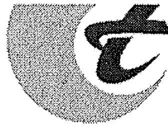

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CR206Feb15

In the matter between:

The Competition Commission	Applicant
and	
Natal Portland Cement-Cimpor (Pty) Ltd	First Respondent
AfriSam (South Africa) (Pty) Ltd	Second Respondent
Lafarge South Africa (Pty) Ltd	Third Respondent
Pretoria Portland Cement Company Limited	Fourth Respondent

Panel	: Norman Manoim (Presiding Member) : Enver Daniels (Tribunal Member) : Medi Mokuena (Tribunal Member)
Heard on	:27-31 August 2018; 24 – 25 January 2019; 28 January 2019; 31 January 2019; 1 February 2019; and 12 March 2019
Reasons Issued on	:04 December 2019

Reasons for Decision

Introduction

[1] This matter concerns whether the four respondents, Natal Portland Cement-Cimpor (Pty) Ltd ("NPC"), AfriSam (South Africa) (Pty) Ltd ("AfriSam"), Lafarge South Africa (Pty) Ltd ("Lafarge") and Pretoria Portland Cement Company Limited ("PPC"), entered into an agreement, alternatively, a concerted practice which:

a. Firstly, indirectly fixed cement prices in contravention of section 4(1)(b)(i) of the Competition Act, No. 89 of 1998 ("the Act"); and

b. Secondly, divided the cement market through, *inter alia*, the allocation of market shares in contravention of section 4(1)(b)(ii) of the Act.

[2] Originally, the Commission sought similar orders against all four of the Respondents. AfriSam, Lafarge and PPC have, however, settled with the Commission. It is unnecessary to deal in detail with the settlements reached with the Commission, except to say that these respondents had agreed to cooperate with the Commission in its pursuit of its case against NPC and did cooperate.

[3] This meant that NPC was the only firm left facing the allegations, and the Commission thus sought the following order:

a. Declaring that NPC contravened sections 4(1)(b)(i) and 4(1)(b)(ii) of the Act[1]; and

b. Directing NPC to pay an administrative penalty of 10% of annual turnover.

[4] The Act commenced on 1 September 1999. Any agreement between, or concerted practice by, firms, or a decision by an association of firms in a horizontal relationship prior to that date would not fall foul of the Act[2]. As will be observed herein, the Commission bases its case primarily on a cartel arrangement reached sometime in

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[1] Section 4(1)(b)(i) and (ii) reads:

> **4. Restrictive horizontal practices prohibited.**—(1) An *agreement* between, or *concerted practice* by, *firms*, or a decision by an association of *firms*, is prohibited if it is between parties in a *horizontal relationship* and if—
>
> (*a*) ...;
>
> (*b*) it involves any of the following *restrictive horizontal practices*:
>
> (i) directly or indirectly fixing a purchase or selling price or any other trading condition;
>
> (ii) dividing markets by allocating customers, suppliers, territories, or specific types of *goods or services*;

[2] *Netstar (Pty) Ltd and others v Competition Commission and another* [2011] 1 CPLR 45 (CAC) at para [19] where it was said that activities prior to the coming into operation of the Act on 1 September 1999, do not fall within the ambit of the Act.

1995 and a later agreement that was concluded in the Winter of 1998 and which the Commission infers continued up 2005.

Background

[5] The complaint against the respondents (including NPC) which are producers and suppliers of cement was that they were competitors in a horizontal relationship (as contemplated in section 4(1) of the Act)[3] in the market for the production and supply of cement in South Africa and the SACU[4] region and had entered into an agreement or, alternatively, a concerted practice which indirectly fixed prices and divided the cement market through the allocation of market shares in contravention of the Act.

[6] The Commission alleged that this cartel conduct commenced in or about 1995 and continued until at least 2009. A legal cartel existed between the respondent cement manufacturers until September 1996, but prior to the demise of that cartel, the respondents met in various places to discuss how the cement production market would operate afterwards.

[7] We note that up to about October 2002, NPC was jointly owned by AfriSam, Lafarge and PPC in equal shares. In essence, NPC was a joint venture of the other three companies. AfriSam appointed the Chairperson of NPC.

[8] Following an investigation, the Commission found that after the demise of the lawful cartel, the respondents engaged in cartel activity by fixing prices and dividing markets through an agreement/(s).

