the Act”).

[4] Since the referral the Commission has arrived at settlement agreements with Thembekile, Silverbuckle and Nauticat Charters. This decision therefore only concerns Ferry Charters and Heritage Charters, who both deny the allegations.

[5] Ferry Charters’ core defence is that it did not increase its prices as alleged by the Commission simply because it had been charging the same price of

¹ Heritage Charters had submitted a bid to RIM as Tigger 2 Charters. The Commission had initially cited Tigger 2 as a respondent but subsequently amended it to Heritage. References to Tigger 2 should be read as Heritage Charters and vice versa.

R18 000 for the past four years. The price charged by Ferry Charters was generally known in the industry. In particular it was known to Richard Smith of Thembekile because he had previously been in business with Ferry Charters.

- [6] The core defence of Heritage Charters is that prior to the tender it was in negotiations with RIM to increase its price by 10%. The price in the tender reflected the very increase that he was seeking from RIM at the time and which RIM had agreed to.
- [7] Both respondents allege that the Commission in its pleadings has not made out a case on a balance of probabilities that there was no such an agreement and asked for the matter to be dismissed.

Background

- [8] The Commission's referral emanates from a complaint filed by RIM on 02 June 2016. The respondents are competitors in the market for the provision of charter services to tourists from V&A Waterfront to RIM and vice versa.
- [9] The matter was set down for hearing on 26-27 June 2018. At the commencement of the hearing on 26 June 2018, we were informed that the Commission's sole witness was ill. The matter was postponed *sine die* at the request of the Commission. Further, we were informed that Thembekile, Silverbuckle and Nauticat Charters had reached settlement agreements with the Commission. We stood the matter down to allow for these discussions to be finalised. The settlement agreements of the Commission with Silverbuckle and Nauticat Charters respectively were confirmed by the Tribunal on the same day being 26 June 2018. The settlement agreement between the Commission and Thembekile was confirmed as an order of the Tribunal on 27 June 2018. The hearing of the merits of the case in relation to the fourth and fifth respondents was postponed to 21-22 May 2019, and 18 June 2019 for closing argument.

Hearing of Evidence

- [10] The matter resumed on 21 May 2019. The Commission's only witness was Ms Zanele Mkubukeli a senior Supply Chain Manager at RIM and who served as the Secretariat to the Bid Evaluation Committee (BEC). The Commission did not call any witnesses from the respondents that had settled with it and who were allegedly present at the coffee shop meeting. Significantly the Commission did not call Mr Esa Yacoob of Silverbuckle on whose statements it relies to advance its case against both Ferry Charters and Heritage Charters.
- [11] Ferry Charters led its manager, Mr Craig Girdlestone. Mr Philippe Parmentier of Heritage Charters who was in attendance throughout the hearing and had filed a witness statement, was not called to testify because Heritage Charters closed its case after the evidence of Ms Mkubukeli and Mr Girdlestone on the basis that no case had been made out by the Commission against it.

Background to the tender

- [12] RIM owns three boats (Susan, Dias and Sikhululekile) that are used to transport tourists and staff from V&A Waterfront to the island and back. Two of the three boats (Dias and Susan) often break down because they are old. Since they are out of commission often, RIM is reliant on Sikhululekile which also gets commissioned frequently for maintenance. The ferrying of tourists to and from Robben Island is part of RIM's mandate and contributes largely to its turnover. In order to carry this out RIM supplements its ferrying capacity by contracting third party boat companies such as the respondents. RIM has always maintained a database of these boats. It selects the suitability of the vessel based on volume of passengers, price and safety.
- [13] Ms Mkubukeli explained that until the tender in question the pricing quoted by the boat operators was based on a per trip basis. RIM would negotiate pricing individually with boat operators and place them on its database. Tourists paid a cover price (ticket price) for a trip and booked online in advance. RIM would then, depending on the number of passengers and weather conditions,

schedule a boat for a trip. The cost of the boat trip and other expenses such as diesel were the operational costs associated with this service.

