



THE COMPETITION TRIBUNAL OF SOUTH AFRICA

Case no. 23/CR/Feb09

In the matter between:

The Competition Commission

Applicant

and

Gralio Precast (Pty) Ltd

Respondent

Panel : Lawrence Reyburn (Presiding Member)
Andreas Wessels (Tribunal Member)
Andiswa Ndoni (Tribunal Member)

Heard on : 5, 6 and 12 August 2010

Order issued on : 29 November 2010

Reasons issued on: 29 November 2010

Order and Reasons for Decision

[1] This matter concerns an allegation by the Competition Commission ('the Commission') that Gralio Precast (Proprietary) Limited ('Gralio') participated,

together with a number of other companies operating in the field of precast concrete products, in a cartel which engaged in *inter alia* price fixing, division of markets, and collusive tendering, in contravention of Sections 4(1)(b)(i),(ii), and (iii) of the Competition Act, No. 89 of 1998 (as amended) ('the Act').

- [2] In the original case brought by the Commission there were ten respondents, of which Gralio was the fifth. The others were cited as Rocla (Proprietary) Limited (the first respondent, referred to below as 'Rocla'); Southern Pipeline Contractors (the second respondent); Concrete Units (Proprietary) Limited (the third respondent); Aveng (Proprietary) Limited (the fourth respondent, referred to below as 'Aveng'); Cobro (Proprietary) Limited (the sixth respondent, referred to below as 'Cobro'); Cape Concrete Works (Proprietary) Limited (the seventh respondent); Conrite Walls (Proprietary) Limited (the eighth respondent); Craig Concrete Products (Proprietary) Limited (the ninth respondent); and D&D Concrete (Proprietary) Limited (the tenth respondent).
- [3] It is possible that there are errors in some of the cited names of the respondents, as there was in the name of Gralio as stated in the documents of record in the form in which they originally reached the Tribunal. (In these, Gralio was cited as Grallio (Proprietary) Limited.)
- [4] The ninth and tenth respondents had been absorbed by corporate mergers into other respondents by the time the hearings took place.
- [5] All the respondents except Gralio admitted contravening the Act by participating in the activities of a cartel and, by the time the hearing in this matter concluded, all but two of these respondents had entered into settlement agreements with the Commission in terms of which they admitted their contraventions and agreed to pay various amounts by way of administrative penalties. These agreements have been confirmed by the Tribunal.¹ The case against the two respondents, Southern Pipeline

¹ The first to settle was Aveng. It admitted that its subsidiary, Infraset, contravened the Act and agreed to pay a penalty of R46 2777 000, being 8% of the turnover attributable to Infraset in the previous financial year, excluding the turnover attributable to paving products. The Commission concluded the second settlement with Concrete Units (Pty) Ltd. It agreed to pay a penalty of R5 763 743, representing 7% of its turnover for the financial year 2008. The third party to settle with the Commission was Cobro Concrete (Pty) Ltd. It agreed to pay a penalty of R4 022 568.29

Contractors (Pty) Ltd and Conrite Walls (Pty) Ltd, where the issue of applicable penalties was raised was heard on 2 and 3 August 2010 by a separately constituted panel and a decision in it is imminent. As the case against Gralio was the only case requiring a hearing on the merits, it was separated from the remaining cases by an order of the Tribunal dated 2 August 2010, and it was determined that this case proceed before a different panel of the Tribunal from that which dealt with the cases against the other respondents.

[6] For convenience the cases against the other respondents will be referred to below as 'the related cases.'

[7] The matter accordingly proceeded as a contested matter in which evidence was heard on 5 and 6 August 2010. Argument was heard on 12 August 2010.

