



COMPETITION TRIBUNAL OF SOUTH AFRICA

CASE No: CR049JUL12

In the Complaint Referral between:

THE COMPETITION COMMISSION

Applicant

and

FRITZ PIENAAR CYCLES (PTY) LTD	1st Respondent
MELODY STREET 18 (PTY) LTD	2nd Respondent
MONEYMINE 88 CC t/a HOTSPOT CYCLES (PTY) LTD	3rd Respondent
PEDAL – ON – MARKETING CC t/a MAVERICK CYCLE (PTY) LTD	4th Respondent
SALOOJEE’S CYCLES CC	5th Respondent
WEST RAND CYCLES CC	6th Respondent
BOWMAN CYCLES (PTY) LTD	7th Respondent
ALBATROS FISHING & CYCLING (Sole Proprietorship) PREVIOUSLY NAMED “WINNERS CYCLES (Pty) Ltd”	8th Respondent
OMNICO (PTY) LTD	9th Respondent
CYTEK CYCLE DISTRIBUTORS CC	10th Respondent
COOLHEAT CYCLE AGENCIES (Pty) Ltd	11th Respondent

PUBLIC VERSION

MAILLOT JAUNE TRADING (Pty) Ltd	12th Respondent
TRIDIRECT SA (Pty) Ltd t/a BICICLETTA	13th Respondent
LE PELOTON (Pty) Ltd	14th Respondent
DBS DISTRIBUTING CC t/a THULE CAR RACK SYSTEMS CC	15th Respondent
PEDALING DYNAMICS CC t/a DUNKELD CYCLES	16th Respondent
SUMMIT CYCLES (Sole Proprietorship)	17th Respondent
DYNAMIC CHOICES TWO CC t/a BESTER CYCLES	18th Respondent
JOHNSON CYCLE WORKS CC	19th Respondent
THE NEW JUST FUN GROUP (Pty) Ltd	20th Respondent

Panel	:	Yasmin Carrim (Presiding Member) Mondo Mazwai (Tribunal Member) Imraan Valodia (Tribunal Member)
Heard on	:	18 – 21 May 2015
Closing Arguments heard on	:	17 July 2015
Closing Arguments in relation to administrative penalty heard on	:	09 September 2015
Order and reasons issued on	:	30 May 2016

ORDER AND REASONS

INTRODUCTION

- [1] This case concerns the alleged involvement of two wholesalers in the cycling industry, namely, Omnico (Pty) Ltd (“Omnico”) and Coolheat Cycle Agencies (Pty) Ltd (“Coolheat”), in an alleged cartel to fix prices and/or trading conditions of bicycles and cycling accessories.
- [2] The case was referred by the Competition Commission (“the Commission”) in terms of section 50(2)(a) of the Competition Act no. 89 of 1998 (“the Act”), as amended, against 20 respondents who are either wholesalers or retailers of bicycles and/or accessories. However, by the time the hearing commenced, most of the respondents had settled with the Commission and concluded consent agreements in terms of section 49D of the Act, admitting that they had contravened section 4(1)(b)(i) of the Act.

PUBLIC VERSION

- [3] The Tribunal has confirmed 6 consent orders by wholesalers and 11 by retailers. Omnico and Coolheat are the only two respondents who deny that they have contravened section 4(1)(b)(i) as alleged. They are the 9th and 11th respondents respectively.
- [4] The essential question for us to decide is whether a contravention of section 4(1)(b)(i) by wholesalers has been established, in circumstances explained more fully in paragraphs 22 and 23 below.

CYCLING INDUSTRY BACKGROUND

- [5] In South Africa, cycling is for the most part a recreational sport practiced mostly by the affluent. It is common cause that the majority of bicycles and cycling accessories are imported into South Africa. According to the evidence, approximately 95% of bicycle and cycling accessories are imported, with very little manufacturing taking place locally.
- [6] Bicycles and accessories are imported by companies usually under license from foreign brand manufacturers. A customer wishing to buy a bicycle has the option to buy a fully imported branded bicycle or to buy components of a bicycle, such as a frame, tyres, rims, brakes, gears and other components of different brands which are then assembled to the customers' specification. At the relevant time, imported bicycles attracted an import duty of 15%, while duties on accessories were higher.
- [7] A typical supply chain comprises of the wholesaler, who supplies to the retailer, who in turn sells to the end-customer. Retailers consist of large national chain stores such as Makro, Sportsman's Warehouse and a host of independents. The latter group consists of larger retailers such as Cajee's, Westdene Cycle and Cycle Lab, with a number of smaller outlets typically established by cycle enthusiasts. Internet sales were also on the rise in the relevant period but for purposes of this decision, we do not concern ourselves with these.
- [8] Wholesalers as the importers of the products, market the products through advertisements placed in cycling magazines and other relevant media. As explained by Mr Brandon Els ("Els") of Probike and Mr Vincent Stevens ("Stevens") of Omnico, it's the wholesalers who market the products as the retailers are too small and do not have the capital and resources for importing and marketing the products or do not,

PUBLIC VERSION

ostensibly, have the requisite license arrangements for the upmarket brands with manufacturers.¹

[9] When advertising these imported products, wholesalers also advertise the retail price to the end consumer, in the form of a Recommended Retail Price (“RRP”).

Competitive dynamics

[10] It bears mention that not all wholesalers supply the full range of products sold in the cycling industry. Competition between wholesalers takes place along a variety of products, depending on the range they carry. For example, a wholesaler who only imports accessories is not necessarily in direct competition with another who only imports bicycles, and indeed the accessory seller might in fact supply that bicycle wholesaler with product. However the accessory wholesaler competes with a wholesaler who supplies both bicycles and accessories or only accessories.

[11] According to Els, the big wholesalers at the time of the alleged offence were Probike itself, Omnico, Coolheat, Cytex and Dragons. Probike was the largest as it supplied chain stores such as Makro, Game as well as independents.

[12] Omnico was another large wholesaler. It was established in 1985 by Mr Allan Hodson (“Hodson”). At the relevant time, Omnico imported various bicycles brands (such as Mongoose, GT, Schwinn and Cannondale). It also imported and manufactured cycling accessories (its brands included Fox, Shox, Stages, Giro, Bell, Ryder, Sigma and D’Arcs) for sale to retailers throughout South Africa.

[13] Coolheat was also one of the large wholesalers. It was only involved in the wholesale supply of cycling accessories. Its brands included the highly popular upmarket Shimano accessories. Mr Stephen Meltzer of Coolheat was regarded as the doyen of the industry.²

[14] During the relevant period, Omnico and Coolheat were direct competitors, at the very least, in the market for the procurement and supply of bicycle accessories.

[15] A peculiar feature of the industry is that, unlike in other industries where retailers set their prices (and determine their mark-ups) independently of wholesalers, pricing in the South African retail bicycle industry (price to the end consumer) is ultimately

¹ See Els and Stevens’ evidence, transcript page 18 and page 237.

² Transcript, page 88.

PUBLIC VERSION

determined by the importers themselves, referred in the industry and in this matter as “wholesalers” (upstream of the retailers). Pricing for the end consumer (or the retail price) is determined by wholesalers through the mechanism of a RRP which is given to retailers on a price list for each brand and model of bicycle or accessory.

[16] It is common cause that historically, wholesalers determined the RRP (price to the end consumer) uniformly by adding a mark-up of 35% to the wholesale price of bicycles and 50% to that of accessories. The evidence before us is that the formula has been used for many years in the South African cycling industry and its origins are unknown.³ As we discuss later, it is the retailers’ share of the RRP that became the subject of a series of meetings between wholesalers and retailers and ultimately the subject of the alleged collusion.

[17] Probike followed a slightly different model to its competitors, which became the bane of the industry’s existence. As described by Els, Probike had a sophisticated production line which enabled it to import bicycle parts in pieces to be assembled at its warehouses locally, thereby creating employment. This model also enabled Probike to avert the duties payable on imports in accordance with the Department of Trade and Industry’s regulations. It seems most other wholesalers did not enjoy this benefit as they did not have similar manufacturing facilities to enable them to avert import duties in any significant way.⁴

[18] ProBike also had a strong balance sheet as it had historically invested heavily in the company. These two factors allowed ProBike, to on the one hand, give a larger margin to its retailers (because it had 15% more to bargain with on bicycles), and on the other hand, offer better terms of repayment and thereby extend credit terms to its retailers, much to the dislike of other wholesalers.⁵ This model in turn enabled the retailers to offer larger discounts to consumers, much to the chagrin of the retailers such Mr Fritz Pienaar (“Pienaar”) of Fritz Pienaar Cycles (Pty) Ltd, the first respondent; and the second respondent, Melody Street 18 (Pty) Ltd, trading as Cycle Lab (“Cycle Lab”) who enjoyed none of these benefits. As explained by Pienaar, Probike continued to supply

³ See Pienaar, transcript, page 95, Els, transcript page 17 and Stevens, transcript page 401.

⁴ Transcript, pages 250-253.

⁵ Els transcript, pages 29 – 30.

PUBLIC VERSION

the so-called “discounters”⁶ who were retailers that offered a discount on the recommended retail price on bicycles to drive volumes and this ‘upset’ other retailers.⁷

- [19] It is common cause that in 2008 the cycling industry was facing financial pressure as a consequence of the global financial crisis, and the depreciation in the Rand. Pienaar explained that retailers found themselves struggling to pay their accounts on time, resulting in the wholesalers also being negatively affected by not getting paid or being paid late by the retailers.⁸ From the wholesalers’ perspective, Stevens confirmed that 2008 was a tough year for his customers (the retailers).⁹
- [20] It appears that these economic circumstances, together with the deep discounting made possible by ProBike, led to some retailers such as Pienaar and Mr Andrew Mclean (“Mclean”) of Cycle Lab, to initiate a series of meetings in the industry.
- [21] As mentioned, a peculiar feature of the industry is that pricing is determined by and large by wholesalers, both at the wholesale and retail levels. In Pienaar’s view the solution to the industry’s woes required collaborative effort. It required wholesalers, in co-ordination, to raise the mark-up on the wholesale price (which in turn would increase the RRP) in order to deliver more margin to retailers so that, even if retailers would discount off the RRP, they would be doing so from a higher base. It also required retailers to not compete vigorously with each other on the discounts they offered, and further required wholesalers such as ProBike to stop facilitating deep discounting by the larger retailers such as Cajees and Game.
- [22] A series of meetings then took place in the industry. These meetings involved a meeting between wholesalers and retailers, who are in a vertical relationship with each other and was preceded by separate meetings between wholesalers and retailers, who are in a horizontal relationship (*inter se*). A common theme in the discussions at these meetings was the increase in the mark-up on wholesale prices of bicycles and accessories (through increasing the RRP) by all the wholesalers, to all their retailer customers, at the same time. It is these meetings that the Commission alleges, led to price fixing.

⁶ Intermittently referred to as the ‘Indians’ and the ‘Muslims’, see transcript, page 30.

