NON-CONFIDENTIAL VERSION

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CR128Nov14

In the matter between:

COMPETITION COMMISSION	Applicant
And	
ISIPANI CONSTRUCTION (PTY) LTD	First Respondent
NEIL MULLER CONSTRUCTION (PTY) LTD	Second Respondent

Panel	: A Wessels (Presiding Member) : M Mokuena (Tribunal Member) : A Roskam (Tribunal Member)
Heard on	: 17 August 2015
Last submission received	: 30 September 2015
Order Issued on	: 18 July 2016
Reasons Issued on	: 18 July 2016

Reasons for decision

Introduction

[1] This case involves a complaint referral by the Competition Commission ("the Commission") in terms of section 50(1) of the Competition Act, 89 of 1998 ("the Act"). The Commission's case before us was that the First Respondent, Isipani Construction (Pty) Ltd ("Isipani") had entered into a collusive agreement with the Second Respondent, Neil Muller Construction (Pty) Ltd ("NMC") in respect of two separate tenders, in contravention of section 4(1)(b)(iii), alternatively section 4(1)(b)(i) and/or section 4(1)(b)(ii) of the Act.

[2] The issue of merits has since been settled since Isipani has admitted the collusive conduct alleged in the complaint referral.[1]

[3] Thus the only remaining issue that falls to be determined by the Competition Tribunal ("Tribunal") is that of the administrative penalty to be imposed on Isipani in terms of section 59 of the Act.

[4] We note that the Commission sought no penalty against NMC, as it applied for, and was granted, conditional immunity on 11 April 2011 in terms of the Commission's Corporate Leniency Policy ("CLP").[2]

[5] As we discuss below, the defence taken by Isipani is two-fold:

(1) whilst it admits the contravention of section 4(1)(b)(iii) of the Act by engaging in the conduct of two separate instances of cover pricing, it alleges that the Commission's insistence on the maximum penalty of 10% of its turnover for each contravention is unjustified in the circumstances; and
(2) that the upper threshold of 10% of turnover should be reserved for the most egregious contraventions of the Act, within which, it alleges, cover pricing does not fall.

Background

[6] As part of the Commission's fast track settlement process of cartel activity in the construction industry, the Commission, on 01 February 2011 issued an invitation in terms of section 21 of the Act to all firms in that industry, to engage in settlement of contraventions of the Act ("the Invitation").

[7] Under the Invitation, firms were required to apply for settlement by disclosing all construction projects that were subject to collusive practices. The collusive

[1] Answering Affidavit paragraph 3.
[2] Government Notice No. 628 of 23 May 2008, published in Government Gazette No. 31064 of 23 May 2008.

conduct, in the context of the Invitation, included collusive tendering or "bid rigging" (which would include cover pricing).

[8] A cover price is normally a price provided by a firm that does not wish to win a particular tender, to a competing firm that does wish to win that tender, to enable the firm that wishes to win the tender to submit a lower price. A cover price may however also be a price that is provided by a firm that wishes to win a tender to a firm that does not wish to do so. In the latter case the cover price is given to enable the firm that does not wish to win the tender to submit a higher price than its competitor for the same tender.

[9] Isipani described the (latter) practice as follows:

> *"From time to time, a construction firm would be invited to tender for a project it did not wish to tender for, due to the location, nature, profitability or difficulty of the project, or simply the availability of capacity to take on the project.*
>
> *Being invited to tender usually means that one is on the client's tender list. The fear that construction firms have is that if they do not submit a bid in response to an invitation, they will be taken off the tender list and accordingly not be invited by the client to tender for future projects. Construction firms therefore felt that they had no choice but to supply a tender price for every tender that they were invited to participate in, even though they did not have the capacity to take on the project should their bid be the successful one.*
>
> *Thus a firm might, in such circumstances, request a cover price from a competitor. The firm has made an independent decision not to compete for a tender, but nevertheless wishes to submit a bid. It is however important to the firm that the bid not succeed, and in order to ensure that it does not, the price that is bid – the cover price – is above that of the competitor from which the price has been requested."*[3] *[our emphasis]*

[10] The Tribunal questioned Mr Arangies, the Managing Director of Isipani since 2010, about his knowledge of the interaction between Isipani and its competitor, NMC, at the time of the collusive conduct. Mr Arangies explained this interaction as follows: "*They [NMC] would have phoned my office and spoke to my colleague that was responsible for tenders and they would ask that we've been invited for this tender, but they are not interested and will he give them a cover price, once they phone*