[8] The allegations against Gralio, which is based in KwaZulu Natal, are that it participated with other companies operating in that province in:

- a. Entering into a market division arrangement with Rocla, Aveng (though an entity named 'Infraset' owned by one of its subsidiaries) and Cobro for the supply of pre-cast concrete pipes in KwaZulu Natal, the market share allocations between these horizontal market participants in terms of this arrangement being Rocla 54%, Infraset 19%, Cobro 17% and Gralio 10%.
- b. Entering into and implementing a collusive tendering arrangement for precast pipes in KwaZulu Natal with Rocla, Infraset and Cobro to achieve market allocations in the same market share percentages as mentioned above.
- c. Entering into and implementing a geographic market allocation arrangement in the field of pre-cast culverts with Rocla, Infraset and Cobro by which culverts were supplied by Rocla in KwaZulu Natal without competition from Gralio, Infraset or Cobro.

which represented 6.5% of its turnover for the financial year 2008. Cape Concrete Works (Pty) Ltd was the last to conclude a settlement agreement. During August 2010 it agreed to pay a penalty of R4 371 386, representing 7% of its turnover in the 2008 financial year.

[9] Gralio admits that the cartel in KwaZulu Natal was in existence² but Gralio denies that it participated in any of the activities of the cartel. In fact Gralio denies that it was aware of the existence of the cartel until the Commission made contact with it in the course of its investigations which preceded the referral of the matter to the Tribunal.

[10] In the related cases manholes and manhole covers were also among the products in respect of which contraventions of the Act were alleged to have taken place, but at the hearing it was confirmed that the Commission's case against Gralio was limited to the allegations listed above and thus excluded manholes and manhole covers.³

[11] At the hearing the Commission called two witnesses in respect of whom witness statements had been filed. Witness statements had also been provided in the related cases in respect of certain other executives of companies in the list of respondents but in the absence of their *viva voce* evidence in this case the Tribunal has for the purposes of this case ignored those statements.

[12] The first witness for the Commission was Mr Francois Myburgh ('Myburgh'), the general manager of infrastructure projects at Infraset. Myburgh testified that in 1998 he had been appointed sales manager in the Western Cape of Fraser Fyfe, a company active in the precast concrete products industry and now absorbed into Aveng, and at approximately that time he had become aware of regional cartels functioning among the suppliers of precast concrete products. The cartels continued their operations until October 2007 when Rocla applied to the Commission for leniency in respect of its participation in the cartels.

[13] Myburgh testified that a cartel existed in KwaZulu Natal between Rocla, Infraset, Cobro and, as far as he was aware, Gralio. He attended some of its meetings and there met Mr Hedley Hansen ('Hansen') who appeared to be

² See T257

³ T254-5 and T276

Gralio's representative in this provincial cartel.⁴ The activities of this cartel concerned precast pipes and culverts. Gralio's allocation of the market for precast pipes in KwaZulu Natal was 10%, with Rocla having 54%, Infracret 19%, and Cobro 17%.

[14]In the market for culverts Rocla had 100%.

[15]Hansen is the key figure in the Commission's attempt to link Gralio to the KwaZulu Natal cartel and to its activities and meetings. However Myburgh could shed little light from personal knowledge on the role which Hansen played in the affairs of Gralio and of the cartel. He said he had been told that Gralio had entered the cartel at the invitation of Rocla in approximately 2002 when Gralio, previously a small company which 'looked after' manholes in Northern Kwa-Zulu Natal, moved to the Durban area (in fact, according to later evidence, to Verulam). The arrangements for Gralio to join the cartel had, he had been told, been made between Rocla and Hansen. Gralio was at that time owned by a construction group named Stefanutti Bressan.

[16]Myburgh was shown a document at the hearing which appears to have been a minute of a meeting of the cartel which took place on 7 November 2007 in which reference was made to the fact that Gralio was 'out' (this clearly meaning out of the cartel). Myburgh said he recalled that for some time Gralio was outside the cartel and there had been discussion about passing on its 10% market share allocation in KwaZulu Natal to D&D, a company acquired at about that time by Rocla, although there was also a suggestion that Gralio might be re-allocated its 10% share if it re-entered the cartel. He could however not confirm that the meeting took place at the date recorded in the minute although this was 'possible.' Shown another document, headed '*Modus Operandi*' and apparently setting out the rules adopted for the cartel operating in respect of precast pipes in KwaZulu Natal, Myburgh could not identify the significance of the date, 19 January 1988, which appeared on it.⁵ He later agreed that a reference in the document to 'amendments' meant that the latest date mentioned on it, 27 June 2001, was the date on which the rules