⁷ Transcript, page 36.

⁸ Transcript, page 97 -98.

⁹ Transcript, page 241.

PUBLIC VERSION

[23] For purposes of this decision in particular, it is the conduct of the wholesalers in relation to pricing that is of concern to us.

The Commission's case

[24] The Commission alleges that the meeting on 10 September 2008, attended by both wholesalers and retailers, resulted in an agreement, or agreements, or concerted practices on the part of wholesalers to directly or indirectly fix the selling price or other trading conditions of their bicycles and cycling accessories, by utilising the RRP as the *“mechanism by which downstream prices and margins of bicycles and accessories could be increased from October 2008 onwards.”*

[25] The Commission explained this RRP mechanism as follows:¹⁰

“Given the fact that the RRP is readily available to consumers through advertisements and the industry practice is to charge the RRP to a retail consumer, this “price” is not merely a recommendation that is of no significance in the market for the end consumer attending at a retail shop.

The price set by the wholesalers and subject to a known uniform mark-up, is, directly or indirectly, the price that will become known and charged to consumers by the retailers. The uniformity of an agreed increase in the mark-up between the wholesale price and the effect of this on the RRP is the mechanism by which the wholesaler respondents achieved the direct or indirect fixing of the selling price or any other trading condition of bicycles and cycling accessories, respectively, by agreement. (underlining is own emphasis)

... it is this RRP pricing mechanism which was the subject of that meeting. Specifically the proposal was made that the RRP for bicycles be increased by a mark-up from 35% to 40% or 50% for bicycles and from 50% to 75% for bicycle accessories. This increase would result in the increase of the selling price of these products by a similar percentage”.

[26] The Commission concluded that the firms had contravened section 4(1)(b)(i) of the Act.

¹⁰ Record, file1, page 528.

Tribunal Proceedings

- [27] The Commission called two witnesses in support of its case. The first witness was Pienaar, former owner of Fritz Pienaar Cycles, a retailer which at the time of the hearing was in the process of being liquidated. As a result, no consent order was concluded between the Commission and Fritz Pienaar Cycles, but Pienaar agreed to testify on behalf of the Commission. The second witness was Els, who was a shareholder of Probike, a wholesaler. At the time of testifying, Els had sold his shares in Probike and no longer had any interest in Probike.
- [28] The Commission initially intended to call Mr Shamus Kreuger of The New Just Fun Group (Pty) Ltd, also a wholesaler, but we were informed in the course of the proceedings that the Commission no longer intended to call him.
- [29] Omnico called Stevens, its Sales Manager, who reported to the CEO, Hodson, as discussed, the founder of Omnico.
- [30] Coolheat had initially indicated that it would call Mr Stephen Meltzer, its Managing Director, who was present throughout the hearing. However, we were informed on the day that he was due to testify that he would no longer be called.¹¹
- [31] We now turn to consider the evidence before us.

MEETINGS AND CORRESPONDENCE BETWEEN WHOLESALERS AND RETAILERS

- [32] As indicated above, the Commission relies for its case primarily on the meeting held on 10 September 2008. In order to properly understand how this meeting came about, it is necessary to set out the background to the meetings that preceded it. We will then analyse the meetings and related correspondence together with the evidence of the witnesses in order to determine whether the Commission has a case against either or both Omnico and Coolheat.

The 7 May 2008 meeting

¹¹ Coolheat had also informed the Commission that it could have Mr Meltzer as its own witness (the Commission's witness) but this offer was declined by the Commission.

PUBLIC VERSION

- [33] The first formal meeting, referred to as either the wholesalers' or suppliers' meeting, took place on 07 May 2008 in Kempton Park, in Gauteng. This meeting was organised by Mr Hodson, the Managing Director of Omnico. Hodson confirmed in Omnico's answering affidavit that he prepared an agenda and took minutes at the meeting.¹² He further confirmed that the meeting was attended by eleven wholesalers, including Coolheat. Mr Dave Wyatt ("Wyatt"), who at the time was the Managing Director of wholesaler Probike, declined the invitation.
- [34] E-mail correspondence shows that when Hodson enquired from Wyatt why Probike would not be attending the meeting, Probike principal Els responded to Hodson directly stating as follows: "...should we want to convey anything or make comments to any suppliers we will do so ourselves".¹³
- [35] At this meeting the establishment of a wholesalers' association and the benefits thereof were discussed. The minutes of the meeting show, *inter alia*, that discussion took place regarding the issue of late payments by retailers and how a wholesalers' association may assist in addressing this. They also show that a discussion took place regarding a possible lobby of government to drop the 15% duty on imports. It appears from the minutes that some wholesalers were not supportive of this. Indeed at the hearing, Els confirmed that Probike was not in support of this as this was an advantage it enjoyed over its competitors.
- [36] The minutes also recorded the following regarding "support for cycle dealers".
- "cycle dealers are struggling with a mark-up that was lower than the international mark-up and discussion would take place in future to ask association members to adjust their recommended retail price which would allow the cycle dealers a higher mark-up on goods. It was emphasised that this would be recommended and there would be no aspect of price fixing or controlling the prices by the association – just recommending prices to cycle dealers"*
- [37] The only witness before us who was present at the meeting was Stevens. His testimony was that the issue of increasing the RRP was never part of the agenda for the meeting. According to him, the issue was only raised towards the end of the meeting by one wholesaler who raised this issue because his customer had enquired about it.

¹² Record, file 1, pages 205 – 206.

¹³ Trial bundle file 4, page 1826.

PUBLIC VERSION

- [38] It does not matter whether raising the RRP was on the agenda or not. What matters is that it was discussed and that all the wholesalers present at that meeting, had become aware of the fact, as early as 7 May 2008, that retailers desired the wholesalers to act collaboratively, as opposed to independently of each other, in raising the RRP and that future discussions in this regard will be taking place. Both Omnico and Coolheat were present at this meeting. It appears however that no agreement to increase the RRP was reached at this meeting. The minutes record clearly that “*a discussion around the RRP would take place in future*”.
- [39] It is common cause that the association was never actually formed due to a lack of support from some of the major wholesale suppliers. Probike was certainly one.

The 11 June 2008 meeting

- [40] The second meeting took place on 11 June 2008 at Coolheat’s offices in Johannesburg, Gauteng. Stevens testified that the meeting was attended by four retailers; Pienaar, Mclean, Bruce Reynecke of Bruce Reynecke Cycles, and Lee Durham of Lee Cycle Centre, and three wholesalers; himself from Omnico, Meltzer from Coolheat and Mr Michael Hirschfield from Dragon Sports¹⁴.
- [41] As mentioned, there were three witnesses that testified before us, Els, Pienaar and Stevens. Els did not attend the meeting.
- [42] Stevens, who was at the meeting, testified that the meeting was “*definitely a recommended retail selling price meeting*”¹⁵. According to Stevens, the meeting was driven by Mclean who wanted wholesalers to collectively push up their RRP to retailers. Stevens testified further that no agreement was reached at this meeting. His evidence was that the wholesalers “*kept pushing back saying Andrew [Mclean], we have tried to form an association on much easier topics than this... We cannot agree on anything.*” He also said although the meeting was “*getting nowhere*” he had a feeling that Mclean was not going to give up the quest to increase the RRP¹⁶.
- [43] Pienaar’s recollection of the meeting was poor. He could not remember whether raising the RRP was discussed but said it may have been discussed in the context of the

¹⁴ Transcript, pages 277 – 278.

¹⁵ Transcript, page 279.

¹⁶ Ibid.

PUBLIC VERSION

wholesalers' association.¹⁷ He said he could not recall much about this meeting as it was not his meeting, but Mclean's.¹⁸ He said he remembered the September meeting better than this one. He was certain, however, that no agreement was reached as this was the reason the September meeting was arranged.

[44] As to whose initiative the meeting was, both Omnico and Coolheat have consistently argued that the initiative of raising the RRP was not the wholesalers' but that of retailers. We did not have the benefit of oral evidence by those directly involved in arranging the meeting.

[45] Els who received the e-mail but declined the invitation again, testified that his belief was that it was Omnico who set the retailers up to arrange the meeting.¹⁹ To the invitation, Els responded by e-mail, saying: *"This is the 2nd approach for us to meet to discuss and I will give you our honest position after just having communicated that telephonically to Michael [Hirschfield of Dragons] and Andrew [Mclean of Cycle Lab]. Probike will resolve problems and strategies directly with our customers – whether individually or as a group. Probike finds it odd that we have been approached by players that have dedicated considerable effort over the recent past to get retailers and suppliers in the East reasons why they shouldn't deal with Probike. Thanks for the invite, but Probike will not attend."*

[46] What we can glean from the e-mail correspondence is that Mclean invited Pienaar in an e-mail where he said: *"The meeting with the wholesalers is at 11 June and we will have it at Shimano, which is Coolheat's offices"*.²⁰

[47] The correspondence also shows that, on the same day that Mclean invited Pienaar to the meeting, Hodson sent an e-mail invitation to the wholesalers, including Coolheat and Probike, in which he said the purpose of the meeting was to *"...discuss problems in the industry and ways in which we can work together to make the industry stronger"*.²¹

[48] Hodson did not testify before us. It was put to Pienaar in cross-examination that Hodson was contacted by Mclean who requested him to invite other wholesalers.

¹⁷ Transcript, page 100.

¹⁸ Transcript, page 124.

¹⁹ Transcript, page 22.

²⁰ Trial bundle, file 1, page 38.

²¹ Trial bundle, file 4, page 1825.

PUBLIC VERSION

Understandably, Pienaar could not confirm this as he was not party to the discussion.²² When pressed, he said his understanding was that the meeting was Mclean's initiative, not Hodson's.²³

[49] Stevens who was also not directly involved in arranging the meeting, testified that the initiative was the retailers'. He said when the May 2008 meeting came to nothing (especially in relation to the RRP issue), Mclean, who had somehow heard of the wholesalers' meeting in May and that the RRP issue was raised at this meeting, took it upon himself to organise a further meeting with the wholesalers in order to try and persuade them to raise the RRP.²⁴

[50] We leave open the question whether insofar as the June meeting is concerned, it was the retailers' or the wholesalers' initiative to raise the RRP, as the witnesses who testified on this issue were not directly involved in arranging the meeting. In any event, it matters not whose initiative it was. Even if we were to accept that it was initiated by the retailers, this serves as no defence to the wholesalers. What was clearly contemplated in the proposal by Pienaar and Mclean, and which the wholesalers had already become aware of as early as 7 May 2008, was that retailers required an agreement among wholesalers that they would all increase their RRP's at the same time and preferably by the same percentage.

The 10 September meeting

[51] The third and last meeting was the meeting held on 10 September 2008, which took place at the Midrand Conference Centre, Gauteng. Pienaar testified that he and Mclean were the organisers of the meeting, and that the meeting was for both wholesalers and retailers. He also testified that the sole purpose of this meeting was to "*give it one more go*"²⁵ to convince the wholesalers to increase the RRP so as to afford the retailers greater margin.