- [14] She explained that contracting external boat operators is RIM's single most significant expense. Essentially, this would mean that if boat operators increase prices for their trips then RIM would be forced to also increase its ticket prices (currently R360 per ticket)² in order to break-even.³
- [15] Hence price competition between operators was important for RIM. If RIM were to choose between two boats of the same capacity and similar safety features, the cheaper boat would be scheduled. Even if it was charged per trip by the boat operator, internally RIM compared operator prices on a per passenger basis.⁴
- [16] The tender was issued during March 2015. A compulsory briefing meeting was held on 22 September 2015. The closing date for submissions was 02 October 2015. Unlike in the past when prices were negotiated on a per trip basis, the tender in question required the boat operators to submit a bid on a per passenger basis.
- [17] Mr Girdlestone on behalf of Ferry Charters explained how the industry worked. Boat operators had different types of vessels with different passenger capacities. Thembekile, Nauticat Charters and Ferry Charters were larger boats which could ferry at least 140 passengers. However, the total passenger capacities for each of them differed – for Thembekile this was 230, for Nauticat Charters 190, and for Ferry Charters 140 passengers. Heritage Charters and Silverbuckle on the other hand are smaller vessels with a passenger capacity of 65. Even if the passenger capacities of the operators were similar this did not mean that their operating costs were the same. For example, Heritage Charters (Tigger 2) ran a vessel which was over 25 tons whereas Silverbuckle had a vessel below 25 tons and hence would have lower operating costs. Boats

² Per adult. RIM has different prices for children and non-South Africans.

³ 21 May 2019 Hearing Transcript, page 16.

⁴ 21 May 2019 Hearing Transcript, page 21.

were seldom filled to the capacity of the vessel. This is why boat operators preferred to charge per trip (as opposed to per passenger) because they needed to cover at the very least their operating costs regardless of the number of passengers.⁵ Return trips were offered at lower prices because of efficiencies gained in operating costs i.e. passengers would be ferried on both legs of the trip.⁶ In some instances prices for RIM staff were lower. Boat operators could roughly calculate each other's operating costs by virtue of knowing the price of diesel and the number of crew required for different vessel sizes.

Lodging of complaint by RIM

[18] Ms Mkubukeli testified that when the BEC convened to evaluate the bid documents, they noticed that Thembekile, Nauticat Charters and Ferry Charters all submitted identical bids of R18000 for 140 passengers. In addition to the R18000 for 140 passengers, both Thembekile and Nauticat Charters bid R80 per additional passenger as their vessels' capacity exceeded 140 passengers. On her calculation (as reflected in her witness statement) prices per passenger had increased significantly⁷ –

Table A

Company	Previous Capacity	Previous price charged per passenger	Bid capacity	Bid price quoted per passenger	price difference per passenger between current and previous price	% price difference per passenger
Thembekile	190	R95	140	R128	R33	35%
Nauticat Charters	190	R90	140	R128	R38	42%
Ferry Charters	140	R128	140	R128	R0	0%

[19] RIM then embarked on price negotiation meetings with each individual operator in order to obtain a better price from each respondent. Price negotiation

⁵ See evidence of Mr. Girdlestone in Hearing Transcript of 22 May 2019, pages 283-285 and 315.

⁶ See evidence of Mr. Girdlestone in Hearing Transcript of 22 May 2019, page 273, lines 2-6.

⁷ See pages 290-295 of the Trial Bundle.

meetings were held with each service provider separately and were recorded in the ordinary course.

[20] According to Ms Mkubukeli it was during the price negotiation meeting with Silverbuckle that Mr Yacoob told her that the operators had met and discussed prices for the tender.

[21] According to the transcript of the price meeting ("PM transcript"), Mr Yacoob said the following:

21.1. *"All the boat owners were sitting in the coffee shop etc...and price rigging is wrong you know...it is a concern of mine that people want to do price rigging it is not right, it is illegal...so all of them they call each other to a meeting and I was horrified that they said before the month the tender came in they actually wanted you to show the document you put in. I said I am not going to do that you know, it is a concern of mine that people want to do price rigging, it is not right it is illegal."*⁸

[22] Mr Yacoob does not specifically mention the names of the boat owners present in this meeting but was obviously referring to all the respondents who had attended the briefing meeting on 22 September 2015.

[23] Further in the PM transcript, Mr Yacoob is reported to have said:

23.1. *"What made me very upset in this when they called me before the tender process is that a similar capacity boat charges presently R11500 and they wanted to increase to R12500...I was called by my other colleague to say Esa I am going to ask R12500 and I bill two trips R10 000 I hope you do the same..."*⁹

[24] It is clear from the latter extract that Mr Yacoob does not expressly mention a representative of any firm, however Ms Mkubukeli inferred that he was referring to

⁸ Transcript: Price Negotiation Meeting between RIM and Silverbuckle, at page 334 of the Trial Bundle.