[9] For the purposes of these reasons we do not have to deal with the legal cartel, as it was officially sanctioned by the then competition authorities and because it operated prior to the commencement of the Act. However, the genesis of the complaint by the Commission is to be found in voluntary arrangements made by the respondents in 1995 which we do have to consider.

[10] The Commission contends that in May 1995 the respondents reached an agreement ("the 1995 agreement"), to allocate market shares as follows:

a. PPC: 42 – 45%;

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[3] The Act defines 'horizontal relationship' as follows: 'horizontal relationship' means a relationship between competitors.

[4] Southern African Customs Union – including Lesotho, Botswana, Swaziland and Namibia.

b. Afrisam: 35 -36%; and

c. Lafarge: 22 -23%.

[11] NPC had an estimated market share of between 11% - 12% which resulted in the market shares of the others being 39%, 31% and 18% respectively. NPC's share was calculated nationally, but the evidence led showed that it operated mainly in southern KwaZulu-Natal and had done so since its incorporation.

[12] PPC, AfriSam and Lafarge operated nationally and had, on a national basis, allocated market shares to themselves. They did, however, have a complete understanding of NPC's market share by virtue of their common ownership of NPC and used that understanding to monitor their own market shares and to preserve NPC's value for the purposes of a sale.

[13] The NPC market share necessarily had to be calculated on a national basis. NPC enjoyed the overwhelming share of the market in KwaZulu-Natal and had the regional share of NPC not been taken into account, the other producers would not have been able to properly monitor the market share movements of each other. The respondents were required by the Commission established in terms of the Act to dispose of their shares in NPC, hence the need to preserve its value.

[14] Despite the 1995 agreement, PPC gained additional market share and the others retaliated through a price war between 1996 and 1998 and this eroded the margins of the cement producers.

[15] In 1998, the cement producers reached another agreement ("the Port Shepstone agreement") which, amongst other things, refined the 1995 agreement and reallocated market shares to themselves in line with the market share allocations under the lawful cartel for the SACU market.

[16] This resulted in PPC's share of the market, which had increased to about 50% of the national market, reverting to about 43% which included its share of the NPC volumes.

[17] It is the Port Shepstone agreement which is the main thrust of the Commission's case against NPC and an earlier agreement to exchange information.

[18] In or about 1996, to maintain and monitor the market shares, the producers agreed to submit detailed cement sales data to auditing firm, Deloitte which had been appointed by the Concrete and Cement Institute of South Africa ("the C&CI")to aggregate and disseminate the aggregated sales data on a monthly basis.

[19] The Commission alleged that the C&CI was a central mechanism in enabling the cement producers to target market shares. The Commission further believed that the cement producers concluded additional agreements on the format of templates used to submit sales data to the C&CI – known as Schedules A – J.

[20] This information also enabled the cement producers to measure their own market shares and to monitor their rivals. The information exchange through the C&CI ended in 2009 when the Commission decided that the information exchange should only reflect national aggregated sales data. Up to then, the information exchange took place under circumstances which the producers believed did not flout the Act.

[21] In 2002, Cimpor acquired the entire shareholding of NPC from Afrisam, PPC and Lafarge and changed the name to NPC-Cimpor.

[22] According to the Commission, Mr Piet Strauss ("Strauss"), the managing director of NPC, deposed to an affidavit submitted to the Commission and confirmed that he attended the 1998 Port Shepstone meeting.

[23] The Port Shepstone meeting had been called by Mr Piet Fourie ("Fourie"), the then managing director of Lafarge. Strauss attended as the invited representative of NPC. According to the Commission, Strauss confirmed that the Port Shepstone meeting was about an "organised market". PPC, Afrisam and Lafarge exchanged geographic and sales information and Strauss did so as well in respect of NPC. Some months after the 1998 Port Shepstone meeting, Strauss attended a follow up meeting in Rivonia.

[24] Critically, according to the Commission, NPC, after its takeover by Cimpor, could have withdrawn from the cartel arrangements but did not. According to the Commission, Fourie had repeatedly lectured all of the producers on the "rules of the game".

[25] The Commission argues that NPC was an integral part of the 1998 Port Shepstone agreement and that it must be presumed that an agreement in contravention of section

4(1)(b) of the Act existed by virtue of section 4(2)[5] of the Act and in the light of the cross-shareholdings, cross-directorships and the admitted conduct of NPC.