²² Transcript, page 187.

²³ Transcript, page 188.

²⁴ Transcript, pages 275 – 276.

²⁵ Transcript, pages 103 - 104.

PUBLIC VERSION

[52] The meeting was the largest of the three meetings in terms of the number of those who were invited and ultimately present at the meeting. Pienaar estimated that approximately 200²⁶ people, comprising wholesalers and retailers attended.

[53] Pienaar testified that he personally drafted the invitation to the meeting. The subject line of the invitation was "Meeting – retail margins on bicycles". The invitation itself read as follows:

"I am sure that most of you are aware that there are a lot of concerns in the retail bicycle industry. There is a lot of rumours about retail shops that are struggling and wholesalers that are not getting paid. This causes a lot of problems for everyone in the industry and I am sure that you would agree that it is not a healthy position to be in.

I have had numerous meetings with retail shops and wholesalers over the last couple of months and everyone seems to agree that the retail shops are not making enough profit and that something needs to be done about it. The bicycle wholesalers agree that a healthier retail industry will also allow for a healthier wholesale industry.

I would like to set up a meeting with all the mayor [sic] bicycle wholesalers and retailers in Gauteng in an effort to come to some sort of resolution to the problem. The aim of the meeting is to increase the profit margins of retailers. Please invite all your dealers (retailers) to have a representative there so that every major bicycle retailer is represented. I would also like all the retailers to invite the wholesalers.

...

It is of utmost importance that we get all the major wholesalers and retailers in Gauteng to this meeting as we need everyone's support to be able to make a change and to be able to implement these changes right away." The underlining is our own emphasis.

[54] Pienaar's evidence regarding the reason for inviting as many retailers and wholesalers was as follows:

²⁶ Transcript, page 178.

PUBLIC VERSION

“ ... I was hoping that the majority of the retailers present at the meeting would feel the same as we felt at the time; that they were struggling and they needed some changes in the recommended retail price and if enough of them have the same view, that our wholesalers won't be able to ignore the retailers and would make some adjustments.”²⁷

[55] The agenda of the meeting which Pienaar said was largely drafted by him, with Mclean assisting, recorded the following as items for discussion:

Agenda:

Margins in the bicycle retail industry – 10 September 2008.

1. *Welcome and background to meeting*
2. *Current situation / problems in retail industry*
 - a. *Industry have changed a lot in recent years, but the retail margins have stayed too low*
 - b. *Retail shops in SA not on par with international shop:*
 - (i) *Much smaller margins*
 - (ii) *Smaller industry*
3. *Proposed new mark-ups*
 - a. *Bicycles – 50%*
 - b. *Accessories – 75%*
4. *Proposed date to start increased margins (1 October '08)*
 - a. *Why now?*
 - b. *Everyone needs to start simultaneously*
5. *Benefits to everyone*
 - a. *Wholesalers:*
 - (i) *Stronger retailers = better payments = better cash-flow*
 - (ii) *Improved shops = better presentation of product*
 - (iii) *Retailers won't need to wholesale to make a profit*
 - b. *Retailers:*
 - (i) *More profit means stable business*
 - (ii) *Less shops closing down and less stock dumping*
6. *Issues to address:*
 - a. *Discount mentality in cycling industry*
 - b. *Price fixing concerns*

²⁷ Transcript page 105.

PUBLIC VERSION

- c. *Importance of everyone's buy-in*
- d. *Retailer's commitment to dealers*

[56] Both Pienaar and Stevens who attended the meeting confirm that at this meeting, wholesalers and retailers discussed increasing mark-ups on bicycles and accessories to 50% and 75% respectively (from the industry norm of 35% and 50% respectively) simultaneously on 1 October 2008. The minutes of the meeting, discussed below, record this.

The minutes of the 10 September meeting

- [57] The first material aspect of the minutes, confirmed by Pienaar is that he proposed an increase for accessories from 50-75% mark-up, and a bike mark-up increase from 35%-50%. Pienaar clarified that the minutes recorded an increase in 'margin' when what he was talking about was 'mark-up'²⁸. In other words the retailers needed a higher mark-up from wholesalers on the wholesale price (which in turn would increase the RRP) so that they could improve their margins by starting off on a higher RRP.
- [58] Pienaar also confirmed saying, as reflected in the minutes, "*The only way we can do this is by all agreeing and uniting with the price increase, and getting the wholesalers to back this decision and help us by providing new suggested retail price (sic) to the retail shop who they supply, and advertise that price to the public.*"
- [59] He also confirmed that he said, as minuted "*Many of you are concerned that this may be some form of price fixing, it isn't and this is not illegal. By any means it could be seen as price fixing from suppliers that we need to sell at only 35% margins.*"
- [60] The second material aspect of the minutes confirmed by Pienaar was that the mark-up was to be raised from 1 October 2008 as recorded in the minutes. The evidence shows that 1 October is the beginning of a new cycling season as new models of bicycles and accessories are usually launched at this time and new price lists issued. According to Pienaar, it was important for the effective date to be uniform as no wholesaler would raise their RRP's unless other wholesalers also raised theirs at the same time to avoid undercutting each other.²⁹

²⁸ Transcript, page 117.

²⁹ Transcript pages 131 – 132.

PUBLIC VERSION

- [61] Stevens also confirmed that increasing the RRP, as described on 1 October 2008 was discussed. Indeed when he debriefed Hodson, as recounted by Hodson during his interrogation by the Commission, "...he [Stevens] said to me why these people wanted to go up to 50%, 45% and I said that is crazy." Hodson also understood that the increases would be implemented on 1 October 2008.
- [62] Neither Pienaar nor Stevens contested the accuracy of the minutes on these two aspects (the proposed percentage increases and date of implementation).
- [63] Stevens' raised two queries with the minutes. The first was that the minutes gave the impression that "*the entire meeting was about recommended retail selling prices. That was not what the entire...there were lots of things discussed, but these minutes make it look like that's all we discussed and that was the be-all and end-all meeting and that's what upset me.*"
- [64] In his witness statement and oral evidence, Stevens mentioned that other options such as, *inter alia*, doing away with the RRP altogether, improving service and retailers cutting down on stockholding were discussed.
- [65] Stevens' second query (which was also raised by Pienaar), was that there was no agreement on raising the RRP. Stevens' testimony was that there was "...*absolutely no agreement on anything whatsoever. There was more than just one point raised and there was no agreement on any of the points*". He further testified at length regarding his scepticism about the likelihood of reaching an agreement.
- [66] Regarding Stevens' first query, it is unsurprising that the entire meeting would have been about recommended retail selling prices. As mentioned, Stevens' own testimony regarding the meeting on 11 June was that "*it was definitely a recommended retail price meeting*"³⁰. He himself testified that when the meeting failed to reach an agreement, he knew that Mclean had not given up³¹.
- [67] He also testified that after receiving Pienaar's invitation to the meeting – with the subject line "*Meeting – Margins in the bicycle industry*" he called Pienaar to enquire

³⁰ Transcript, pages 279.

³¹ Ibid.

PUBLIC VERSION

what the meeting was about. His evidence was that Pienaar told him “*we really want to drive the RRSP issue...*”³²

- [68] In any event, a full reading of the minutes indicates that some of the options mentioned in his witness statement were in fact recorded in the minutes.³³ Crucially, and like Pienaar, he did not deny that the discussions regarding RRP's and the implementation date as recorded in the minutes took place, save to deny as we have mentioned, that an agreement was reached.
- [69] Pienaar tried to distance himself from the minutes. He said the minutes had been taken by a Mr Wessel van der Walt (“van der Walt”), his IT and Marketing Manager. According to Pienaar, van der Walt was inexperienced in the cycling industry. Pienaar also said van der Walt sent the minutes while he (Pienaar) was out of the office and before he (Pienaar) could approve them.
- [70] Whether Pienaar’s version is true or not, what remains of importance is whether the minutes capture the essence of the discussions at the meeting. As discussed above, neither Pienaar nor Stevens query the accuracy of the minutes insofar as they record a discussion on increasing mark-ups by the said percentages on the specified date (1 October 2008).
- [71] Els did not attend the meeting however his testimony was that the minutes as well as the feedback he received from Wyatt (who attended the meeting on behalf of Probike) was “*an exact reflection of the meeting that had happened in his boardroom*”³⁴.
- [72] As mentioned, Probike had declined invitations to the previous two meetings. Els testified that a few weeks prior to the September meeting, Pienaar had visited Probike’s offices and met with him (Els) and Wyatt. According to Els, “*the gist of the meeting [with Pienaar] was that the discounters are making life difficult for the retailers and that something needed to be done about it. And he requested me to increase our pricing to Cajey's [sic] [one of the discounters] and he requested me to increase our advertised pricing. I [sic] recommended retail pricing to that 50% and 75%...*”³⁵

³² Transcript, pages 281-282.

³³ Trial bundle, file 1, pages 108 – 114.

³⁴ Transcript page 47.

³⁵ Transcript, page 36.

PUBLIC VERSION

[73] Els testified that he refused to comply with Pienaar's request and warned him that he regarded these discussions to have competition law concerns. When he refused to comply, Pienaar threatened a group boycott against Probike or any wholesalers who did not co-operate.³⁶ According to Els, it was this threat that made him decide to send Wyatt to the September meeting. Pienaar did not dispute Els' recount of the meeting between them but denied making any threat to Probike.³⁷

RELEVANT PROVISIONS OF THE ACT

[74] Section 4(1)(b) provides that:

“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) It has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement, concerted practice or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect ; or

(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.”

[75] An “agreement” is defined in section 1 of the Act as: “a contract, arrangement or understanding, whether or not legally enforceable.” A “concerted practice” is defined in the same section as: “co-operative or co-ordinated conduct between firms, achieved

³⁶ Transcript, page 37. See also paragraph 11 of Els' witness statement. Els also testified that Probike actually lost about 6 to 10 retail customers that he knew were affiliated to Mr. Pienaar. Els' view is that he lost these customers because Probike was against what Pienaar wanted to achieve, i.e. an increase in the RRP's of bicycles and accessories - transcript pages 61 – 62.

³⁷ Transcript, page 200.

PUBLIC VERSION

through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement.”

[76] Let us turn to consider the legal framework for interpreting ‘agreement’ and ‘concerted practice’.

LEGAL FRAMEWORK

[77] Both the Commission and respondents rely on the CAC decision in *Netstar*³⁸ which was re-affirmed in the *MacNeil*³⁹ decision of the CAC, where the concept of agreement and concerted practice was developed as follows:

“[25] ... an agreement arises from the actions of and discussions among parties directed at arriving at an arrangement that will bind them either contractually or by virtue of moral suasion or commercial interest. It may be a contract, which is legally binding, or an arrangement or understanding that is not, but which parties regard as binding upon them. Its essence is that the parties have reached some kind of consensus. No doubt in many instances the same evidence may be relied upon as pointing towards either an agreement or a concerted practice. However, sight should not be lost of the fact that they are different. The definition of an agreement extends the concept beyond a contractual arrangement. However, what it requires is still a form of arrangement that the parties regard as binding upon themselves and the other parties to the agreement. Absent such an arrangement there is no agreement even in the more extended sense embodied in the definition. By contrast a concerted practice examines the conduct of the parties to determine whether it is co-ordinated conduct or they are acting in concert.”