[3] Isipani's Answering Affidavit page 52 and 53 para 14 to 17.

him, to get that."[4] He initially went on to testify that it was clear to Isipani what NMC's intention must have been when it requested a cover price.[5] Upon further questioning by the Tribunal he however said "*I wasn't part of the conversations. So, I'm not 100% sure if they [NMC] said that they aren't interested in the work. I can't, sorry.*"[6]

[11] Mr Arangies further testified that "*We [Isipani] wanted the work. We tendered for it. We worked out the tender and then they [NMC] said give us a price higher than yours .... So, in both instances we wanted the work ....*"[7] He confirmed that to his knowledge Isipani gave NMC an inflated price above its own tender price.[8]

[12] As stated above, Isipani has admitted that it contravened the Act by engaging in collusive conduct by providing cover prices to NMC for two separate tenders. These contraventions occurred between August and November 2010 when Isipani provided cover prices to NMC in respect of two separate tenders. The first tender, in August 2010, related to the construction of a private building in Stellenbosch, also known as the "Tienie Louw Project". The second tender, in November 2010, related to alterations and additions to the multi-storey building at the University of Stellenbosch's engineering faculty ("the University of Stellenbosch Project").

[13] We note that Isipani did not participate in the above-mentioned fast track process for construction firms to settle contraventions of the Act, notwithstanding the fact that it was aware of its involvement in cover pricing in both construction projects, and of the settlement process initiated by the Commission.[9] It must be stressed that the fast track settlement process was highly publicized.

Appropriate penalty

[4] Transcript page 87.
[5] Transcript page 87.
[6] Transcript page 87.
[7] Transcript page 100.
[8] Transcript page 100.
[9] Isipani confirmed in its Answering Affidavit at page 54 para 20 that it was aware of the Commission's investigations as well as the fast track settlement process.

[14] Section 59 of the Act empowers the Tribunal to levy administrative penalties for contraventions. The relevant sections of the Act reads,

"(1) The Competition Tribunal may impose an administrative penalty only -

(a) for a prohibited practice in terms of section 4(1)(b)... ;

(2) An administrative penalty imposed in terms of subsection (1) may not exceed 10% of the firm's annual turnover in the Republic and its exports from the Republic during the firm's preceding financial year."

(3) When determining an appropriate 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 Competition Commission and the Competition Tribunal; and

(g) whether the respondent has previously been found in contravention of this Act.

[15] In calculating the administrative penalty we will follow the approach adopted by the Tribunal in the *Competition Commission v Aveng.*[10] In that case the Tribunal identified a six-step approach for determining a fine in accordance with section 59 of the Act. We will be using these steps to determine the appropriate fine for Isipani. These steps are as follows:

15.1 **Step one**: determination of the affected turnover in the relevant year of assessment;

15.2 **Step two**: calculation of the 'base amount,' being that proportion of the relevant turnover relied upon;

[10] *The Competition Commission vs Aveng (Africa) Limited t/a Steeledale and others* (84/CR/DEC09).

15.3 **Step three**: where the contravention exceeds one year, multiplying the amount obtained in step 2 by the duration of the contravention;

15.4 **Step four**: rounding off the figure obtained in step 3, if it exceeds the cap provided for by section 59(2);

15.5 **Step five**: considering factors that might mitigate or aggravate the amount reached in step 4, by way of a discount or premium expressed as a percentage of that amount that is either subtracted from or added to it;

15.6 **Step six**: rounding off this amount 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.[11]

[16] The Commission contended that Isipani must be given the maximum penalty of 10% of its annual turnover for each instance of cover pricing.[12]

[17] Isipani disagreed with the Commission's contention that it should be fined separately for each admitted instance of cover pricing. Isipani alleged that when it was discussing or providing a cover price to NMC in August 2010, there was no indication that the November 2010 bid could even have been made or that Isipani was not aware of the November 2010 bid. Isipani thus argued that the fine must be calculated as one and not two self-standing contraventions of the Act.

[18] The fact is that Isipani admitted two separate instances of cover pricing. The first instance relates to the Tienie Louw Project and the second to the University of Stellenbosch Project.