⁴ T276

⁵ T276

of the cartel were last changed.⁶ In the document the four firms apparently taking part in the cartel were identified by number, not by name, and Myburgh initially identified '4' as the code number for Gralio.⁷ However, later in his evidence, he changed his identification, saying this had been a mistake, and associated Gralio with the code number 3.⁸

[17]The apparent contradiction in his evidence between the date of 'approximately 2002' as the year in which he understood Gralio to have joined the cartel and the reference in the document updated in 2001 to a participant whom he identified as Gralio was not explained.

[18]Myburgh's knowledge of Hansen's status within Gralio was distinctly limited. He was 'never sure' what Hansen's relationship was with Gralio although he said that Hansen had mentioned to him that he was an 'agent' who sold concrete pipes on behalf of Gralio.⁹ He testified that at meetings of the cartel Hansen 'declared' figures on behalf of Gralio in discussions concerning the volumes of business transacted.

[19]The purpose of these discussions was to ensure that information was available so that cartel participants who had exceeded their allocated quotas in KwaZulu Natal would be required at the meetings to hold back their sales until their volumes were again in accordance with the agreed market share allocations. Myburgh assumed that Hansen had access to the figures of Gralio in order to state these data.

[20]Myburgh testified that he had been told that Gralio had at some stage withdrawn from the cartel but could not recall when this was, and was not sure whether Gralio had returned as a participant. He had been told by his company's regional manager in Kwa-Zulu Natal, Mr Blake ('Blake'), that Gralio had been dissatisfied about the size of its allocated quota in the cartel.¹⁰

⁶ T 278

⁷ T 278

⁸ T 282

⁹ T 277

¹⁰ T 288 - 289

[21]Under cross-examination by Mr Marnewick ('Marnewick'), who appeared for Gralio, Myburgh conceded the limitations of his knowledge. The following passage from the record is instructive:¹¹

Marnewick: ...[I]f I were to summarise the import of your evidence whatever you know about Gralio's alleged involvement in the cartel is what you have heard from Mr Hansen reporting his figures from time to time and saying he was an agent or representative of Gralio. Is that correct?

Myburgh: That sums it up.

[22]Further ¹²:

Myburgh: ...[J]ust to sum it up, I've never met anybody from Gralio. I was always told that Hedley Hansen was an agent who represented Gralio and that's about it.

[23]Pressed for details of arrangements prevailing within the cartel concerning Gralio, Myburgh stated repeatedly '*I can't remember,*' ¹³ and acknowledged that what appears to be a substantial part of his information about Gralio's involvement in the cartel's affairs came to him not by direct experience but in reports from Blake, who was not called by the Commission as a witness.¹⁴

[24]The Commission's second witness, Mr Daniel Greeff ('Greeff'), was Rocla's manager in Blackheath in the Western Cape and for a time acted as its manager in Durban. He testified that he had attended meetings of the KwaZulu Natal cartel in a period from approximately the latter part of 2004 until mid-2005 while so acting and also later when he was based in Gauteng.¹⁵ Others present at the meetings were representatives of Infraset and Cobro, and Hansen. He took Hansen to be the representative of Gralio.

¹¹ T 306

¹² T 315

¹³ For e.g. T286

¹⁴ T 289

¹⁵ T 330

[25]At the meetings it was made clear that Gralio had a 10% allocation of the market for precast pipes in KwaZulu Natal but was pressing for a greater allocation. Gralio's sales volumes on a month by month basis were disclosed by Hansen at the monthly meetings of the cartel and Hansen participated in discussions about allocations as if he represented Gralio.

[26]Under cross-examination Greeff conceded that he had no knowledge of Gralio's participation in the cartel other than the fact of Hansen's participation in cartel meetings. He did not know any of the directors or the CEO of Gralio, or the basis on which Hansen received remuneration from Gralio.

[27]No other witnesses were called by the Commission.