[78] Quite what ‘consensus’ means is a subject of dispute between the parties.

[79] The Commission submitted that consensus was reached at the meeting of 10 September. By not distancing themselves from the discussions at this meeting, submitted the Commission, an inference can be drawn that Omnico and Coolheat reached an agreement which replaced their independent discretion of setting their own RRP's with collaborative (collusive) action.

³⁸ *Netstar (Pty) Ltd and others v Competition Commission and another* [2011] 1 CPLR 45 (CAC).

³⁹ *MacNeil Agencies (Pty) Ltd v the Competition Commission* 121/CAC/Jul12.

PUBLIC VERSION

- [80] The respondents submitted that the Commission has failed to prove an agreement firstly, because neither the evidence of the Commission's own witness, Pienaar, or Stevens', confirms an agreement. According to Omnico, the meeting of 10 September was intended by retailers to put pressure on wholesalers. It does not follow, however, that wholesalers horizontally reached an agreement among them.
- [81] Secondly, Omnico submitted that the Commission had failed to prove an agreement in the sense that Omnico and at least one other wholesaler or more, present at the meeting each reasonably believed the other to be assenting to the proposal in question, and each considered itself bound by it (the so-called doctrine of *quasi-mutual* assent) as espoused in *MacNeil*. This was because Stevens had no mandate to bind Omnico to any price related increases.
- [82] It is trite that our case law establishes a duty to speak on a firm that is present at a meeting where collusive activity is discussed. According to the case law, this duty is discharged when the firm concerned distances itself from the discussions by firmly repudiating its involvement in the discussions. The position in European case law, as contended for by the Commission is that non-distancing by a passive firm is sufficient to prove an agreement.
- [83] In *MacNeil* the CAC left open the question whether the South African approach to passive attendance and public distancing should be the same as European (or US) law. The CAC decided that, of concern ultimately, was the factual question whether sufficient consensus was achieved to constitute 'agreement' as defined in our Act and explained in *Netstar*.⁴⁰
- [84] It bears mention that counsel for *MacNeil* in the CAC argued that liability for non-distancing presupposes that an agreement was reached at the meetings where collusion was discussed, an argument similar to the respondents' case that there was no agreement to start with.
- [85] In rejecting MacNeil's argument, the CAC held as follows: "[82] *Mr Rosenberg, who did not in principle challenge the Tribunal's legal approach based on European cases, said that liability on the strength of passive attendance and non-distancing presupposes that the passive firm attended a meeting where some agreement was actually reached (i.e. between others). I think this misses the point that, in circumstances such as the*

⁴⁰ At page 23, paragraph 62.

PUBLIC VERSION

present, the very fact that an ‘agreement’ (within the broad definition of the Act) has been struck can be inferred from silence because there was a duty to speak and because silence in the face of such duty may create the reasonable impression of consensus (in private law, the doctrine of quasi-mutual assent.) This could be so even where the discussion is bilateral and the one party is silent. As it happens, the meetings with which we are concerned here were multilateral, and, on the probabilities, the attendees must have been aware of the purpose of the meetings.”

- [86] We will turn to consider whether on the facts before us sufficient consensus was achieved to constitute ‘agreement’. Before we do so however, we deal with a preliminary question raised by the respondents as a basis to dismiss the Commission’s case.
- [87] The question is when assessing a section 4(1)(b) contravention, whose prices or trading conditions are of concern? Is it the prices and trading conditions of the competitors themselves (in this case, Omnico and Coolheat as competitor wholesalers), or prices further downstream?

Does section 4(1)(b) apply to the wholesalers since RRP is a retail, not wholesale price?

- [88] Omnico submitted that the Commission’s case does not even get off the ground under section 4(1)(b) because this section contemplates that the fixing of a purchase or selling price, or other trading condition, must be that of the competitors themselves. RRP is the retailer’s price downstream. Since the Commission has not pleaded a case that the setting of prices at the retail level somehow amounted to, or resulted in a setting of prices or trading conditions at the wholesale level upstream, the Commission’s case falls to be dismissed on this basis.
- [89] Mr Stephens, who appeared on behalf of Coolheat, echoed the submissions made by Omnico. He added that section 4(1)(b) is inapplicable as the RRP merely amounts to a suggestion by wholesalers, which the retailers might choose to ignore, and sell at a higher or lower price.⁴¹ Mr Stephens submitted further that the Commission failed to allege how the wholesalers would be able to implement and monitor the retail prices allegedly set by them.

⁴¹ Heads of argument, page 18.

PUBLIC VERSION

- [90] The Act contemplates two types of price fixing: horizontal (between competitors) and vertical (between a supplier and customer). The former is located in section 4 and contemplates collusive conduct among parties in a horizontal relationship. The latter is located in section 5 and relates to parties in a vertical relationship such as between a supplier of goods and a downstream reseller of goods or services. Section 5(2) prohibits a supplier from fixing a minimum resale price. In our jurisprudence section 5(2) creates, much like section 4(1)(b), a *per se* offence in that no defence is available to respondents once the conduct has been proved.
- [91] The Commission has not mounted a section 5(2) case against the respondents. It has pleaded a section 4(1)(b)(i) case.
- [92] It is widely accepted in competition law jurisprudence that the concept of price fixing in section 4(1)(b)(i) is broad. It is not limited only to the mere setting in stone of a price to a particular value in Rands and cents, but includes various components of a price. This is why we find a range of agreements between competitors, which have not included the “fixing” of a price to some nominal value, that have been caught in the net of section 4(1)(b)(i). These have included an agreement among competitors to limit discounts to a maximum value,⁴² to give discounts off a national price limited to a range,⁴³ agreements to apply a certain formula,⁴⁴ agreements not to compete on price,⁴⁵ and agreements to fix maximum buying levels (prices) of various products.⁴⁶
- [93] The position is similar in other jurisdictions.⁴⁷
- [94] Section 4(1)(b)(i) is concerned with collusive, as opposed to independent, conduct or arrangements between firms in a horizontal relationship which are likely to lead to a lessening of competition between them. There is no limitation firstly, on an ordinary meaning of section 4(1)(b)(i) that the price that is the subject of a collusive agreement

⁴² See Competition Commission v Pioneer Foods (Pty) Ltd (15/CR/Feb07, 50/CR/May08) [2010] ZACT 9 (3 February 2010).

⁴³ See Competition Commission v DPI Plastics (Pty) Ltd and Others (15/CR/Feb09) [2012] ZACT 47 (4 July 2012).

⁴⁴ See Competition Commission v Safripol (Pty) Ltd (48/CR/Aug10) [2010] ZACT 57 (25 August 2010).

⁴⁵ Pioneer *supra*

⁴⁶ See Competition Commission v Power Metals Recyclers (Pty) Ltd (37/CR/Apr08) [2010] ZACT 46 (14 July 2010).

⁴⁷ See Whish, Competition Law, Seventh Edition – page 523. Also see Areeda, Fundamentals of Antitrust Law, Fourth Edition, chapter 20 (20.06).

PUBLIC VERSION

among competitors has to be located in that same market or at the same level. Indeed all that section 4(1)(b)(i) states is that “*an agreement... between parties in a horizontal relationship... is prohibited ...if it involves directly or indirectly fixing a purchase or a selling price or any other trading condition*”.

- [95] Secondly, the evidence of all the witnesses establishes that wholesalers competed on two levels in the industry. The first was that they competed with each other on the basis of retail prices. The wholesalers themselves determined the RRP and advertised their products and the RRP to the public at large. Pienaar explained that customers knew the advertised price and this constrained the ability of retailers to price higher than the RRP, as they would lose customers.⁴⁸ Were it not so, there would have been no need for Pienaar and Mclean to require wholesalers to all increase the RRP at the *same time*.
- [96] As put succinctly by Pienaar it was important for the effective date to be uniform “...otherwise there’s going to be wholesalers saying that I can’t put up my prices until X,Y, and Z does it...”⁴⁹, because of the risk of losing customers. The RRP of wholesaler X acted as a constraint to wholesaler Y’s RRP, which had an impact on each wholesaler’s sales. Therefore, for all intents and purposes the RRP was the wholesalers’ price and the basis of competition between them.
- [97] Although the RRP was located at the retail level and was the starting point of pricing in the market, it was not the basis of competition amongst the retailers. In relation to price, the retailers competed with each other on the basis of the discounts they were able to offer off the RRP, which as discussed above was constrained by the extent of mark-up they enjoyed from wholesalers. This was the reason for their unhappiness with ProBike and the so-called discounters.
- [98] Wholesalers also competed with each other on the basis of the mark-up extended to retailers, the upstream “wholesale” level (the second level of competition). While Omnico at the relevant time offered the industry standard of 35% on bicycles and Coolheat the industry standard of 50% on accessories, ProBike offered more on both, which enabled its retailers to offer deeper discounts off the RRP. ProBike was able to increase its sales volumes *vis-à-vis* other wholesalers through this mechanism but it

⁴⁸ Transcript, pages 118-119.

⁴⁹ Transcript pages 131 – 132.

PUBLIC VERSION

also enabled intense competition in the retail market through discounters such as Cajees and hence “upset” wholesalers and retailers alike.

- [99] Stevens’ evidence confirms the interplay between mark-ups at the wholesale level and retail prices downstream as a basis of competition among wholesalers. He explained that when Omnico entered the business of wholesaling accessories, its strategy was to offer higher margins to retailers in order to gain more sales. He said:

“... Alan [Hodson] had been in the industry for a while but he had only been with accessories. I joined the company. ...we started getting bikes and now we were going out to cycle dealers with bikes and we were saying guys, tell us the story here. What is the story with bikes? How does it work and they said listen, the industry norm is a 35% mark-up. ... So, we did the sums and we looked at everybody else’s bikes and we looked at their prices, their recommended retail prices ... and we said, but hang on a sec, guys. Here is a gap for us.

... If we give our cycle dealers a higher margin just like we do on accessories, we play the same old game on the bikes. It worked for us with accessories. We have been successful with accessories. We are going to be successful in bikes. So we came in about 8% higher than what the industry norm was. So we came in at about 43%, 44% when it came to mark-up for our cycle dealers with exactly the same theory.”⁵⁰

- [100] Stevens also explained that in 2008 Omnico’s mark-up on bicycles was the same as the industry norm of 35%, having dropped from 40% in 2006. He said:

“... if I remember correctly and in 2006 I said guys listen, this is not working anymore, you know? My sales are not ... the whole effect was I wanted to give the cycle dealers a reason to sell my bikes over everybody else’s bikes, but at the end of the day the consumer, you know, it comes down to price and it is that fine balance between incentivising the customer to really push your bike, which means your bike is going to cost a little bit more versus the consumer going, listen here, I don’t care what you say, Mr Cycle dealer. I have got X budget, these two bikes look identical to me. This one is R100.00 cheaper. You know what? Forget you. I am buying the R100.00 cheaper bike. So, that is the balance my life revolves around when it comes to bicycles...”⁵¹

⁵⁰ Transcript, pages 304 – 305.