⁹ Transcript of Price Negotiation Meeting between RIM and Silverbuckle, at pages 330-333 of the Trial Bundle.

Heritage Charters because he made mention of a “similar capacity boat”. As mentioned, Tigger 2 (Heritage) and Silverbuckle have boats of similar capacity of 65 passengers.

[25] These two factors namely the increase in the pricing of the larger operators and Mr Yacoob’s remarks in the price negotiation meeting led RIM to lodge a complaint with the Commission. The complaint however was lodged only on 02 June 2016 and after RIM had conducted all its price negotiations with the operators.

[26] After negotiations were held with each operator the pricing per operator was as reflected below:

Table B¹⁰

TABLE 1

COMPANY	BID RATE PER TRIP	CAPACITY	RATE P/PERSON	NEGOTIATED RATE	CAPACITY	RATE P/PERSON
THEMBERKILE MARITIME SERVICES	R 18 000.00	140	R 128.57	R 18 000.00	190	R 94.73
	R 22 000.00	190	R 115.78	R 22 000.00	230	R 95.65
	R 24 000.00	230	R 104.34			
SILVERBUCKLE 22 T/A YACOOB YACHT						
MV Thandi	R 7 800.00	65	R 120.00	R 7 800.00	65	R 120.00
MV Tigriss	R 8 100.00	60	R 135.00	R 8 100.00	60	R 135.00
MV Ameera	R 5 150.00	38	R 135.00	R 5 150.00	38	R 135.00
Staff	R 7 750.00			R 7 000.00		
Sleepover	R 3 000.00			R 1 500.00		
NAUTICAL CHARTERS (MV Jester)	R 21 850.00	190	R 115.00	R 18 500.00	190	R 97.36
TIGGER 2 Charters (MV Tigger2)	R 12 650.00	65		R 11 500.00	65	
				R10 000.00 @ 2 TRIPS BACK 2BACK (09:00 & 11:00)	65	R 153.84
FERRY CHARTERS (MV Sea Princess)	R 18 000.00	140	R 128.57	R 18 000.00	140	R 128.57

[27] The Commission’s case against the respondents was based solely on the statements of Mr Yacoob as testified to by Ms Mkubukeli and the pricing submitted in the RIM tender document.

¹⁰ As seen on page 233 of the Trial Bundle.

[28] Ms Mkubukeli, not being present at the coffee shop meeting, could only testify to the prices she had received in the bid documents and what Mr Yacoob had conveyed to her.

[29] In the absence of direct evidence, the Commission, as conceded by it, required the Tribunal to draw an inference, from Mr Yacoob's statements and the pricing information contained in the bid documents, that the respondents had colluded to increase prices for the RIM tender at the coffee shop meeting.

Our Analysis

Pricing Evidence

[30] Mr Girdlestone testified that Ferry Charters had charged the same price of R18 000 to RIM for the last four years hence could not have colluded with the other operators to charge a price it had already been charging independently. He testified that Ferry Charters had submitted a bid of R18 000 for 140 passengers in the bid and this price remained unchanged after the price negotiations with RIM. Mr Girdlestone further testified that while there was a commonality in the prices submitted by Thembekile and Nauticat Charters, that was not the case with Ferry Charters.¹¹

[31] During cross-examination by counsel for Ferry Charters Ms Mkubukeli conceded that the commonality in the bids of Thembekile and Nauticat Charters raised RIM's suspicions and that Ferry Charters has been charging the same price (R18000) for the previous years, and its price did not change in the bid nor after price negotiations.¹²

[32] The Commission itself in para 18 of its referral affidavit confirms that Ferry Charters had not altered its price of R18 000 for 140 passengers in the bid. Ferry Charters had alerted this fact to the Commission on 26 June 2018 arguing that the allegations of collusion to increase prices could not be sustained

¹¹ 22 May 2019 Hearing Transcript, at pages 244-245.

¹² 21 May 2019 Hearing Transcript, pages 99-100.

against Ferry Charters. At that time the Commission submitted that it may endeavour to amend its papers for clarity purposes¹³ but ultimately did not do so.