[26] Although Cimpor changed the NPC board of directors, Strauss remained the managing director and NPC continued to abide by the cartel arrangements, submitted sales data to Deloitte and continued to target its allocated market shares, comprised primarily of sales in the south of Kwazulu-Natal[6].

[27] Other aspects of this arrangement, as detailed by the Commission, need to be noted. Lafarge's presence in Southern Kwazulu-Natal was less than one percent. It transported cement from its Lichtenburg plant, approximately 600 kms away to supply its customers in Northern Kwazulu-Natal. NPC was the direct beneficiary of the arrangement and some of its documents identified certain regions in KwaZulu-Natal as no-go areas. PPC added a surcharge to quotes requested by NPC customers.

[28] In 2008, an NPC commissioned expansion to its Simuma plant to increase capacity by approximately 500 000 tonnes became operational and enabled NPC to reach and maintain its market share. This factor is, for our consideration of the matter, also important, especially as Strauss had for a long time, before the NPC takeover by Cimpor, argued for an expansion in NPC's capacity.

[29] Afrisam and Lafarge were also shareholders in Ciments de Bourbon (now known as Holcim, a cement company based in Reunion) and were represented on its board. The directors attended meetings in Paris and there discussed and affirmed the South African cement market shares required by Afrisam and Lafarge. Those discussions filtered down to NPC by virtue of the cross shareholdings.

[30] Strauss attended other international meetings one of which was reflected in a minute and which was also attended by Fourie, Elmor Leo and Frederick de Rougemont of Lafarge. Lafarge and Afrisam discussed cooperating in the South African market and discussed Lafarge supplying NPC with cement.

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[5] Section 4(2) reads: An agreement to engage in a restrictive horizontal practice referred to in subsection (1)(b) is presumed to exist between two or more firms if –
(a) any one of those firms owns a significant interest in the other, or they have at least one common director or substantial shareholder in common; and
(b) any combination of those engages in that restrictive horizontal practice.

[6] The NPC share of the market was calculated at 11-12% of the SACU market nationally, although NPC operated mainly in Southern Natal, allocated to it by the other three producers, which had divided KZN into Northern and Southern-KZN.

[31] NPC continued to submit detailed information and made use of the C&CI information to monitor and target its allocated market share. It also submitted sales statistics on a monthly basis to the auditors of C&CI. NPC had a market share of up to 90% in Southern KwaZulu- Natal. Lafarge predominated in Northern KwaZulu- Natal where NPC had only 15% of that market. NPC monitored its market share by segments and monitored volumes by bag and bulk in order to ascertain movement in the market.

[32] In his affidavit, Strauss stated that at the 1998 meeting, the representatives of PPC, Alpha and Lafarge decided that each of their companies and NPC should maintain certain market shares in designated geographic areas. He also mentioned that his participation in the 1998 meeting was limited and he was instructed to carry out the decisions of the NPC shareholders in respect of the market share allocations made to NPC. He also stated that NPC's market share in southern KwaZulu-Natal remained unchanged and that he has no recollection of having given instructions to NPC staff to give effect to the 1998 meeting and any other meeting. He states that within 3 - 4 years of 1998 meeting, he had already put in place measures to compete with the shareholders and after the Cimpor takeover, the shareholders were relegated to competitors and customers.

[33] NPC's answering affidavit was deposed to by Edney Vieira ("Vieira"), the administration and legal director of NPC-Cimpor (Pty) Ltd. Vieira denies that NPC is guilty of contraventions of section 4(1)(b) of the Act. According to him, NPC had cooperated fully with the Commission's investigation and requests and had made its witnesses available to the Commission. NPC was of the view that it had placed all the facts before the Commission and that those facts did not justify the referral of a complaint in terms of section 4(1)(b) against NPC.

[34] He mentions that NPC was prejudiced by the long delay in the prosecution of the matter as during that delay many of its records were destroyed in a fire in 2013 at Metrofile where it stored its records. He suggests that NPC may want to raise a section 67(1) defence[7] but that the Commission would contend that NPC bears the onus to show, with reference to records, that the conduct it was engaged in during the 1990's ceased prior to June 2005. It would be prejudicial to NPC to have to deal with those allegations as many of its records have been destroyed.

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[7] Section 67(1) states that a complaint in respect of a *prohibited practice* may not be initiated more than three years after the practice has ceased.