[28]At the hearing on 5 August 2010 Marnewick announced that Gralio had subpoenaed Hansen to give evidence to the Tribunal and that a witness statement had been taken from him by Gralio's attorney. (This witness statement was duly filed in advance of the hearing.) However an attorney acting for Hansen had later informed Gralio's attorney that Hansen was medically unfit and would be unable to appear to testify. A report from a neurologist practising in Pietermaritzburg, Dr Zaheer Sacoer, was handed in to the Tribunal (Exhibit 1 in the record) stating that Hansen was suffering from a number of ailments which would make it difficult for him to testify adequately or at all.

[29]The Commission's legal representative, Mr Mooki ('Mooki'), requested that in these circumstances Hansen's witness statement be disregarded *in toto* by the Tribunal.¹⁶ The Tribunal consents to this request but makes no finding as to the allowability of the written statement. It is therefore unnecessary to deal with Gralio's request that the statement be admitted into the evidence in terms of Section 3 of the Law of Evidence Amendment Act, 1988 and its probative value be assessed in terms of that Act.¹⁷

[30]The evidence of Gralio's first witness, Mr Rajan Naidoo ('Naidoo'), who is Gralio's attorney, largely concerned his encounter with Hansen when taking

¹⁶ T 520

¹⁷ T 511

the witness statement referred to above and his subsequent dealing with Hansen's attorney about Hansen's failure to attend the hearing in response to the subpoena. In view of our decision to disregard Hansen's statement in the absence of his *viva voce* evidence, Naidoo's evidence requires no consideration or comment by us.

[31] Gralio's second and final witness was Mr Daniel Jagadasan Singh, known as Jay Singh ('Singh'). He is the CEO of Gralio but is not one of its directors. It seems that the board of directors of Gralio consists of members of his family but that Singh exercises day-to-day control over Gralio and makes commercial decisions on its behalf.

[32] Singh's evidence was to the effect that his family trust had acquired Gralio in October 2003 from a company named Ukumba Brick and Quarry (Pty) Ltd, which was then in the Stefanutti & Bressan group and which manufactured precast concrete products at Richards Bay, north of Durban.¹⁸ Singh is a substantial businessman whose interests include a civil engineering operation which uses quantities of precast pipes. Singh saw in Gralio an opportunity to obtain concrete pipes for his civil engineering operations and also an opportunity to sell pipes profitably on the open market. Moreover, and this appears to have been an important consideration for the acquisition, Gralio had an SABS approval certificate for its products.¹⁹

[33] Having acquired Gralio for R3.5 million Singh proceeded to close down its manufacturing base in Richards Bay in January 2004 and to move it to Verulam, where he expended another R6 million in creating a new factory.²⁰ While the capacity of the old factory had been 35 tons per day, that of the new factory was 95 tons per day, or approximately three times the capacity of the defunct factory.²¹ The process of reorganising the production facility took approximately a year and it was only in the first half of 2005²² that Gralio was producing precast pipes on a commercial scale in Verulam, with the cachet of

¹⁸ T 398 and T423

¹⁹ T 456

²⁰ T 407 and T 444

²¹ T 412 and also T 435 where he mentions the figure of 90 tons per day

²² T 413, but also T 434 where Singh stated that production started in about October 2004

the SABS certificate.²³ During the interim period Gralio sold products from a stockpile it had accumulated and also bought in products from two other suppliers then active in the market, Fraser Fyfe and Cobro.²⁴

[34]The output of the factory in Verulam is, on Singh's evidence, devoted as to some 30% to the needs of his civil engineering business and the remaining 70% is sold on the open market at prices which he determines, in competition with products of Rocla, Infraset and Cobro.²⁵ The factory at Verulam had operated at full capacity from the start, he maintained.²⁶

[35]Singh denied strenuously that Gralio under his family's ownership had ever participated in cartel activities or that he had even known of a cartel in the industry in KwaZulu Natal until the time when its activities were disclosed in a report and request for leniency made to the Commission and of which he became aware when he was first questioned by the Commission about the cartel.