[33] During cross examination Mr Kantor put some calculations to Ms Mkubukeli suggesting the prices per passenger had not increased as much as she had alleged in her witness statement and had in fact decreased in some instances. Ms Mkubukeli conceded this.¹⁴ These calculations were subsequently put up by Ferry Charters in its Heads of Argument.¹⁵ In our view nothing much turns on the magnitude of the increase or in fact an effective decrease in prices as calculated by Ferry Charters because what Ms Mkubukeli appeared to be comparing was the price for 140 passengers in the bid documents against the prices RIM was paying at the time. And in this instance, as conceded by her, the only two that she was concerned about were Thembekile and Nauticat Charters.¹⁶

[34] Further cross-examination from Mr Botha on behalf of Heritage Charters resulted in Ms Mkubukeli conceding that Heritage Charters had already communicated and motivated to RIM why it needed a 10% fee increase (from R11500-R12650) prior to the bid. An email dated 01 October 2015 sent by Mr Parmentier to RIM reveals that Heritage Charters had requested an increase of 10% and RIM had agreed to this increase in a responding email dated 30 December 2015.¹⁷ Heritage Charters did however agree to reduce its price during the price negotiation meeting. The Commission did not challenge this evidence.

[35] Thus, the pricing evidence that the Commission relies on cannot sustain the inference that Ferry Charters and Heritage Charters colluded with the other respondents to increase their prices for the RIM tender. The facts as confirmed

¹³ 26 June 2018 Hearing Transcript, page 12 lines 5-6.

¹⁴ 21 May 2019 Hearing Transcript, pages 120-128.

¹⁵ See table in Ferry Charters' Heads of Argument, page 23.

¹⁶ 21 May 2019 Hearing Transcript, page 101 lines 19-20.

¹⁷ E-mail from Mr Parmentier to RIM, at pages 1268-1269 of the Trial Bundle. E-mail from Ms. Zukiswa confirming RIM's acceptance of the R12650, at page 1275 of the Trial Bundle.

by the Commission's own witness (and supported by documents in the trial bundle) are that Ferry Charters had charged the same price for the last four years, had submitted the same price in the bid and maintained that price after negotiation. Heritage Charters on the other hand had written to RIM requesting a 10% increase prior to the bid, to which RIM had agreed and had submitted that price in the tender

[36] On this evidence, the contrary inference is more likely namely that Ferry Charters and Heritage Charters did not collude to increase their prices for the RIM tender.

Other evidence

[37] During cross examination Ms Mkubukeli conceded that RIM's knowledge of the alleged coffee shop meeting was entirely based on what Mr Yacoob had said during price negotiations with RIM and that RIM had not made further enquiries about his allegations.

[38] Ms Mkubukeli also conceded that Mr Yacoob had given inconsistent accounts of that meeting in a subsequent interrogation by the Commission¹⁸ and in his answering affidavit.¹⁹

[39] The inconsistencies in Mr Yacoob's version included him denying being at the coffee shop meeting²⁰ then conceding that he was there but only for 10-15 minutes²¹, then contrary to his statements to RIM, denied discussing prices with any other respondent including Heritage Charters at any time.²²

[40] The Commission thus had not put up any direct evidence of what had transpired at the coffee shop meeting. The Commission in answer to an enquiry by the Tribunal on 26 June 2019 as to whether it intended calling any witnesses who

¹⁸ Commission's interrogation Trial Bundle volume 2, pages 478, 482-482.

¹⁹ Silverbuckle Answering Affidavit, Trial Bundle volume 1, page 50 par 6.9.1-6.9.5

²⁰ Commission's interrogation Trial Bundle volume 2, page 481.

²¹ Commission's interrogation Trial Bundle volume 2, page 482.

²² Commission's interrogation Trial Bundle volume 2, page 521.

were present at the coffee shop meeting, submitted that the witnesses “*who were present at the coffee shop meeting could not bring any facts that would assist the Tribunal*” thereby implying that Mr Yacoob himself was not reliable enough to call.²³ Given the extent of his inconsistencies, it is no surprise that the Commission did not call Mr Yacoob.

[41] Mr Girdlestone however was able to provide a direct account of the coffee shop meeting. He explained that he was present at the coffee shop meeting because all the respondents were returning from a briefing session given by RIM on 22 September 2015. Prospective tenderers had to attend a compulsory briefing meeting on the tender. They had all done so and were walking back when they had to wait for a swing bridge to close. The swing bridge separates the RIM offices from their offices in the V&A precinct and is drawn from time to time to allow boats to pass. Pedestrians on either side of the bridge have to wait until it opens again. The respondents were waiting at the Cape Town Fish Market coffee shop and it was here that a discussion did take place. But the discussion was not about prices. After the briefing by RIM the respondents were confused about how they were going to price on a per passenger basis which was required by RIM in this tender.²⁴ The discussion revolved around this issue and industry specific concerns like the weather.