[35] After InterCement had purchased 100% of the shares in Cimpor during 2012, Cimpor was significantly restructured and many of the NPC records relevant to the period 2002 – 2009 were either discarded or destroyed. The main allegations against NPC relate to events which happened between 1998 -2003. The Commission, he contends, made no allegations of explicit conduct by NPC after 2003 and is intent on relying on inferences to prove continuing conduct by NPC after 2003. The long delay will also prejudice NPC as memories fade and NPC has not been able to establish exactly what records may be in Deloitte's possession.

[36] InterCement and the BEE shareholders who hold 26% of the NPC shares will bear the financial consequences of the action, even though both InterCement and the BEE shareholders were uninvolved in NPC prior to 2012 and 2008 respectively and were not involved in the affairs of the company during the period referred to in the complaint. For these reasons, NPC argues that the referral should be dismissed or permanently stayed.

[37] NPC also raises a special defence in terms of section 67(1) of the Act. The complaint was evidently initiated on 02 June 2008. Therefore, a prohibited practice which ceased prior to June 2005 cannot be the subject of a valid initiation and a referral of such a complaint is fatally defective.

[38] According to NPC, each of the agreements were made prior to either 2002, or alternatively, prior to June 2005. The agreements relied on by the Commission were concluded while NPC was a wholly owned subsidiary of the other three cement producers and no separate liability can be imposed on NPC for its involvement in arrangements made by those producers and also for any involvement by NPC prior to October 2002 when NPC was acquired by Cimpor and the board of directors replaced.

[39] The decisions made by NPC were not influenced by any collusive arrangements between the other cement producers and no agreement is alleged by the Commission to have been concluded between NPC and the other cement producers after Cimpor took control of NPC. Furthermore, no jurisdictional facts to prove a prohibited practice after 2003, alternatively 02 June 2005 have been established.

[40] NPC also raises as a defence that information sharing *per se* is not prohibited by section 4(1)(b).

[41] NPC alleges that after it was acquired by Cimpor:

a. it entered the ready-mix concrete industry, which it had been precluded from doing, to increase cement sales in July 2003;

b. in October 2003, Cimpor authorised feasibility studies for expanding the milling and clinker production capacity of NPC and the replacement of the packing lines in Durban to improve efficiencies;

c. Cimpor authorised the movement of a mill from operations in Brazil to NPC in Simuma to increase milling capacity in Simuma; and

d. Cimpor authorised and funded the construction of a new kiln line in Simuma.

[42] That then is a brief summary of the Commission's and NPC's cases. We have not deemed it necessary to refer to the Commissions replying affidavit, except to say that the Commission places much of what is stated in NPC's answering affidavit in dispute.

Evidence

[43] The first witness called by the Commission was Mr Colin Jones ("Jones") who from the time of the demise of the legal cartel in 1996 until October 2002 was the PPC executive responsible for Sales and Marketing. He explained that the fundamentals of the legal cartel were a market sharing arrangement between the three producers that shared the market, the northern market, between those producers in a specific ratio. Cement was sold to the public through the Cement Distributors (South Africa) (Pty) Ltd ("CDSA") which at the end of every month distributed the profits to the individual companies according to their market shares.

[44] The selling price was determined according to the "Twycross pricing formula", which was designed to optimise rail transport. Customers would pay a list price which was the Lafarge factory base price plus the rail costs.

[45] Jones stated that although the legal cartel was to end on October 1996, it was ended a year earlier by the producers who also agreed at a South African Cement Producers Association meeting held on the 15th of December 1995 to set target market share limits as follows; Alpha[8] 35 – 36%, Lafarge 22 – 23%, PPC 42 – 43% which included one third of NPC's sales in each market share.

[8] Alpha became Afrisam.

[46] PPC was well prepared for the end of the legal cartel and gained about 50% of the market share which resulted in a price war. The producers, including NPC, eventually met at Port Shepstone in 1998 where the Port Shepstone Agreement, which reaffirmed their commitment to specific market shares, was reached. According to Jones, Mr Pieter Strauss ("Strauss") who was the managing director of NPC from 01 January 1998 up to 2005 when he was appointed by Cimpor, which had acquired NPC, as its country manager for South Africa and Mozambique, was present but could not be specific about Strauss' participation in the meeting. After the Port Shepstone meeting, PPC reduced its share of the market to pre-price war levels. PPC was able to monitor its market shares through information obtained from the C&CI[9] through Deloitte. The producers, according to him, met regularly, exchanged information and compared notes.