⁵¹ Transcript, page 309.

PUBLIC VERSION

- [101] Hence we see that wholesalers competed with each other, horizontally, at both upstream and downstream levels.
- [102] This is why the proposal discussed and entertained at the September meeting was that wholesalers should agree (amongst themselves) to increase the mark-ups to all retailers to 50% on bicycles and 70% on accessories. As explained by Pienaar, this increase was to be achieved by wholesalers raising mark-ups on wholesale prices (upstream), through increasing the RRP (downstream) at the expense of the consumer.
- [103] In conclusion, the fact that the RRP resided at the retail level does not help the respondents escape the section 4(1)(b)(i) net simply because the RRP was their own price and a basis of competition between them. Retailers were constrained in their ability to increase prices above the RRP. The extent to which retailers could discount off the RRP was also limited by the mark-ups extended to them by the wholesalers.
- [104] Furthermore the fact that the price was a “recommended price”, as contended for by Mr Stephens, does not help the respondents escape the ambit of section 4(1)(b)(i). This is because, as discussed above, section 4(1)(b)(i) casts the net wide and includes components of price. It is not limited to a static price fixed in stone. Mark-up on wholesale prices were clearly a component of the price ultimately paid by the consumer.
- [105] Significantly, section 4(1)(b) is concerned with co-ordinated conduct in relation to elements of pricing as opposed to independent conduct. Here the impugned conduct was not simply that a recommended price was to be increased but that all the recommended prices of all the wholesalers would be increased by the same percentage by all of them at the same time. Wholesalers were not considering separately on their own to increase their RRPs on the basis of their independent business imperatives – instead, in this instance, wholesalers were sitting in a meeting (on the back of prior meetings among them discussing increases to the RRPs) and discussing a proposal to increase mark-ups to retailers by the same percentages (through increasing the RRP) at the same time. Such conduct falls squarely within the ambit of section 4(1)(b)(i).
- [106] We return then to the question of agreement. Do the facts before us show consensus sufficient to constitute agreement?

ANALYSIS OF THE EVIDENCE OF THE SEPTEMBER MEETING

- [107] As mentioned, both Pienaar and Stevens deny that an agreement was reached at this meeting. On the facts before us, these denials are unconvincing.
- [108] First, there is no doubt that Omnico knew that collusive activity would be discussed at the meeting – the e-mail invitation drafted by Pienaar was clear that the purpose of the meeting was to get the wholesalers, collectively and not independently, to raise the RRP so as to allow more margin to the retailers. The agenda, prepared by Pienaar and Mclean clearly stipulates the proposed new mark-ups and the proposed date of implementation.
- [109] On Stevens' own testimony when he received the e-mail invitation he called Pienaar to enquire what the meeting was about and was told that the retailers wanted to drive the RRSP issue to enable retailers to make more margin.
- [110] As to the agenda which also clearly itemised proposals on raising the RRP and implementation date, Stevens' testimony was that he did not recall receiving it. According to Pienaar, the agenda was handed out at the meeting. It does not matter whether Stevens received it or not, the point is he knew before the meeting that collusive activity would be discussed, indeed it was and yet he did not distance himself or Omnico from it.
- [111] Omnico tried to skirt this issue by saying although it knew that collusive activity would be discussed, it did not know or understand that the intention was for an agreement to be reached at the meeting. According to Stevens, he expected the meeting to be another "*waste of time*"⁵². This argument does not assist him. He knew that the collusive activity would be discussed and he attended nevertheless.
- [112] *MacNeil* clearly says "...if a firm's representative attends a meeting of competitors knowing that collusive activity will be discussed, or ... finds after arrival at the meeting that collusive activity is being proposed, ... in general the representative would be under a duty to distance from the proposals under discussion, either by leaving or by stating that he wants no part of them..."
- [113] Second, the minutes of the meeting of 10 September record an in principle agreement. Pienaar has prevaricated on the question of agreement. The minutes record him

⁵² Transcript, page 285.

PUBLIC VERSION

saying, in opening the meeting: “*I would like to say that everyone agrees in principle with raising the margins in the cycling retail industry, we have support from many retails [sic], whom [sic] have phoned or contacted me personally to say that they are behind the decision and that it’s time something like this occurs. i.e. Bowman’s, Hatton Cycles...Wholesalers all agree in principle that this is needed.*” Underling is own emphasis.

[114] When asked about this in his evidence-in-chief, Pienaar said he could not remember saying these specific words⁵³. According to him it was “*premature*” at that stage of the meeting to say there was an agreement. When asked “*...are you saying you never said something along the lines that wholesalers all agree in principle that this is needed after all your many discussions with people?*”⁵⁴, Pienaar’s response was that “*... we were talking about retailers who agree in principle*”⁵⁵, not the wholesalers.

[115] When pressed further on whether there was an in principle agreement by wholesalers specifically, Pienaar’s answer was affirmative, as demonstrated in the extract below:

Chairperson: And the same applies to wholesalers?

Mr Pienaar: And the same?

Chairperson: Applies to wholesalers?

*Mr Pienaar: Yes, so the individual contact that I had with people and mentioned the idea, I felt they supported it.”*⁵⁶

[116] During his interrogation by the Commission while still investigating the complaint, Pienaar also tried to deny an agreement. He said no decision was taken at the meeting. In cross-examination, he was taken to the extract of the interrogation in which he said the end point of the meeting was, having made the wholesalers aware that retailers were suffering, retailers would then discuss a change with their individual wholesalers, meaning that no decision was made at the meeting⁵⁷. Pienaar confirmed that indeed that was how the meeting ended.

⁵³ Transcript, page 113.

⁵⁴ Transcript, page 114.

⁵⁵ Ibid.

⁵⁶ Transcript, 114 – 115.

⁵⁷ Transcript, page 171.

PUBLIC VERSION

- [117] When pressed in our proceedings on his statement during the Commission's interrogation (whether an in principle agreement was reached), Pienaar deftly shifted the focus onto retailers and said: "*No, I think there was a feeling that there needs to be change, but how do I judge if there is an in principle agreement? There was not a signing of an agreement or a show of hands and who is going to do it and who is not going to do it and I think that is why there was after a follow-up e-mail to try and get the view of the people to say so, are we going to go ahead and from our side it was also pretty much a wait and see. We wanted to increase the price tags on our bikes, but I wanted to see what the other dealers are going to be doing because it will affect...I felt I could not do it alone, otherwise we will lose customers to other dealers.*"⁵⁸
- [118] Pienaar's rhetoric aside, what was clear is that by the end of the meeting, there was an understanding that mark-ups needed to be raised as proposed. There was also an understanding as to when this should happen. Pienaar's reservations as to who is going to do it and who is not, concern implementation of the agreement, not a lack of understanding of the desired behaviour.
- [119] Third, Pienaar's prevarication in oral evidence is inconsistent with his witness statement where he stated repeatedly that no attendee at the meeting opposed the proposal to raise RRP⁵⁹. He also said in the witness statement that wholesalers would have implemented the increases had the minutes not been exposed on the Hub.
- [120] This suggests that he had formed a view that there was consensus reached among those wholesalers present at the meeting that they would simultaneously, and not independently, put through mark-up increases to retailers by raising the RRP^s. He even expressed disappointment that some of the people who had attended the meeting and had spoken to him in clear support of the proposal distanced themselves from the proposal when the minutes were exposed on the Hub.
- [121] Fourth, Stevens' denial of an agreement stands in clear contradiction to Hodson's evidence during his interrogation. The relevant extract from the interrogation relied on by the Commission is the following:

⁵⁸ Ibid.

⁵⁹ Paragraphs 13 – 14 of the witness statement.

PUBLIC VERSION

“Ms Makhudu: So Vincent [Stevens] went to the meeting and I assumed that Vincent must have come back to you as the MD to say “this is what was discussed” what is it that he communicated with you after the meeting?

Mr Hodson: ..., he [Stevens] said to me why these people wanted to go up to 50%, 45% and I said well that is crazy. I mean you know it is difficult times and when the minutes came out afterwards, okay so that is what he said to me then. He basically said they discussed the mark up and you know what did..., what did I think we were going to do...

...

Mr Hodson: ...yah and I remember on 1 October I pushed up to 40%. So I must have said well you know maybe we must push up to 40%. Maybe we discussed it before in fact I think we had discussed it before but I sort of said well listen I am telling we are pushing up to 40% irrespective of what is going to happen in the market and so that is why on 1 October it went up to..., to 40%...”⁶⁰

[122] The Commission also relies on this exchange from Hodson’s interrogation:

“Mr Mtombeni: Okay can I ask then what..., what did you base the 40% on?...”

Mr Hodson: Because, it was only five percent. It was from 35 to 40. I did not want to make it 39 or 41 because then it is quite a difficult thing to work out I suppose. You know 40% is nice round figure based on what I heard overseas that the mark up is 50% based on what some cycle dealers said you know we should try and move it up to 40% again. Yah and of cause there was that one meeting we had with the wholesalers and we spoke a little bit about it then and people you know just gave us on what the recommended mark up should be.”⁶¹ Underling own emphasis.

[123] As mentioned, Hodson did not testify before us. Stevens did not controvert Hodson’s reasons given to the Commission for Omnico’s increase in its mark-ups, which in turn increased its RRP’s. Indeed his evidence was that he did not make pricing decisions

⁶⁰ Trial bundle, file 5, pages 2336 – 2337.

⁶¹ Trial bundle, file 5, page 2273.

PUBLIC VERSION

for Omnico without Hodson's approval as Hodson was "*hands-on*" and "*...makes final decisions. All things are brought to him.*"⁶² In his examination-in-chief, Stevens tried to dilute Hodson's admission by saying that a discussion to increase the RRP on bicycles had taken place internally before the September meeting.