[36]According to Singh's evidence, Hansen and two other persons, known as AK and Sadique, had been sales agents of Gralio before his family trust acquired it, operating on a commission basis. Hansen had, he understood, been pensioned off by the Rocla organisation before joining Gralio.²⁷ These three salespersons were retained by Gralio when it was taken over by his family trust. They jointly received a commission of 5% of all sales of pipes by Gralio, even if the sale was not made through their instrumentality. Singh was not aware of the basis on which they divided this commission among themselves.

[37]Singh was steadfast both in his evidence in chief and under cross-examination in maintaining that Gralio, while owned by his family trust, had always set its own prices for pipes. He had personally, he said, set the prices and had compiled Gralio's price lists.²⁸

²³ T 421 - 422

²⁴ T 435

²⁵ T 435 - 436

²⁶ T 442

²⁷ T 451

²⁸ See e.g. T 437

[38] Gralio, he maintained, had sold pipes when and where it suited Gralio, including a few sales made as far from Verulam as the Eastern Cape and the Free State. He insisted that Gralio under his leadership had played no part in the cartel, and he maintained that the news of its existence and activities had come as a complete surprise to him in 2007.

[39] He referred to a substantial public tender of the KwaZulu Natal provincial department of transport which Gralio had won in the face of competition from Rocla. The prices in Gralio's tender had, he said, been set by himself. Hansen and other members of the sales team were bound, he claimed, to charge prices in terms of the price list which he compiled, and were not permitted to grant discounts unless he had approved them. He denied that Hansen had in any way been authorised to represent Gralio in any aspect of the cartel operations.

[40] The Commission initially sought to find a contradiction in the fact that in a witness statement filed with the Tribunal before the hearing Singh had stated that Hansen had been 'employed' as a sales representative when at the hearing Hansen's status was said to be that of an independent commission agent.²⁹

[41] In Gralio's annual report for the year 2004 no expenses of the company in the form of commission were disclosed. Marnewick was however quick to point out that commission running into six figures annually was disclosed in the annual reports of subsequent years, up to the 2009 year, with one exception, and Singh testified that the reason for the exception, which occurred in the statements for the 2008 year, was that sales commission to Hansen's team of sales agents was only payable when a customer had made payment, and there had been a delay in payments in the year of the omission.³⁰ The payment of commission was, he said, reported in the next annual report, once payment by the customers concerned had been received by Gralio.

²⁹ T 457

³⁰ T 465 - 466

[42]In argument, Mooki contended that there was a sufficient basis in the evidence for a finding against Gralio. Section 4(1) of the Act is concerned with *per se* contraventions of the Act and, he asserted, it was unnecessary for the Commission to show what effects ensued from the cartel arrangements or even that the person who participated on Gralio's behalf in the operations of the cartel was formally authorised by Gralio to do so.

[43]He accepted that it was irrelevant to the Commission's case whether Hansen had been an independent contractor acting as a sales agent for Gralio and receiving remuneration in the form of commission on its sales of pipes or whether Hansen had been an employee of Gralio under a conventional employment contract. The important fact was that Hansen had been shown to have been an active and even vociferous participant in meetings of the KwaZulu Natal cartel when he was authorised to sell concrete pipes by Gralio and was indeed achieving such sales for Gralio.

[44]This participation in the cartel had to be imputed to Gralio, he contended, under the doctrine of 'unified economic consciousness' which was applied in the USA in antitrust law and which he invited the Tribunal to adopt in respect of South Africa. In this regard he referred to the case of *Pink Supply Corp. v Hiebert, Inc*³¹ and a subsequent case in the USA in which it was followed.³²

[45]The Commission's alternative submission, if the Tribunal declined to adopt the doctrine arising from the *Pink Supply* case, was that Hansen had acted as Gralio's agent in his activities at meetings of the cartel and that Gralio was therefore bound by them.

[46]We set out later in this decision our comments on the Commission's submissions as advanced in Mooki's argument.

[47]Gralio's argument centred on the submission that Hansen was not authorised while Gralio was owned by the Singh family trust to participate in a cartel, and that no evidence had been led of a corresponding authority in the preceding period when Gralio was under different ownership.