[47] The second witness was Ms Marlene Corrie ("Corrie") who worked for PPC and was the person responsible for sales within the Gauteng region and KZN and, at the time of giving evidence, the general manager for sales within the inland areas and KZN looking at sales and the distribution of cement in those areas. Corrie confirmed that each of the producers, including NPC, targeted specific market shares and that PPC would actively take steps to either increase or decrease the market shares to maintain the targeted market share by either increasing the prices to certain customers to deter those customers from buying PPC cement or decrease prices to encourage the customer to buy their products.

[48] She also confirmed that information was exchanged, and the producers knew what the markets shares were of each producer. According to her, the exchange of information through the C&CI helped to stabilise the market and when there were deviations from those market shares by a producer, the other producers would retaliate. PPC reviewed their market shares on a monthly basis using the C&CI information and managed those shares accordingly. Ms Corrie also confirmed that prior to the demise of the lawful cartel, PPC prepared for that event by buying up transport companies and cement merchants and signing up new customers with the result that PPC's market share increased to 50%.

[49] The price war was sparked by all the producers targeting the same customers and offering them price incentives to buy from them. The price war ended after they were

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[9] The Cement and Concrete Institute.

all told to go back to their old market shares. According to Ms Corrie, Mr Jones had given them the instruction in respect of PPC. PPC stuck to its market share, as did the others because they did not want to start a price war which would erode their revenue. Informal meetings took place between the producers at which they discussed which customers to give up or to receive in order to maintain those market shares. Although she had decided to target customers in the area supplied by NPC, she was told to exit that market, presumably, according to her, because there were complaints that they had entered an area which they had undertaken not to. Ms Corrie mentioned a request to supply cement to a customer in Swaziland which was traditionally an AfriSam market. After some discussion, PPC decided not to supply into Swaziland because PPC feared that AfriSam would then target Lesotho which was PPC territory.

[50] Under cross- examination, Ms Corrie made a number of concessions. The important ones for the purposes of these reasons is that during the legal cartel, NPC did not sell its products through though the CDSA; that NPC was not part of the quota balancing system under taken by the other producers at the end of each accounting period to ensure that each of the producers received their fair shares, as NPC was controlled by the other three; and that NPC was never part of the legal cartel and that the other producers determined market shares.

[51] Other important concessions made by Ms Corrie were that she did not get market share information about the other producers, but that Mr Jones had given them the market shares which each producer would adhere to; at the end of 2002, in relation to the C&CI data, they received aggregated information and could not determine NPC's data from that and when they received PPC's data they could not see NPC's data and could not see what NPC's actual share was and whether NPC was growing or declining in sales. They could also not use the C&CI information to determine the shares of the other producers. She had received market share information from her compatriots at the other producers. However, she did not receive any information from anyone at NPC. She also conceded that when she spoke about cartel conduct, that did not include NPC.

[52] In her witness statement, Corrie confirmed that between 1999 and 2001/2, she attended regular, scheduled meetings with Lafarge and AfriSam at which targeted market shares, the level of pricing and related matters were discussed. NPC was not part of those meetings, but Corrie makes the bald statement in paragraph 5.3 of her statement that NPC conducted itself in the same manner as the others did to maintain market share, without providing any details.

[53] Costs, particularly the transport costs, play an important role in determining prices at which cement may be sold competitively. A reduction in transport costs would reduce the prices at which cement was sold. Therefore, it made sense to sell cement as close as possible to where the cement is produced. NPC's manufacturing facilities were situated in Southern Natal and it had the competitive advantage over the other manufacturers by being able to sell cement in that part of Natal, more particularly the Durban and surrounding areas. This point, too, was conceded by Ms Corrie.

[54] When asked by Adv Turner:

> *"And so depending on where you are in Northern Natal, at the Southern part, NPC will be able to get there, and at the Northern part, the Northern refiners, the Northern producers would be able to get there cheaper. Is that correct?"*[10]

Ms Corrie replied in the affirmative as it would make no real economic sense for producers to sell cement far from their manufacturing plants, as they would not be able to compete effectively with producers who do sell close to their plants.