[42] The Commission did not challenge Mr Girdlestone’s evidence.

[43] Given that Mr Yacoob was considered to be unreliable by the Commission itself and Ms. Mkubukeli was not present at the meeting and therefore could not shed any light on what had transpired in that coffee shop meeting, the version of Mr Girdlestone stands unchallenged.

[44] Notwithstanding the inconsistencies in Mr Yacoob’s version, the Commission still urged us to have regard to the statements he made ‘contemporaneously’ namely those that were made by Mr Yacoob to RIM in the price negotiation

²³ 26 June 2018 Hearing Transcript, page 11-12.

²⁴ Hearing Transcript 22 May 2019, page 263.

meeting as opposed to those that he had made subsequently to the Commission when he faced prosecution. But as we show below, having regard to Mr Yacoob's contemporaneous statements does not assist the Commission.

[45] In relation to Ferry Charters the Commission had already in para 18 of the referral stated that Ferry Charters did not increase its price. The Commission argued that in light of Mr Yacoob's comments to RIM we should draw the inference that the decision by Ferry Charters not to increase its prices was somehow 'influenced' by the discussions at the coffee shop meeting. But the Commission's own witness has made short shrift of this argument by supporting Mr Gidlestone on the pricing evidence that Ferry Charters had charged the same price for the last four years. The Commission requires us to suspend logic and fairness when it asks that we draw an inference of collusion from statements made by Mr Yacoob, who the Commission itself considers to be unreliable, and in circumstances where its own witness Ms Mkubukeli supports Ferry Charters' version that it priced independently of the other boat operators.

[46] In relation to Heritage Charters the Commission's case is rendered even weaker when we consider Mr Yacoob's statement in full. He is reported to have said:

46.1. *"What made me very upset in this when they called me before the tender process is that a similar capacity boat charges presently R11500 and they wanted to increase to R12500...I was called by my other colleague to say Esa I am going to ask R12500 and I bill two trips R10 000 I hope you do the same . I don't believe that is right, that is not business that is not right and I was concern I was trying to call Robben Island (our emphasis)how do I address this issue you know in a tender bid is the cheapest best not the cheapest but if you can deliver the service and there is a good price it must be considered you must be the preferred supplier so I am going to ask the question to Robben Island in this tender process"²⁵ (SIC)*

²⁵ Transcript: Price Negotiation Meeting between RIM and Silverbuckle, page 333 of the record.

- [47] The statement seems incoherent at first but if we unpack it we see that Mr Yacoob advises RIM that he had received a call from “other colleagues” – the inference drawn by Ms Mkubukeli is that this was a reference to Heritage Charters – about pricing for a trip and two trips but that he Mr Yacoob thought this was *wrong*. In other words, while he is confessing to receiving a call from presumably Heritage Charters, at the same time he disavows the practice and considers it to be wrong. Mr Yacoob effectively *distances himself* from the conduct of his colleague.
- [48] In competition law jurisprudence competitors are required to distance themselves from collusive arrangements or concerted practices. Where a duty to speak arises, a competitor is obliged to distance itself from collusive conduct. In *Pioneer Foods*²⁶, after an evaluation of comparative jurisprudence²⁷, the Tribunal held that there is a duty on competitors to speak out against collusion. This duty should manifest in the form of positive evidence that shows that a competitor has distanced itself from collusion.²⁸ This approach was upheld by the Competition Appeal Court (CAC) in *MacNeil*.²⁹ While a responsibility is placed on competitors to publicly distance themselves from such conduct, the manner and the timing of that is not necessarily prescribed and would depend on the facts of each case.
- [49] Mr Yacoob was not called to shed any more light on his remarks of distancing himself but if we are required to have regard to this statement then the only reasonable inference that can be drawn from it is that Mr Yacoob had been approached – by someone – and that he did not approve of this practice. This is not evidence of collusion but on the contrary evidence by Mr Yacoob that he tried to distance himself from what in his view is an attempt to collude and “*not right*”. At best it is evidence of an attempt to collude and which on Mr Yacoob’s version failed.

²⁶ *The Competition Commission v Pioneer Foods (Pty) Ltd* Case no: 15/CR/Feb07 – 50/CR/May08

²⁷ *Trefileurope v Commission* Case T – 141/89 [1995] ECR II 791; *DKKK Kaisha & Others v European Commission* (citation omitted).