³¹ 788 F.2d 1313 (8th Cir. 1986)

³² See *F.B. Leopold Co. v. Roberts Filter Manufacturing Company, Inc.* 882 F. Supp. 443 (1955).

[48]Marnewick discussed several leading cases on the question of the authority of an official of a firm to bind it in its dealings with third parties, among them the cases of *Tuckers Land and Development Corporation (Pty) Ltd v Perpellief* SALR 1978(2) T 11 and *Alli v. De Lira* 1973(4) T 635. His submission was that Hansen could not be said on any basis to have had authority to represent Gralio after its acquisition by the Singh family trust in participating in the cartel.

[49]Questioned about Gralio's possible liability for contravention of section 4 of the Act even if Hansen had not been authorised to represent Gralio in the meetings and activities of the cartel, Marnewick asserted that there would still be no contravention of the Act since no evidence had been led to establish that Gralio had in fact acted in accordance with the cartel's rules and the limitations they imposed on the conduct of its members.

[50]As far as abstention from the market for culverts was concerned, it was simply coincidence, asserted Marnewick, that Gralio had no interest in this product and had not produced it commercially. Singh had testified that since his civil engineering business did not make use of culverts Gralio had not engaged in their production.

[51]The Commission's evidence was limited in its scope and included no comparisons of prices, price lists, tender conditions, and related details from which it could be established whether the commercial policies and practices exercised by Gralio either before its acquisition by the Singh family trust or thereafter were in fact consistent with Gralio's participation in the KwaZulu Natal cartel and represented compliance with the dictates of the cartel. On the argument advanced by Mooki the Commission considers that this evidence was unnecessary because its complaints referred to *per se* contraventions of the Act, and mere agreement to participate in a cartel, or actual participation in meetings where cartel activities were conducted, amounted to a contravention of the Act. On this argument, the fact that Hansen had attended and taken part in meetings and deliberations of the cartel at a time when he was acting as a salesperson for Gralio and was attempting to secure benefits for Gralio from the market allocations made by

the cartel was sufficient to prove the Commission's case. Hansen's 'economic consciousness' was in unison with that of Gralio whether or not Gralio was aware of his activities in attending meetings of the cartel and participating in its procedures.

[52]We point out that in the USA the doctrine of a unified economic consciousness as explained in the *Pink Supply* case arose in the context of dispelling the notion that salesmen of a company could conspire with other personnel of the company when conduct was considered with reference to section 2 of the Sherman Act, which is a criminal statute outlawing conspiracies with anticompetitive effects. The salesmen were considered not capable of conspiring with other personnel of the company since all shared a single and unified economic consciousness.

[53]The framework of the South African competition system is different in various respects from that of the USA, but the notion of a unified economic consciousness, perhaps for want of a more apt term, has attractions in considering instances of cartel activity where a company gains benefits from the participation of members of its personnel in the cartel even if the directors and senior managers of the company are unaware of the cartel and of the role of their colleagues who so participate. Here it would perhaps be valid to assert that a unified economic consciousness has prevailed despite differences or clashes in regard to the consciousness of the company's personnel regarding legal and ethical issues.

[54]We are, however, not persuaded that it is necessary to consider the matter on the basis of any notional nexus between the economic consciousness of Gralio and that of Hansen. Section 4(1)(b) of the Act reads as follows:

"An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if –

(b) it involves any of the following restrictive horizontal practices:

(i) directly or indirectly fixing a purchase or selling price or any other trading condition;

(ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or

(iii) collusive tendering.”

[55]In Section 1 of the Act ‘*agreement*,’ when used in relation to a prohibited practice, is defined as including ‘*a contract, arrangement or understanding, whether or not legally enforceable*’; while ‘*concerted practice*’ is defined as ‘*co-operative, or co-ordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement.*’

[56]Clearly, we must establish whether an ‘agreement’ in this sense existed between Gralio and the other members of the KwaZulu Natal cartel, or whether Gralio’s conduct in relation to the rules and activities of the same cartel amounted to a concerted practice in the sense of the Act.