[19] We agree with the Commission that each instance of a cover pricing constitutes a separate self-standing infringement of the Act. This is consistent with the approach followed by the *Office of Fair Trading* and the *Competition Appeal*

[11] *Competition Commission v Aveng* at para 133.
[12] Founding Affidavit para 34.2. See also Calculation of Proposed Penalty document dated 24 August 2015, provided by the Commission in response to a request by the Tribunal ("*Commission Calculation Document*").

Tribunal in *Kier Group PLC and others v Office of Fair Trading*[13] where each of the Appellants were fined separately for each cover pricing infringement.

[20] However, we have the discretion based on the facts of each case in the interest of fairness and the doctrine of proportionality to decide how to levy an appropriate administrative penalty pursuant to section 59(3) of the Act. In this case we have decided to levy a single administrative penalty in respect of the two separate incidences of cover pricing. In our decision we were cognizant of, the fact that there was a second, separate contravention of the Act in our final calculation of the single penalty amount.

[21] We now turn to deal with each of the above-mentioned six steps to determine the penalty.

STEP ONE

[22] The above-mentioned Tienie Louw Project and the University of Stellenbosch Project fall within what would be classified as building projects. Both the Commission and Isipani agreed that Isipani generates revenue from building contracts and therefore the relevant market is the market for construction services.

[23] The Commission argued that Isipani's total turnover for its financial year ended 30 June 2012 should be used for the calculation of the penalty in respect of each of the contraventions.

[24] Isipani argued that the appropriate year to use would be its 2011 financial year and that only a part of its turnover, i.e. turnover excluding negotiated contracts, should be used for the calculation of the penalty.

[25] Two issues fall to be decided under this step. First, the appropriate year for the determination of the turnover. Second, whether the penalty should be based on total turnover (as contended by the Commission) or whether a distinction should

[13] [2011] CAT 3.

be drawn between tendered and "non-tendered" (or negotiated) turnover (as contended by Isipani).

Appropriate year of turnover

[26] The Commission submitted that the relevant year should be determined with reference to when the collusive practice ceased. The relevant year that the practice ceased will be dealt with in more detail below in step three, since the Commission submitted that the collusive arrangement between the parties, or the effects of Isipani's contravention of section 4(1)(b)(iii) of the Act did not cease at the date of the agreements with NMC, but endured beyond that time.[14] The Commission therefore argued that Isipani's 2012 financial year is the relevant affected turnover year.

[27] Isipani was of a different view and submitted that the relevant financial year to use should be 2011, based on the fact that (i) the conduct took place between August and November 2010; and (ii) Isipani's financial year end is 30 June.[15] Therefore, according to Isipani, the conduct took place (and ended) in the 2011 financial year. Isipani furthermore argued that the Commission referred incorrectly to the *Aveng* decision to find application to the provision of "simple cover pricing". Isipani contended that it is preceded by the rationale that the affected turnover "*is based on sales of the products or services that can be said to have been affected by the contravention*".[16]

[28] We submit that, although not expressly considered in the *Aveng* decision[17], the act of cover pricing is an offence in terms of section 4(1)(b)(iii) of the Act and thus falls to be determined under the six step process as set out in the *Aveng* decision.

[29] In the *Aveng* decision the Tribunal held that the relevant year of assessment is "*the last financial year of the period for which we have evidence that the cartel existed.*"

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[14] Transcript page 3.
[15] Answering Affidavit para 27.
[16] *Competition Commission vs Southern Pipeline Contractors and others* (23/CR/Feb09) at para 44.
[17] Which concerned the fixing of prices and levels of discount.

[30] The Commission contended that the practise of cover pricing involved a reciprocal obligation to provide Isipani, in this instance, with a cover price at a later stage, if required. Mr Arangies confirmed this under cross examination: -

MR QUILLIAM: Okay. Following from the August 2010 and the November 2010 tenders for the university, based on your understanding of simple cover pricing as well as the indirect benefit that you have alluded to if in the future Isipani could at least approach NMC for a reciprocal benefit of the same, would you provide me with the cover price, merely the question. If such a situation arose, would you … let's just ask it this way. Was there any opportunity in the future that Isipani approach NMC to cash in at this indirect benefit?
MR ARANGIES: Yes, it might be.
MR QUILLIAM: Let me just understand the question. So, it certainly is possible based on what you've just said that Isipani could have approached NMC to provide it with a cover price on a certain bid.
MR ARANGIES: Yes.
MR QUILLIAM: Following the November 2010 tender. Is that correct?
MR ARANGIES: Yes.[18]