- [124] It does not matter whether the increase was discussed internally before the meeting. The point is both Stevens and Hodson knew, as early as the May 2008 meeting that raising the RRP would be discussed in future as recorded in the minutes of that meeting. Stevens also testified that he knew after the June 2008 meeting that the RRP issue was not over. As for the September meeting, recall that Hodson sent Stevens on a "fact-finding mission".
- [125] Indeed Stevens' attendance at the meeting provided signals to Omnico on competitor pricing plans, which ultimately informed its decision on pricing. In the *Pioneer* matter referred to above, Pioneer made a similar claim that it had decided on its price increase before attending a meeting where price fixing allegedly occurred. In dismissing this claim, the Tribunal found that: "*The point of negotiation...is to arrive at an agreement, as close as possible to one's preferred position, with those others whose agreement is necessary to turn a unilateral wish into an agreed upon reality...The point of the meeting was to fine tune the agreement as to size and timing, and above all, to enable each to assess that its competitors understood the imperative to sustain the agreed price hike.*"
- [126] Stevens' own testimony was "*...I was really happy that there was dissension in the September meeting. You know why, because it played into my role. If everybody had pushed their prices up to 40%, well, I'm a bit stuffed, because my clever little plan of being a bit...giving a little bit more meat to the cycle dealers would have been flawed. Now everybody is doing it, well why am I special?*"⁶³
- [127] Unfortunately this "*clever plan*" is too clever by half. It merely indicates Stevens' intention to cheat on the agreement - a common feature in cartels, but does not undermine a finding that an understanding or arrangement was reached, despite Stevens' disavowal of such.
- [128] Fifth, concerns that raising the RRP as proposed could be in contravention of the Act were known long before the meeting. As mentioned, when Pienaar met with EIs before

⁶² Transcript, page 235.

⁶³ Transcript, page 324.

PUBLIC VERSION

the September meeting, Els told Pienaar that his plan “*would land [him] up in the Competition Commission*”⁶⁴, which discussion Pienaar did not deny. Price-fixing concerns were specifically listed in the agenda.

[129] The minutes of the meeting also record a certain Barney Treger saying at the end of the meeting that legal advice should be sought. Omnico submitted that this was not indicative one way or another whether there was a binding agreement at the meeting. We disagree.

[130] As the Commission points out, the caveat to obtain legal advice does not mean that no agreement was reached. By this time, an understanding of what needed to be done was clear. It is also clear from the minutes that Treger’s comment is made at the end of the meeting when Pienaar asked “*Does everyone agree? Is there any retailer or wholesaler who disagrees?*” There is no indication from the minutes or in any other document that anyone disagreed. As mentioned in his witness statement, Pienaar did not recall anyone opposing the proposal.

[131] Sixth, it is common cause that 11 retailers and 6 wholesalers have admitted contravening section 4(1)(b)(i) of the Act.

[132] In our view, the minutes of the meeting, despite the reservations expressed by Pienaar and Stevens about them, taken with the evidence of all the witnesses, sufficiently establish that an agreement by wholesalers to increase mark-ups on wholesale prices, through increasing RRP’s, was reached on 10 September 2008. The implementation date for the increases was also agreed at the meeting.

ANALYSIS OF THE EVIDENCE OF DEVELOPMENTS POST 10 SEPTEMBER

[133] The Commission relied on four pieces of evidence post the 10 September meeting to substantiate its claim that an agreement (or concerted practice) was reached at the September meeting.

The e-mail of 11 September 2008

[134] The first is that, a day after the meeting, Mclean’s colleague, Mr Gary Marescia e-mailed Mclean informing him that he (Marescia) had arranged a similar meeting for Cape Town. The e-mail reads: “*It is going to take a hard drive from 1 October to ensure*

⁶⁴ Transcript, page 37.

PUBLIC VERSION

*stores are coming up to speed on the price changes, and a continuous drive with bike suppliers, but we have to continue with this. Previous endeavours all fell apart. Need to keep key people focused on this.*⁶⁵

- [135] In response, Mclean indicated to Marescia that Mr Dean Black also of Cycle Lab was planning a similar meeting for Durban. Mclean copied this response to Pienaar, asking Pienaar to request the doyen of the industry, Meltzer to send an e-mail out for 'us'. On 16 September 2008, Pienaar responded that he would send the minutes later that day and would ask Meltzer to send them to his data base.
- [136] The Commission submitted that this e-mail correspondence shows that Marescia and Mclean believed that an agreement had been reached. That being the case for Gauteng, plans were underway to do the same in Cape Town and Durban.
- [137] Mr Wilson submitted that the Commission could not rely on this evidence as neither Mclean nor Marescia were called as witnesses. He submitted that should the Tribunal choose to take this evidence into account, it should do so holistically by having regard to all the evidence including Mclean's interrogation which indicates repeatedly, his denial of an agreement.
- [138] Taking the evidence as a whole, Mclean's denials seem, at best, to be premised on an incorrect understanding of the law, or at worst, a belief that the contrived plan to have the wholesalers issue new RRP's as proposed, would get the parties out of harm's way. This is because in the posting on the Hub relied on by the Commission, he denies that there was price fixing while at the same time confirming that the consensus will be to move the RRP up.
- [139] In his post, Mclean said: "*There was No Talk of Price Fixing [In fact this was reiterated more than once]...Price fixing will never work and everybody knows that.*" Mclean goes on to say "*...what was discussed was lifting the recommended retail on bikes, this is the price that the wholesalers advertise. (at the moment it looks like the consensus will be to move it from 35% to 40%) that is mark-up not margin!*".⁶⁶
- [140] Moreover, Mclean's firm, Cyclelab has concluded a consent order in which it admits to contravening section 4(1)(b)(i) of the Act.

⁶⁵ Trial bundle, file 1, page p125.

⁶⁶ Exhibit 1, page 6/8.

PUBLIC VERSION

[141] Thus Mclean's e-mail of 11 September that agreement was reached in Gauteng is supported by the evidence, taken as a whole.

The e-mail of 17 September 2008

[142] Secondly, the Commission relied on the e-mail of 17 September 2008 allegedly sent by van der Walt before Pienaar could approve it. This e-mail requested attendees (including non-attendees) of the September meeting to indicate their support for the increases by clicking the appropriate box.

[143] The opening paragraphs of the e-mail are exactly the words of the e-mail invitation drafted by Pienaar. The e-mail goes on to say: "*We've had a great response from the meeting on 10th September 2008! With all mayor [sic] bicycle wholesalers and retailers in Gauteng, we've all come to an agreement that raising the margins is the resolution to the problem.*" (our emphasis)

[144] It goes on further to say: "*It is of utmost importance that we sign-up and state that you support this decision, we need everyone's support to be able to make this change and to be able to implement the changes right away.*

...

[145] *Please click here to state if you are supportive of higher margins in the Bicycle Retail sector*".

[146] In cross-examination, Pienaar was asked what the purpose of sending the e-mail was. The exchange goes as follows:

"Mr Wilson: What were you seeking to try and do in that follow-up e-mail is to progress the initiative to see whether you could get some kind of indication of support for various increases and retail prices. Is that correct?"

Mr Pienaar: Yes, for sure. So I think what I was trying to achieve is for instance, if I was a Marida dealer and there was 4 other Marida dealers there, I was hoping to get feedback from the 4 Marida dealers to say that they feel we should have 40% or 50% on mark-up on the recommended retail price, which means we could then go back to Marida and say this is what your dealers in Gauteng want, can

PUBLIC VERSION

*we please get an adjustment or some change. So that was the intention of the follow-up e-mail.*⁶⁷

[147] Mr Wilson submitted firstly that the very existence of the e-mail was inconsistent with a binding agreement as there would have been no need for the e-mail, had an agreement been reached. He submitted that in any event, Omnico did not respond to the e-mail. Secondly, submitted Mr Wilson, Pienaar's response in the extract above pertained to getting consensus by retailers, not wholesalers. We have already dealt with this aspect of Pienaar's evidence in paragraphs [113]-[118] above. Thirdly, he submitted that the evidence of Stevens was that many other options were discussed (with no agreement reached on any of them) but the minutes gave importance to one item only. We have also dealt with Stevens' evidence regarding the latter in paragraphs [66]-[68] above.

[148] Regarding the point of sending the e-mail as Pienaar alleged, we agree with the Commission that Pienaar's need for feedback as to the level of increase in the mark-up does not detract from the fact that an agreement was reached. The uncertainties expressed by Pienaar, discussed in paragraph 115 above, as to who might or might not increase RRP's is relevant to the implementation of the agreement, not its conclusion. In any event, it is trite that implementation is not a requirement for finding a contravention under section 4(1)(b)(i).

Hub postings

[149] Thirdly, the Commission relied on postings on the Hub. By way of example, the Commission referred to Mclean's posting where he said: "*what was discussed was lifting the recommended retail on bikes, This is the price that the wholesalers advertise. (At the moment it looks like the consensus will be to move it from 35% to 40%) that is mark-up not margin!*".⁶⁸

[150] The Commission also relies on postings by Coolheat (through Meltzer, who was present at the meeting), none of which firmly repudiated Coolheat's involvement in the collusive agreement, or distanced Coolheat from it. For instance, in response to the irate public on the Hub, Meltzer posted: "*...the minutes on the Hub are not entirely the same as what was actually mentioned in this meeting. There are a lot of issues which*

⁶⁷ Transcript, page 177.

⁶⁸ Exhibit 1, page 6/8.

PUBLIC VERSION

*have been relayed which have been incorrectly minuted. Do yourselves a favour get on your bikes and go and enjoy yourselves.*⁶⁹

- [151] In his witness statement, Meltzer said that he did not agree with the proposal on how retailers could improve their business. He said he told the retailers to focus on providing better customer service. He denied that any agreement was reached at the meeting, which he said, was why Barney Treger of the New Just Fun Group (Pty) Ltd suggested at the end of the meeting that legal advice be sought before any decision could be taken.
- [152] None of these explanations in Meltzer's witness statement or his posts on the Hub assist Coolheat. The point is Meltzer did not voice his disagreement by firmly repudiating any impression that he may be assenting to the proposal. His suggestion at the meeting that retailers should focus on customer service and his *non-chalant* postings on the Hub are a far cry from a firm repudiation as set out in *MacNeil*, nor in the words of *Aalborg*⁷⁰, are they 'an expression of firm and unambiguous disapproval.'
- [153] Moreover, he did not avail himself to testify; his witness statement was not subjected to cross-examination and therefore serves of limited probative value.
- [154] As for Omnico, it appears that it did not participate in the Hub exchanges. Stevens testified that after reading the minutes on the Hub, he called Pienaar to complain about the minutes. As mentioned earlier, he was angered by the fact that the minutes gave the impression that only one thing (raising the RRPs) was discussed. However, Stevens did nothing to firmly repudiate his or Omnico's involvement in the agreement alleged in the minutes, the covering e-mail and the Hub posts.
- [155] Hodson, who came to know of the minutes from Stevens, also did nothing to repudiate Omnico's involvement in the alleged agreement.

Price increases in October 2008

- [156] Fourthly, the Commission relied on the fact that both Omnico and Coolheat increased their respective RRPs in October 2008. Mr Wilson submitted that the Commission's reliance on the increase in the RRP constituted circumstantial evidence. That being the

⁶⁹ Exhibit 1, page 1/5.

⁷⁰ *Aalborg Portland AS/ Commission of European Communities* [2005] 4 CMLR 251.

PUBLIC VERSION

case, he submitted, the evidence should be assessed on the principles in *R v Blom*⁷¹, as adapted to meet the civil standard of proof (on the balance of probabilities), namely: that all the evidence not merely selected parts must be evaluated; the inference sought to be drawn must be consistent with all the proved facts; and the proved facts should render the inference sought more probable than any other reasonable inference.