[57]It is unnecessary to consider the question of a possible ‘decision’ by an association of firms since this was not the Commission’s case and the cartel in KwaZulu Natal was clearly not an ‘association’ of the kind contemplated in Section 4 of the Act.

[58]If Hansen was authorised by Gralio to represent it in the KwaZulu Natal cartel, that would amount to an ‘agreement’ in the sense of Section 4 of the Act, with Gralio as one of the parties to the agreement. We accept the correctness of the Commission’s argument that the mere existence of such an agreement would represent a contravention of the Act even if the cartel had not been shown to have carried out any of the conduct described in subsections 4(1)(b)(i), (ii) or (iii). To that extent Section 4(1) sets out *per se* prohibitions.

[59]However, if the evidence falls short of establishing that such an agreement existed, that is not the end of the matter since Hansen's participation in the meetings of the KwaZulu Natal cartel might indicate that Gralio was engaged as a participant in a concerted practice of the cartel, and hence have been contravening Section 4 on that basis.

[60]With this clear language of the Act before us, it seems to us unnecessary to embark on an exploration of the extent to which a unified economic consciousness linked Hansen to Gralio. We must merely apply the tests mandated by the Act of ascertaining whether an 'agreement' or a 'concerted practice' prevailed between Gralio and the cartel members.

[61]These tests devolve into the following questions:

- (1) Was Hansen authorised by Gralio to participate (as we accept he did) in the meetings and procedures of the KwaZulu Natal cartel, hence establishing the existence of an agreement prohibited under Section 4?
- (2) If not, is there evidence to show that Hansen's participation brought about conduct of Gralio that amounted to acceptance of, or implementation of, the rules and procedures of the KwaZulu Natal cartel, and hence Gralio's participation in a concerted practice prohibited under Section 4?

[62]We accept that it is not necessary for the Commission to show that Gralio gained benefits from the cartel. Not all business activity leads to profits or other positive benefits. The Commission is also undoubtedly correct in asserting that if a cartel is proven or admitted to have been in existence, it is not necessary to show that a member of the cartel actually abided by its rules and procedures. Mere acceptance of them, or an expression of intention to abide by them, would be caught by Section 4.

[63]In this case, while Hansen was clearly participating in the cartel ostensibly as a representative of Gralio, we believe that the evidence that he was in reality representing Gralio is absent. Singh was, on the contrary, adamant that

Hansen had no such authority after his family's acquisition of Gralio, and that he (Singh) as the executive head of the company, caused it to act in ways which were diametrically opposed to the consensus of the cartel.

[64]If Hansen lacked Gralio's authority to represent it in the activities of the KwaZulu Natal after the acquisition of Gralio by the Singh family trust, as we have found, we are obliged to leave open the question whether he was or was not acting with Gralio's authority in the preceding period. No evidence either way is available to us.

[65]What Hansen's true business was in the cartel is obscure. The Tribunal is left confronting the strange spectacle of Hansen participating for some time, possibly a number of years, in the meeting and procedures of the cartel, to all intents and purposes as a representative of Gralio, when in fact Gralio was, at least after its acquisition by the Singh family trust, wholly outside the cartel. One is reminded of Mata Hari and other double agents of legend.

[66]It is however futile for the Tribunal to speculate about Hansen's true role and motives. Had Hansen given evidence at the hearing the truth would no doubt have emerged, but in the absence of his evidence the mystery must remain unsolved.

[67]Mooki asked the Tribunal to disbelieve Singh on the question of Hansen's authority to represent Gralio in the cartel in KwaZulu Natal and to accept that on a balance of probabilities Hansen would have conveyed the blandishments of the cartel to Singh and Singh would have yielded to them. We reject that conclusion. Singh appeared to us to be a man of independent mind who gave entirely credible answers in refutation of all suggestions of collusive activity.

[68]On the first question posed above we therefore consider the answer is in the negative. Singh satisfied us that Gralio while owned by his family trust gave no authority to Hansen to represent Gralio in the affairs of the cartel, and in the preceding period there is no direct evidence of such authority from the group which then owned Gralio.