[31] We concur with the Commission that the reciprocal benefit of the conduct to Isipani ceased only when Isipani abandoned this benefit, which it did on 23 November 2011. In this regard Isipani, having taken legal advice pursuant a Commission letter of 23 November 2011 in which it was accused of bid rigging, ceased all communication with NMC and any involvement in cover pricing.[19]

[32] We have further considered the fact that the effects of this conduct on competition would have endured for as long as the intention of NMC being retained on the university's tender list was realised, which, although we do not have a precise date for this, went beyond November 2010; NMC's intent, according to Isipani, was to remain on the university's tender list for future building projects whenever they occurred.

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[18] Transcript page 34.
[19] See Answering Affidavit page 62; Transcript page 35.

[33] Thus given the evidence that the conduct took place in the year 2010, but was only ceased in November 2011, the turnover for the 2012 financial year should be used for calculating the penalty.

Total turnover or only "non-tendered" turnover

[34] The Commission contended that the penalty should be based on Isipani's total turnover.

[35] Isipani however argued that a distinction should be drawn between tendered and "non-tendered" (or negotiated) turnover. According to Mr Arangies negotiated contracts occur where a client selects its builder of choice and negotiates a contract with that builder. He further contended that cover pricing does not arise in respect of these contracts. Based on this logic Isipani contended that the affected turnover should be calculated on the basis that only turnover resulting from invited tenders should be considered and not Isipani's overall annual turnover. This would significantly reduce Isipani's turnover to be used for the calculation of the administrative penalty.

[36] We disagree with Isipani's argument that only turnover resulting from invited tenders must be used for the calculation of the administrative penalty. The CAC confirmed that affected turnover can be used in the initial determination as to a penalty to be formulated in terms of section 59(3).[20] There is no basis to deviate from the Tribunal's previous interpretation that affected / relevant turnover means the line of business or the market in which the contravention has taken place.[21] As pointed out in *Aveng,* affected turnover must however not be conflated with a relevant market approach – the former does not demand the rigour or precision required of the latter.[22]

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[20] CAC, *Southern Pipeline Contractors and another v The Competition Commission,* paragraph 52.
[21] Tribunal, *The Competition Commission v Southern Pipeline Contractors and another,* paragraph 44-45.
[22] *Competition Commission v Aveng (Africa) Ltd* 84/CR/Dec09 par 37.

[37] Thus we conclude that Isipani's total turnover for its financial year ended 30 June 2012 of R[...][23] should be used for the calculation of the administrative penalty.

STEP TWO

[38] The next step is to calculate the base amount, i.e. that percentage of relevant turnover to take into account in the calculation.

[39] The issue *inter alia* is how cover pricing, as a specific class of cartel conduct, viewed in the context of other collusive conduct such as price fixing and market division, should be treated for purposes of determining administrative penalties.

[40] The Commission suggested a base amount of 17% for each contravention. Isipani suggested a base amount of 10%.

[41] As per the *Aveng* decision we considered the available evidence relating to (i) the nature, gravity and extent of the contravention; (ii) any loss or damage suffered as a result of the contravention; and (iii) the market circumstances in which the contravention took place.

[42] Contraventions of section 4(1) of the Act constitute *per se* offences and are considered the most serious of the contraventions of the Act. Of these contraventions bid rigging is seen as more harmful than even price fixing because of the fact that it is so much easier for the cartel members to enforce.[24]

[43] We further agree with the Commission's argument that cartel conduct was so pervasive in the South African construction industry that the appropriate administrative penalty (i.e. the percentage of the relevant turnover to be used in this step) should be sufficiently high to constitute an effective deterrent to Isipani, as well as other firms, from engaging in such collusive conduct in the future.

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[23] Certain information has been claimed as confidential by the Respondent and has thus been removed from the Tribunal's public reasons.
[24] See Areeda and Hovenkamp, *Antitrust Law*, paragraph 2005b.

[44] This approach would suggest that the percentage on which to calculate the base amount should be closer to the 30% upper bound. However, in this case given that Isipani did not directly profit from the cover pricing since it was ultimately unsuccessful in winning the two tenders in question, the gravity of the conduct is reduced from what it might have been otherwise. This however, does not mean that Isipani's conduct did not harm the competitive process, as we explain below.