²⁸ Note 23, par 159.

²⁹ *MacNeil Agencies (Pty) Ltd v The Competition Commission* CAC Case no: 121/CACJul12.

Conclusion

[50] In *De Lacy*³⁰ the Supreme Court of Appeal enunciated that inferential reasoning requires an evaluation of the evidence in its entirety, and not merely selected parts. In summary, the legal principles applicable to drawing inferences are well established and can be summarised as follows:

53.1 The process of inferential reasoning calls for an evaluation of all the evidence and not merely selected parts;

53.2 The inference that is sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn;

53.3 The proved facts should be such as to render the inference sought to be drawn more probable than any other reasonable inference, if they allow for another more or equally probable inference, the inference sought to be drawn cannot prevail.³¹

[51] The evidence taken as a whole does not allow us to draw the inference suggested by the Commission. The Commission did not call a witness who had direct knowledge of the events that took place at the coffee shop meeting. The pricing evidence led by Ferry Charters and Heritage Charters and confirmed by the Commission's own witness does not lead to the inference that the respondents had colluded to increase prices for the RIM tender. Ferry Charters had been charging the same price for more than four years and submitted the same price in the tender. Heritage Charters had requested a 10% increase in its prices prior to the tender to which RIM had agreed. This was the price that had been submitted in the tender.

[52] Mr Yacoob was considered to be an unreliable witness by both the Commission and the other respondents. The statements made by Mr Yacoob to RIM must be seen through this lens but even if we are to place some weight on it then as

³⁰ *SA Post Office v De Lacy* 2009 (5) SA 225 (SCA), par 35.

³¹ *R v Blom* 1939 AD 188 at 202-203; *MacLeod v Rens* 1997 (3) SA 1039 (E) at 1049A-B; *H Mohammed & Associates v Buyeye* 2005 (3) SA 122 (C) 130D.

urged by the Commission, this does not shift the probabilities in favour of the Commission.

[53] The Commission bears the onus to show that the respondents colluded as alleged at the coffee shop meeting of 22 September 2015 to increase prices for the RIM tender. We find that the Commission has not discharged its onus, and has failed to show the existence of an agreement or concerted practice on the part of the respondents in contravention of s4(1)(b)(i) and(iii) of the Act. The matter is accordingly dismissed, and we make the order as set out below.

Absolution from the instance in the Tribunal

[54] During the hearing, Mr Kantor sought an absolution from the instance to discharge Ferry Charters as a respondent from this case. This was because Ferry Charters was of the view that the Commission did not establish a case to be met. The Tribunal refused to grant such absolution.

[55] We refused to grant such absolution from the instance because unlike an ordinary civil court, the Tribunal enjoys inquisitorial powers and could in a given case ask for more evidence whether *viva voce* or in documentary form.³² The Tribunal is also empowered under the Act to consider evidence whether or not it is admissible in court.³³ Thus in this case the transcripts of the RIM's interview with Mr. Yacoob were admissible, even though he had not been called to give oral testimony. We were entitled to hear whether the respondents' witnesses would confirm or repudiate this documentary evidence, which would make granting absolution an inappropriate exercise of adjudicative discretion. Furthermore, owing to the *sui generis* nature of our proceedings and complexity of cartels, there are instances whereby the Commission's case may be strengthened through information elicited during cross-examination of witnesses. Respondents can however elect to close their case but at the risk

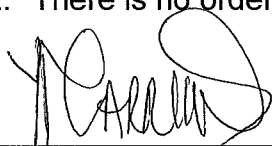
³² Hearing Transcript 22 May 2019, page 236, lines 5-10.

³³ See section 55(3)(a).

of an adverse inference being drawn against them, which was the advice given to Mr. Kantor.³⁴

Order

1. Ferry Charters and Heritage Charters are found to not have contravened sections 4(1)(b)(i) and (iii) under case no:CR067May17.
2. There is no order as to costs.



Ms Yasmin Carrim

14 August 2019
Date

Mr Norman Manoim and Mr Enver Daniels concurring

Tribunal Case Manager: Kgothatso Kgobe

For the Fourth Respondent: A Kantor SC Instructed by Michael Baynham Attorneys

For the Fifth Respondent: P.A Botha Instructed by Cluver Markotter

For the Commission: T Ramoshaba and D Mashego

³⁴ Hearing Transcript 22 May 2019, page 236, lines 13-14.