[69]On the second question, no evidence was presented that Gralio abided by or implemented the pricing formulae of the cartel or its market allocation percentages or its collusive arrangements in regard to tendering or its reservation of the culverts market to Rocla in KwaZulu Natal. Such evidence as there was on these issues came from Singh and it was entirely at odds with any notion that Gralio in the period following Gralio's acquisition by Singh's family trust participated in the collusive practices of the cartel.

[70]As regards the preceding period, there was no evidence at all either to implicate or to exculpate Gralio on the alleged cartel conduct.

[71]The evidence of Singh is in our view sufficient to establish that Gralio operated after its acquisition by the Singh family trust completely independently of the cartel in regard to pricing, volumes of pipes sold, and the geographical location of Gralio's customers. Regarding sales achieved by tendering, Singh's evidence about Gralio's biggest tender contract under his family's ownership of Gralio, that with the provincial department of transport, was that he secured the contract for Gralio in competition with Rocla if not other members of the cartel, and that he and no other person set the prices which led to the award of the contract to Gralio.

[72]It is entirely plausible that in failing to make culverts Gralio was not stepping into line with a requirement of the cartel but was simply responding to the fact that there was no need for culverts in Singh's civil engineering business and hence no base-load for Gralio's output of culverts had it chosen to make them. No evidence to the contrary was presented.

[73]Furthermore, no evidence was led to suggest that in reality Gralio abided by provincial boundaries for its operations. On the contrary, Singh's evidence showed that Gralio proceeded to supply pipes to the Free State and Eastern province when it found customers for them in these areas which it could supply at acceptable prices despite the transportation costs to these relatively distant destinations

[74]Singh's actions in acquiring Gralio for his family trust and expanding its capacity some threefold are consistent with the dual goal he explained of

serving his civil engineering operation by using its requirements for pipes as a baseload for Gralio's operations while also competing for business in the open market. This capacity expansion is diametrically opposed to the notion of participation in a cartel with a fixed ceiling on sales volumes. It would be otherwise if, for instance, a cartel participant had been granted exclusivity in a territory, as sometime happens with cartel arrangements and in this cartel was the position of Rocla in the culverts market in KwaZulu Natal. Capacity expansion in those circumstances would be consistent with participation in the cartel.³³

[75]We also take into account that Gralio under Singh's management appears to have made an honest attempt to get Hansen before the Tribunal so that his evidence would be available to us and he could be subjected to cross-examination by the Commission. This too is inconsistent with participation in the cartel, which would favour suppression of the truth. The fact that the effort failed to get Hansen as far as the witness stand was not the fault of Gralio.

[76]The Tribunal considers that the question whether Hansen was an employee of Gralio in the sense that he had a conventional contract of employment or whether was an independent contractor earning a commission on sales achieved is not decisive of the case, and in fact nothing of significance turns on it.

[77]The fact that Gralio's code number, if that is what it was, appeared in the *modus operandi* document referred to by Myburgh and Greeff raises suspicion, but no evidence linking this fact with the reality of Gralio's activities in the period before its acquisition by the Singh family trust was presented to the Tribunal.

[78]Both questions posed above must accordingly be answered in the negative.

[79]With these considerations in mind, the Tribunal dismisses the complaints against Gralio. Gralio has not been shown to have been party to an agreement or concerted practice prohibited under Section 4 of the Act.

³³ See the comments of Areeda and Hovenkamp in their treatise Antitrust Law Volume XII at #2032 under the heading "Naked and 'Nearly Naked' Market Divisions."



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[80]No order as to costs is made.³⁴

29 November 2010

L Reyburn

Concurring: A. Wessels and A. Ndoni

Tribunal Researcher: Rietsie Badenhorst

For the Commission: Adv O Mooki instructed by the State Attorney

For Gralio: Adv CG Marnewick instructed by Naidoo & Company Inc

³⁴ It is not the Tribunal's practice to award costs against the Commission when it fails in a prosecution of allegations of contraventions of the Act.