[45] In the two instances in 2010, where Isipani provided NMC with cover pricing, the alleged intention of NMC, according to Isipani, was to submit a bid at a higher price than Isipani in order to ensure that it did not win the tender, but remain on the University's tender list to be invited to tender for future projects. Isipani, on the other hand, in both instances submitted bids with a view to being awarded the tenders, although in the end it was unsuccessful in both tenders.[25]

[46] The harm of this practice can be explained with reference to the customer, the University of Stellenbosch. The University uses a closed tender process in terms of which it only invites pre-selected contractors to tender. On Isipani's version, by colluding with NMC, it enabled NMC to bid for a tender that it could not perform. By colluding NMC provided the University with false information on its pricing, capabilities and capacities, therefore deliberately misleading the customer since it was not able to properly and honestly bid for the tender. More importantly, NMC tendered at an inflated price above that of its competitor which gave the customer a false sense of the level of competitive prices for each project.

[47] Isipani submitted that the fear existed that by not tendering the pre-selected contractors may be excluded from future invitations to tender. Thus, absent cover pricing, the non-bidding firm may be removed from the tender list and be replaced with a firm that is able to submit a competitive bid. The harmful effect of this to

[25] There were seven bids for the Tienie Louw Project ranging from R12 280621 to R14 077 000; and eleven bids for the University of Stellenbosch Project, ranging from R26 692 370 to R29 746 800. According to Isipani, its bids were not the lowest on either project and it was therefore not awarded either tender. NMC's bids were allegedly higher than that of Isipani. Although neither of these two parties directly benefitted by winning the tenders, we have explained how these parties' conduct would be harmful to competition not only in relation to the immediate tender but also future tendering exercises.

competition is that it excludes other more competitive firms from being placed on the University's tender list, and thus undermines not only the current tender process, but also future competitive tender processes.

[48] This echoes the sentiments expressed by the CAT in *Kier* where the CAT analyzed the harm associated with simple cover pricing as follows:

> *"Some of the effects there mentioned may also occur where an unwilling bidder, rather than requesting a cover price, simply decides to have a stab at formulating a bid which is sufficiently high to ensure that he does not win. Such a bid would hardly be regarded as truly "competitive", and the anticipated number of competitive bids may therefore still not necessarily be received by the client even though no cover price has been provided. On the other hand, as the OFT points out, the bidder may risk losing credibility if his inflated bid is very out of line with other bids. Cover pricing therefore provides protection from that particular element of competition and is thereby capable of providing an illicit advantage in relation to future tendering exercises. In the absence of cover pricing, companies who were invited to bid but did not want the work would either have to take the credibility risk associated with an artificially inflated bid, or decline the invitation to tender at the appropriate time. In the latter case the client would normally be in a position to invite a substitute tenderer who might well be interested in obtaining the work, and would therefore submit a competitive bid.*
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> ...
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> *It is an unlawful practice which at the very least may deceive the customer about the source and extent of the competition which exists for the work in question, and which is capable of having anti-competitive effects on the particular tendering exercise and on future exercises."*[26]

[49] Furthermore, based on the number of contraventions admitted to by numerous construction firms to date, it is clear that the practice of cover pricing was pervasive in the construction industry at the time. In fact it was so prevalent that Mr Arangies

[26] *Kier* Judgment page 33 para 96, page 34 para 99.

claimed to have not taken up the Commission's invitation because he did not consider that cover pricing was a contravention of the Act.[27] Throughout these proceedings Isipani maintained that cover pricing was a practice so common that it was even mentioned in University lectures - Mr Arangies testified to this effect "*one of my partners studied a degree in construction science and they learnt the terminology in university*".[28]

[50] All that the above demonstrates is the widespread and blatant disregard by the South African construction industry in general for competition and the Act for an extended period of time, as borne out by the large number of contraventions of section 4(1) of the Act by numerous firms in the construction industry to date, including many instances of cover pricing.

[51] Given all of the above, we are discounting the base figure that might otherwise have been applied to a collusive bidding cartel, from 30% to a base amount of 12%. This gives a figure of R**[...]** as the base amount.

STEP THREE

[52] In this step we consider duration.