[157] He submitted that the explanations of the increase in the RRP given by Stevens were inconsistent with the Commission's case. Stevens' explanation was that Omnico had, since inception, operated as a maverick. According to him, Omnico's strategy had always been to provide higher mark-ups to the norm. As discussed in paragraph 99 above, when Omnico entered the cycling industry as a wholesaler of cycling accessories, it offered a higher mark-up (of 60%) compared to the industry norm of 50%, and adopted the same strategy when it later entered the bicycle industry by offering a mark-up of 44%, instead of the industry norm of 35%. However, as discussed in paragraph 100, in 2008, Omnico's mark-up was the same as the industry norm apparently due to changes in competitive conditions.

[158] These explanations, Omnico submitted were inconsistent with the Commission's case that Omnico's increase in the RRP was the result of the September meeting. Omnico submitted further that, in any event, the increases it implemented were not discussed at the meeting. Omnico increased its mark-up to 40% on bicycles (not 50%), and did not increase its mark-up on accessories. It also increased its settlement discount from 7.5% to 10%.⁷²

[159] Coolheat's involvement in the cycling industry is limited to the wholesale of accessories. According to the Commission, Coolheat increased its mark-up from 50% to 70%. As mentioned, Meltzer did not testify before us. In his witness statement, he stated that Coolheat did not increase its prices save for ordinary exchange rate fluctuations.

[160] Mr Stephens also submitted that the Commission's evidence was circumstantial and should be assessed on the principles of *R v Blom*.

[161] We find it unnecessary to deal with the Commission's reliance on the October increases by Omnico and Coolheat to find an agreement. This is because the question whether or not Omnico (or Coolheat) increased their prices concerns implementation.

⁷¹ *R v Bloem* 1939 AD 188 at 202 – 203.

⁷² Transcript, page 314.

PUBLIC VERSION

We have already held that the Act does not require the implementation of an agreement – merely its conclusion for a finding of a contravention under section 4.

[162] In conclusion, the agenda and minutes of the meeting of 10 September clearly itemise discussion points that are collusive, seek agreement on them and illustrate their benefits to the parties. The minutes demonstrate how RRP will be used as the transmission mechanism to achieve its objectives, and set out to address issues of implementation, including price fixing concerns.

[163] The e-mails of 11 and 17 September 2008 as well as the Hub postings referred to above substantiate the conclusion that an agreement by wholesalers was reached at the meeting of 10 September 2008. On the balance of probabilities, the evidence led shows that the objectives set out in the agenda, as recorded in the minutes, were met, thereby indicating that an agreement as contemplated in section 4(1)(b)(i) can be inferred from both Omnico's and Coolheat's conduct at the meeting.

THE REMAINDER OF THE RESPONDENTS' ARGUMENTS

[164] Mr Wilson tried to dispel the notion that any attendee at the meeting could have reasonably believed that Omnico was assenting and binding Omnico to the discussions. This was, *inter alia*, because Stevens had no mandate to agree on pricing. According to Stevens, Hodson was known in the industry as "*the face of Omnico*" and "*He is a very hands on managing director*⁷³..." Mr Wilson cited the Tribunal decision in the *Gralio* matter on the point of mandate.

[165] With respect, this argument does not assist Omnico. Firstly, the *Gralio* decision is distinguishable from Omnico's case. In the *Gralio*⁷⁴ case, Gralio was implicated in a cartel that seemingly operated from 1998 to 2007. In 2003, Gralio was acquired by a family trust at the instance of a certain Mr Singh who became its CEO. Through the acquisition, Gralio inherited a certain Mr Hansen who had apparently been an agent of Gralio at meetings where the cartel was discussed, and who continued, unbeknownst to Mr Singh to attend meetings ostensibly on Gralio's behalf.

[166] In this case, Hodson was well aware that Stevens would be attending a meeting where raising the RRP would be discussed. In fact, he instructed Stevens to attend the meeting as '*a fact-finding mission*'. Stevens gave him feedback of the discussions at

⁷³ Transcript, page 233.

⁷⁴ The Competition Commission v Gralio Precast (Pty) Ltd, case no: 23/CR/Feb09.

PUBLIC VERSION

the meeting, which as we discussed, indeed informed his view as to what to do with his own RRP.

- [167] Secondly, Omnico's argument of a lack of authority may have application in private contract law but does not assist it in the context of competition law. As observed by the CAC in *MacNeil*, the objective of private law principles (in creating a duty to speak) is to ensure fairness to the parties to the agreement, whereas competition law is concerned with harm to the public interest⁷⁵. A lack of mandate can therefore not avail Omnico where competition harm to the public consumer is concerned.
- [168] In any event, even on its own version, if Hodson was the decision maker, Hodson himself had a duty to speak. That duty arose at the earliest, when he decided to send Stevens to a meeting knowing full well that it was a meeting of competitors and the customers and that the nature of the discussions concerned the proposal that wholesalers should collaborate to increase the RRP at the same time, and not in competition with each other, so as to deliver better margins to the retailers, and at the latest when Stevens reported back to him.
- [169] Omnico also submitted that its conduct at the meeting was no different to Probike's. It submitted that its reason for attending the meeting was also because of pressure from the retailers, similar to Probike, which attended reluctantly due to Pienaar's alleged threat. Like itself, Omnico submitted, Probike was silent at the meeting and did not distance itself. Therefore, Omnico submitted, Probike should be "in the same boat" as it were with Omnico.
- [170] In our view, Probike's case is distinguishable from Omnico's. From the onset, Probike declined invitations to the meetings and did not attend the first two meetings, indicating that it wanted no part in discussions with its competitors. To the contrary, Omnico was pro-active in both meetings (the wholesalers' association on 7 May, was its initiative, and it was Omnico that sent e-mail invitations to the meeting on 11 June, which according to Stevens, was clearly an RRP meeting).
- [171] Moreover, Probike also distanced itself from the discussions of the meeting when the minutes were exposed on the Hub, which neither Omnico nor Coolheat did. Coolheat

⁷⁵ See paragraph 61 of the judgement.

PUBLIC VERSION

on the other hand was *non-chalant* in its postings, advising disappointed commentators to “*get on [their] bikes and go and enjoy [themselves]*”.⁷⁶

[172] Omnico did not take up the opportunity even after the minutes were posted on the Hub to distance itself from the collusive agreement. Stevens testified that after reading the minutes on the Hub, he was angered because the minutes were “...*horribly slanted towards a discussion that just involved recommended retail selling prices*” when that wasn’t the case⁷⁷. As discussed, he called Pienaar to complain about the minutes. Pienaar confirmed that Stevens called him to complain but he could not recall exactly what his complaint was⁷⁸.

[173] Neither did Hodson do anything to distance Omnico from the collusive discussions at the meeting. Indeed the only firm which seems to have taken steps to distance itself is Probike which sent the following email to Pienaar after the minutes were distributed:

*“Probike would like to make it clear that we attended the meeting reluctantly. Our company does not agree with the contents of your email which implies dealers must collude to achieve an agreed margin or exclude suppliers. Our company encourages competition amongst wholesalers and retailers. Please take this as our company’ official response to the minutes of the meeting which has been circulated by yourself.”*⁷⁹

[174] We mentioned earlier that in denying an agreement, Coolheat submitted that the Commission has not shown, assuming there was an agreement, how this agreement would be monitored and implemented. The Act does not require monitoring or even implementation of an agreement for it to fall foul of section 4(1)(b). The CAC held in *MacNeil* that consensus sufficient to constitute agreement under the Act need not amount to a contract at private law, need not be enforceable, punishable or even have a level of precision that the arrangement could defeat an argument that it is void for vagueness⁸⁰.

⁷⁶ Exhibit 1, page 1/5.

⁷⁷ Transcript, page 292.

⁷⁸ Transcript, page 206.

⁷⁹ Record, file 5, page 2059.

⁸⁰ See paragraph 56 of the judgement.

PUBLIC VERSION

- [175] Coolheat submitted that its involvement in the cycling industry was limited to the wholesale of cycling accessories. It is not involved in the wholesale of bicycles. Coolheat intimated that it could not be in contravention of section 4(1)(b)(i) as it did not compete in the wholesale of bicycles, along with Probike and Omnico.
- [176] This argument misses the point. We have already mentioned that not all suppliers at the wholesale level provide the full range of products in the cycling industry. As explained by Pienaar, it was necessary for all wholesalers to be present at the meeting because retailers wanted to put pressure on wholesalers to increase mark-ups on both bicycles and accessories.
- [177] In any event, as an accessory wholesaler, Coolheat competed with other accessory wholesalers who were present at the meeting, including Omnico. At best for Coolheat, its non-involvement in bicycle wholesaling will be relevant in determining the appropriate penalty if any, but does not exonerate Coolheat from being party to the agreement reached at the September meeting.
- [178] None of these submissions alter our finding that Coolheat and Omnico were party to an agreement reached by wholesalers at the meeting on 10 September 2008 in contravention of section 4(1)(b)(i).
- [179] In light of our conclusion that on the balance of probabilities an agreement can be inferred from the evidence before us, we do not find it necessary to consider whether a concerted practice has been established.

CONCLUSION

- [180] The evidence before us shows that both Omnico and Coolheat attended the September 2008 meeting, where an agreement was reached amongst wholesalers that mark-ups on wholesale prices for bicycles and cycling accessories would be increased and such increases were to be achieved by increasing RRP's, to allow more margin for retailers off the higher RRP . The implementation date was also agreed at the meeting. Omnico and Coolheat did nothing to distance themselves from these discussions.
- [181] Both Omnico and Coolheat knew that the RRP increases were discussed in previous meetings and, by the time the September 2008 meeting was convened, the evidence shows that they could have been in no doubt as to what the retailers required from them. Their explanations for attending and reactions to the proposal in question,

PUBLIC VERSION

objectively viewed, are consistent with an inference of an understanding or arrangement as contemplated in the definition of agreement.

[182] We therefore find that both Omnico and Coolheat engaged in conduct to directly or indirectly fix prices and/or trading conditions of bicycle accessories in contravention of section 4(1)(b)(i) of the Act. It does not matter that Omnico did not increase prices on its accessories as discussed at the meeting, as this goes to the implementation, rather than the conclusion of an agreement.

ADMINISTRATIVE PENALTY

[183] We now turn to deal with the question of the appropriate penalty below.