[53] As already stated above, according to the Commission the collusive agreements included a benefit that NMC would reciprocate a cover price to Isipani, when needed; and the objective of the collusive arrangements being NMC remaining on the customer's tender list, was only realised or abandoned after the conclusion of the collusive agreement. The Commission therefore contended that the effects of each of the collusive agreements lasted longer than a year and that the agreements / benefits / effects only ceased later when the terms or purpose of such collusive agreements had been fulfilled or abandoned. This occurred when Isipani abandoned this benefit by repudiating the collusive agreements on 23 November 2011.[29]

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[27] Answering Affidavit, pages 53 and 54, para 18 to 21.
[28] Transcript page 14.
[29] Answering Affidavit page 61, para 41.

[54] The Commission relied on *Competition Commission vs RSC Ekusasa Mining (Pty) Ltd:*[30]

> *"Quite clearly the legislature contemplated the practice as having ceased when its effects have ceased... The choice of the term 'ceased'...suggests a practice that is on-going or continuous in nature, and that has ended, and not an act which occurred only in a moment in time.*
>
> *Even if the initial agreement precedes the cut-off date, if the subsequent acts of execution have effects that succeed it, the practice has not 'ceased' but is continuing after the cut-off date and therefore is not barred in terms of section 67(1). Whether there are effects, and what constitutes 'effects', is a matter for evidence in each case."*

[55] Isipani argued that the collusive conduct ceased in November 2010. It therefore suggested a multiplier of 1.

[56] Mr Arangies was asked if there were other tenders by the University that NMC and Isipani were invited to tender for following the November 2010 project, to which he responded as follows: "*Ja, I can't remember now.*"[31]

[57] He went on to acknowledge at least two further tenders of the University from which Isipani received income, i.e. (i) project number 199 US Library; and (ii) project number 222 US Food Sciences. He could however not confirm or deny that NMC was on those tender lists.[32]

[58] Furthermore, as stated in paragraph 30 above, Mr Arangies confirmed that the conduct in question could result in a future reciprocal benefit to Isipani.

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[30] (65/CR/Sep09) at para 146 and 150.
[31] Transcript page 31.
[32] Transcript pages 31 to 33.

[59] We concur with the Commission that the conduct ceased only when the effects of the conduct and the benefits to Isipani ceased. The evidence was that the benefits to Isipani ended only on 23 November 2011 when it ceased and abandoned all collusive conduct.[33]

[60] Based on the above, the duration of the first contravention is **[...]**, i.e. **[...]**. This can be translated into a multiplier of **[...]**. Applying this multiplier gives an amount of R**[...]**.

STEP FOUR

[61] The "*preceding financial year*" should, generally, be the most recent completed financial year before the imposition of a fine. According to the Commission, the relevant year for calculation of the 10% cap is Isipani's 30 June 2014 financial year, since Isipani's 2015 financial statements have not yet been audited.

[62] Isipani however submitted that the Tribunal should consider using an earlier year's turnover for the purposes of determining whether there should be a rounding down. Isipani submitted that the collusive practices ended in 2010 and it has taken a number of years for the case to be heard before the Tribunal and Isipani has since significantly increased its turnover. The Tribunal was therefore requested to not use the years in which it increased its turnover but rather the older years when the turnover was significantly lower.

[63] We concur with Commission that the year 2014 is the relevant year for purposes of applying the 10% cap. 10% of Isipani's turnover for its financial year ended 30 June 2014 is R**[...]**. Thus the above figure of R**[...]** need not be rounded off.

STEP FIVE

[33] Answering Affidavit page 61, para 41.

[64] We next consider if the above amount should be adjusted either upwards or downwards by a percentage depending on the balance of the mitigating and/or aggravating factors present.

[65] We do the above by considering *inter alia* the available evidence relating to the behaviour of the respondent; the level of profit derived from the contravention; the degree to which the respondent has co-operated with the Commission and the Tribunal; whether the respondent has previously been found in contravention of this Act; as well as the fact that there was a second, separate contravention of the Act given the November 2010 cover pricing occurrence.

[66] The Commission argued that the aggravating factors in this case, at the very least, counterbalance any valid mitigating factors. The Commission therefore contended that no discount should be applied in terms of this step.

[67] Isipani, on the other hand, argued that the amount be reduced by a mitigation factor of 75%.

[68] We have found some mitigating and some aggravating features of Isipani's behaviour. We first deal with the mitigating features.