[184] The relevant provisions of the Act are sections 58 and 59 of the Act. In particular, section 59(3) provides that:

“When considering an administrative penalty, the Competition Tribunal must consider the following factors:

- (a) the nature, duration, gravity and extent of the contravention;*
- (b) any loss or damage suffered as a result of the contravention;*
- (c) the behaviour of the respondent;*
- (d) the market circumstances in which the contravention took place;*
- (e) the level of profit derived from the contravention;*
- (f) the degree to which the respondent has co-operated with the Commission and the Competition Tribunal; and*
- (g) whether the respondent has previously been found in contravention of this Act.”*

[185] Section 59(2) states: *“An administrative penalty ... may not exceed 10 per cent of the firm’s turnover in the Republic and its exports from the Republic during the firm’s preceding financial year.”*

PUBLIC VERSION

The Commission and respondents' submissions on methodology

[186] The Commission relied on our decision in the *Aveng*⁸¹ matter to calculate the administrative penalties to be levied against the respondents. The *Aveng* decision sets out a six-step approach to determining an appropriate penalty. This methodology, together with the parties' submissions, are discussed below.

- a. Step one: determination of the affected turnover in the relevant year of assessment. It is common cause between the Commission and respondents that the relevant financial year for the assessment of the affected turnover is 2009. The Commission calculated the affected turnover as follows: (i) for Omnico the Commission used the total turnover of both bicycles and accessories, including exports for 2009, which was R [...] and (ii) for Coolheat the Commission used the total turnover of accessories (as Coolheat was only involved in the wholesale of accessories) for 2009, which was R [...]. Both respondents however argued differently as discussed under the respective headings below.
- b. Step two: calculation of the "base amount" being that proportion of the relevant turnover relied upon. This base amount can range between 0 – 30% depending, *inter alia*, on the factors set out in section 59(3). The Commission applied a factor of 15% of the affected turnover for both respondents based on case precedent. The respondents however argued that a 15% base amount is not warranted in this matter for reasons we will discuss below. Omnico submitted that a base amount in this case should be significantly less than the 15% argued for by the Commission and closer to 5%. By applying 15% as a base amount to the turnover value of R [...], the Commission arrived at a figure of R 13 882 235.70 for Omnico and R 6 375 918.30 for Coolheat (based on a turnover of [...]).
- c. Step three: where the contravention exceeds one year, multiply the amount contained in step two by the duration of the contravention. The Commission submitted that the cartel ran from October 2008 to October 2009, and possibly longer as Omnico's price lists for three financial years following the September 2008 meeting show that Omnico may have benefitted from the cartel for more

⁸¹ Competition Commission v *Aveng (Africa) Ltd and Others*, Case Number: 84/CR/Dec09.

PUBLIC VERSION

than one year. However, since the Commission had Coolheat's price list for the 2009 financial period only, the Commission used a period of 1 year for both respondents. Omnico made a distinction regarding duration, depending on whether the Tribunal finds an agreement or a concerted practice. If the former, Omnico submitted that since any agreement reached at the September meeting lasted one week, the applicable duration should be one out of 52 weeks, as opposed to one whole year. If a concerted practice, then the applicable duration would be one year since the Commission had evidence for one year.

- d. Step four: rounding off the figure obtained in step three, if it exceeds the cap provided for by section 50(2). The Commission did not round off any figure as the penalties arrived at were less than the cap.
- e. Step five: considering factors that might mitigate or aggravate the amount reached in step four, by way of a discount or premium expressed as a percentage of that amount that is either subtracted from or added to it. Both respondents raised similar mitigating factors. They submitted that (i) they have not previously been found guilty of contravening the Act; and (ii) they have fully co-operated with the Commission during its investigation; the fact that they elected not to accept the Commission's settlement offer does not in any way, contrary to the Commission's submission, constitute a lack of co-operation. The Commission on the other hand is of the view that there are no mitigating factors.
- f. Step six: rounding off the amount in step five if it exceeds the cap provided for in section 59(2). If it does, it must be adjusted downwards so that it does not exceed the cap. The Commission did not round off any figure as the penalties arrived at were less than the cap.

Our assessment

Omnico

[187] As mentioned, the Commission submitted that the affected turnover was R [...], being the turnover for bicycles and accessories including exports. Omnico submitted that the affected turnover was R [...] (comprising bicycles and accessories, but for some unexplained motivation, excluding exports). Omnico however argued that the affected

PUBLIC VERSION

turnover should only be in relation to bicycles under R20 000 as the prices of bicycles over R20 000 and those of accessories remained unchanged. According to Omnico, the affected turnover should therefore be R [...] (which is the turnover for bicycles under R20 000).

[188] We are, however, not persuaded that the affected turnover should be limited to bicycles under R 20 000. This is because the agreement was to increase RRP's for both bicycles and accessories. There is also no justification to exclude exports as Omnico has done, since exports are included under the Act. We have therefore decided to use the affected turnover of R [...] (step one).

[189] We have previously held that step 2 relates to industry wide features of the cartel generally. The respondents submitted that the cartel was borne out of the economic downturn in 2008 where wholesalers were under pressure from retailers to increase margins for the retailers. Secondly, they submitted that the initiative was not a wholesalers' initiative; it was driven by retailers. Thirdly, the respondents submitted that the wholesalers did not stand to gain from increasing the RRP's as requested by retailers. Fourthly, the September meeting was a regional meeting and no meetings in other regions took place as the initiative died with the exposure of the minutes on the Hub.

[190] There is no dispute that there was an economic downturn in 2008. It is also not in dispute that the meeting where the agreement was reached took place only in Gauteng. We are however not persuaded that the respondents did not stand to gain from the cartel. The agenda clearly sets out in item 5, the benefit for wholesalers. The respondents have also not adduced any evidence regarding the number of volumes of bicycles and accessories that were sold in order to show whether in fact any of them suffered a reduction in sales as result of the cartel.

[191] Regarding whose initiative it was to raise the RRP, it does not make a difference whether it was a retailer initiative or not, the contravention is no less egregious.

[192] However, since this was a 'once-off' cartel with no clear evidence of what profits were derived from it, we have decided to use a base amount of 10% instead of the 15% proposed by the Commission. We have also taken into account that the agreement pertained to luxury products and not basic commodities.

PUBLIC VERSION

- [193] The base amount of 10% in Omnico's affected turnover is therefore R 9 254 824 (step two).
- [194] Regarding step 3, we are not persuaded that the multiplier to the base amount should be one week out of 52, instead of a multiplier of one whole year. This is because, because although the agreement reached at the September meeting was exposed a week later, the effects of the agreement carried on for longer than one year. According to the Commission, the effects of the agreement lasted for at least three years. However, as mentioned, the Commission submitted that since it only had Coolheat's prices for one year instead of three, it applied a duration of one year. We have decided to use a multiplier of one whole year since this is the evidence available to us, and have arrived at a base amount of R 9 254 824, being the base amount multiplied by 1.
- [195] Omnico's total turnover for the financial year ended June 2014 (being the most recent audited financial statements) was R [...] - 10% of this amount is 22 785 586.50. Thus the figure arrived at in step three (R 9 254 824) does not exceed 10% of Omnico's turnover in 2014 (step four).
- [196] Given the mitigating factors discussed in step 5 above, we have given a 50% discount on the amount arrived at in step four, which gives a figure of R 4 627 412. This is because, in addition to the mitigating factors raised in paragraph (e) above, Omnico increased its prices for bicycles under R 20 000 only, and did not increase for accessories at all. This amount does not does not exceed the statutory cap of 10% of Omnico's total turnover in 2014 (step six). The penalty amount is thus R 4 627 412.

Coolheat

- [197] Mr Stephens submitted from the bar that Coolheat only increased prices in relation to 94 products out of about 4000 product lines. He therefore submitted that the affected turnover should only be in relation to these products⁸². However, Coolheat did not provide the turnover of these products. In his witness statement, Meltzer did not make any reference to price increases for 94 products only. In fact, what he stated is that Coolheat never increased any prices save for ordinary increases determined by

⁸² Transcript, pages 603 and 606.

PUBLIC VERSION

exchange rate fluctuations from time to time. He also did not make any reference to raising prices of only certain products during his interrogation at the Commission.

[198] Meltzer chose not to give evidence at the hearing to explain Coolheat's price increases and whether or not the increases were in relation to only certain products. We have therefore used the turnover provided by Coolheat for the 2009 financial period, which is R [...] as the affected turnover (step 1).

[199] We have also decided to use 10% as the base amount, as we did for Omnico, for the same reasons. The base amount, calculated at 10% of Coolheat's affected turnover, is R 4 250 612 (step two). This amount is multiplied by 1, being the number of year(s) of the contravention, and remains R 4 250 612 (step three). Coolheat's total turnover for the financial year ended June 2014 was R [...] (being the most recent audited financial statements) - 10% of this amount is 7 198 345, 40. Thus the figure arrived at in step three, i.e. R 4 250 612 does not exceed 10% of Omnico's turnover in 2014 (step four).

[200] We have found no basis to give Coolheat a discount. This is because Meltzer was of no assistance to the Tribunal. As mentioned in his witness statement, he said that Coolheat did not increase its prices save for exchange rate fluctuations. He was in attendance throughout the hearing but chose not to testify. Instead, his counsel submitted from the bar that Coolheat increased prices only on 94 out of 4500 products, without any further explanation or supporting evidence. This contradiction required explanation, but Meltzer chose not to explain it.

[201] Furthermore, Meltzer did not take the opportunity to distance Coolheat from the agreement on the Hub. Instead his contribution on the Hub was condescending. We see no mitigating factors on Coolheat's part. While this is a first contravention for Coolheat and could be seen as a mitigating factor, this factor is outweighed by Meltzer's failure to explain the contradictions as discussed above. Furthermore, Meltzer unlike Stevens, displayed a particularly dismissive attitude towards concerns about price fixing on the Hub. One would have expected him in such circumstances to be enthusiastic to provide the Tribunal with an explanation of his posts, rather than leaving readers thereof with the impression that he ridiculed those who expressed outrage at the alleged collusion.

PUBLIC VERSION

[202] Without a discount, the penalty amount arrived at in step 3 remains R 4 250 612. This amount does not does not exceed the statutory cap of 10% of Coolheat's total turnover in 2014 (step six). The penalty amount is thus R 4 250 612.

PUBLIC VERSION

ORDER

[203] Omnico is found to have contravened section 4(1)(b)(i) of the Act.

[204] Omnico is hereby ordered to pay an administrative penalty in the amount of R 4 627 412. 50% of the penalty amount is to be paid within 60 days of the date of this order. The balance is to be paid within 60 days of the first payment.

[205] Coolheat is found to have contravened section 4(1)(b)(i) of the Act.

[206] Coolheat is hereby ordered to pay an administrative penalty in the amount of R 4 250 612. 50% of the penalty amount is to be paid within 60 days of the date of this order. The balance is to be paid within 60 days of the first payment.

[207] There is no order as to costs.


Ms MONDO MAZWAI

30 May 2016
Date

Ms Yasmin Carrim and Mr Imraan Valodia concurring

Tribunal Researcher : Ipeleng Selaledi

For the Commission : Adv. Michelle le Roux instructed by the
State Attorney
Administrative penalty – Ngoako Moropene and Thulani
Mandiriza

For Omnico : Adv. Jerome Wilson SC instructed by
Lowndes Dlamini Inc.

For Coolheat : Adv. David Stephens instructed by Shaie Zindel Attorneys