[69] The mitigating features of Isipani's behaviour are that (i) Isipani is a first time offender of the Act; and (ii) it was common cause that Isipani did not directly profit from the cover pricing in question, since it was not awarded any of the tenders in question. We have further considered that Isipani accepted that what it did was illegal under the Act by pleading guilty to the conduct.

[70] The above must however be weighed up against the fact that the conduct of cover pricing is harmful to competition and future competition, as explained above.

[71] Although Mr Arangies testified that cover pricing was so endemic at the time of the contravention that Isipani was simply unaware that it was illegal, he recognised

that ignorance of the law can never be a defence in respect of culpability.[34] Cover prices were provided by experienced businessmen in the construction industry that ought to have known that engaging with a competitor on price was a contravention of the Act. Many construction firms have admitted to cover pricing being an infringement of the Act and have settled matters with the Commission on this basis.

[72] An aggravating factor in this case is that a procurement director, being a high level employee of Isipani was involved in the collusive arrangement. Furthermore, by his own admission the CEO of Isipani was aware of the practice of cover pricing and aware of the Commission's above-mentioned invitation for firms in the construction industry to settle contraventions of the Act as part of a fast-track settlement process. However, this invitation was ignored.

[73] We therefore find Mr Arangies' averment that when Isipani contravened the Act - by openly discussing tender prices with its competitor in the market - it acted in ignorance of the law, not to be a credible argument. No mitigation is given to this.

[74] Isipani further argued that a substantial penalty will set its BBBEE initiative back by at least 3 years, as the adverse effects of the proposed penalty on Isipani's business and on future contracting opportunities will mean that there will be no dividends declared within which to repay the loan of the BBBEE participants. This would further impact on Isipani's BEE status and its ability to tender for Government projects.

[75] More specifically, Isipani stated that it needs to retain sufficient net assets in order to secure future work. For this reason Isipani declared minimal dividends, because it wished to achieve a certain asset current liability ratio and wishes to be registered as a CIDB grade 9 contractor, which would enable it to tender for Government work of a certain level.[35] It further submitted that it required R40 million capital available for the purposes of this CIDB grade 9 rating.[36]

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[34] Respondent Heads of Argument, para 51.
[35] Transcript pages 11 and 12.
[36] Transcript page 12.

[76] It further argued that Isipani's prospects of having sufficient available capital to be legible for registration as a CIDB grade 9 contractor, would be materially jeopardised by the Commission's proposed penalty and further, that a very large penalty would affect dividend flow (and therefore it would take a longer period for the BBBEE shareholders to buy their shares).[37]

[77] The Tribunal does not consider this argument to be a credible factor in mitigation of Isipani's sentence. An administrative penalty would not exclude Isipani from tendering for Government work. Mr Arangies confirmed that Isipani currently bids for Government contracts under a CIDB grade 8 grading. Government may however want to take note of firms, like Isipani, that have been involved in collusive conduct when Government designs future tender processes and awards future tenders.

[78] As far as the capital requirement is concerned, we note that this is only one of many factors taken into account when applying for a CIDB grade 9 classification. There is furthermore no evidence to suggest that Isipani could not gain the benefit of a financial sponsorship to make up any shortfall to fulfilling the capital requirement and strengthen its grading, if it chooses to do so.

[79] The final aggravating factor is that Isipani is guilty of a second, separate contravention of the Act, i.e. the November 2010 cover pricing. Since we have based our above calculations only on the first contravention, this is a significant aggregating factor.

[80] Weighing up all the mitigating and aggregating factors we reduce the amount of R[...] by [...]%. This means that Isipani is liable for a penalty of R21 783 153.40 for both contraventions.

STEP 6

[37] Transcript page 12 and 13.

[81] The above figure is less than 10% of Isipani's total turnover for the financial year ended 30 June 2014. There is thus no need for any rounding off.

Order

[82] Isipani has admitted to have contravened section 4(1)(b) of the Act by engaging in two separate instances of cover pricing with NMC.

[83] Isipani is ordered to pay an administrative penalty of R21 783 153.40 for both above-mentioned contraventions of the Act.

[84] We make no order as to costs.

11 July 2016

Ms M Mokuena DATE

Mr A Roskam and Mr A Wessels concurring

Tribunal Researcher:	Derrick Bowles
For First Respondent:	Adv. Fagan SC instructed by Werksmans Attorneys
For the Commission:	Mr Layne Quilliam