[55] In respect of Northern Natal, Ms Corrie conceded that the discussions which took place between PPC, Lafarge and AfriSam, entailed a consideration of where the plants were and an allocation of shares to optimise markets, transport costs and profits. However, she also stated that they were not to sell in certain parts because that was part of the market allocated to NPC and that the price war impacted most on Lafarge, PPC and Afrisam and did not have an impact on NPC in the Durban area where most of their products were sold.

[56] The next witness was Mr Eugene Pienaar ("Pienaar"). Mr Pienaar was transferred to the cement division of AfriSam in or about 1996, as the general manager reporting to Mr Marco Germena, to assist in preparing AfriSam to sell and distribute cement, pending the termination of the legal cartel at the end of September 1996. Although he did not know how the market shares were calculated, AfriSam's target market share was 31.6%. Mr Pienaar resigned from AfriSam on 31 March 2003 and could only speak confidently about the events at Afrisam until December 2002.

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[10] Transcript. 29 August 2018. Page 429.

[57] He confirmed that Afrisam, Lafarge and PPC had reached an agreement in 1995 that after the breakup of the legal cartel, they would maintain their national market shares. In his witness statement he confirmed that NPC was owned by PPC, Afrisam and Lafarge and managed by AfriSam but that all four were competitors of each other. He was tasked with ensuring that AfriSam's national market share of 31.6% was maintained and although there was no agreement on regional shares, each company had to manage its regional shares to ensure that they added up to the national shares. He developed a method to monitor the market shares by taking into account the national and regional sales volumes and then weighting them. Employees were incentivised through a bonus system to adhere to those target shares. AfriSam attempted to adhere to the 1995 agreement but suspected that PPC did not.

[58] He met privately with Colin Jones of PPC and Pieter Fourie of Lafarge to discuss ways of stabilising the market and the implementation of national market sharing arrangements. One meeting was attended by Strauss of NPC who complained that NPC's market share was dropping and that there was interference by one of the others in NPC's market. He was unable to provide any further details about Strauss' complaints. The meetings ended around 2002 or possibly earlier by which time the market sharing arrangements had been institutionalised.

[59] He received the aggregated data disseminated by C&CI to industry participants and used that to monitor AfriSam's shares but if it lost sales, he could not establish which of its competitors had benefited from the loss. He did, however, have access to NPC's data as AfriSam managed NPC. Therefore, he needed the data of only one other competitor to monitor accurately the market share fluctuations of the other competitors. He clandestinely exchanged data with Mr Fourie of Lafarge. He made his calculations on his home computer and made monthly presentations to Mr Michael Malachi Doyle ("Doyle"). He did not share his information with anyone else in AfriSam.

[60] When Mr Doyle became the managing director of AfriSam, he appointed McKinsey & Co to assist it with a business strategy to address its problems in the market and its profitability. McKinsey assisted it with a cost cutting exercise and sales strategy which involved selling in the right markets to the right customers to maximise profits and then to try to restore industry value. McKinsey & Co also developed a "co-opetition" strategy based on the principles of predictability, transparency and credible threats. Up to 2002, he carefully monitored the target market share. He confirmed that AfriSam's regional sales varied as a function of transport costs and distance from the plant. In this regard, he confirms Ms Corrie's evidence that transport costs do influence sales. In fact, he

confirmed that they used the position of their plants to claim a market and that some markets were more suitable for AfriSam to supply and others more suitable for supply by the other competitors because of transport logistics.[11] If Afrisam suspected that its markets were being targeted they made appropriate threatening noises.[12]

[61] According to him, the outcome on the Port Shepstone meeting was market stability, although nothing specific about Natal was discussed. He also confirmed that the competitors he spoke about were Lafarge, PPC and NPC and that they together with AfriSam understood how stability was to be achieved in the market. He could not recall whether AfriSam had a presence in Southern KwaZulu-Natal but mentioned that it was a no-go area because of the transport logistics. Mr Pienaar confirmed that shipping cement into Southern KwaZulu Natal would have been horrendously expensive and that those areas were never seen as part of the AfriSam market.[13]

[62] Mr Pienaar was asked by Mr Gotz about a document, "Exhibit 4A" which records that the then shareholders of NPC would have been prepared to invest R500 million to purchase NPC as they would have received a rate of return in real terms of 10%. He explained that certain businesses have an internal rate of return and if you assume 10% that would translate into R500 million. However, if other cement manufacturers supplied cement into the area through a backhaul or entered the market then that would reduce the internal rate of return[14] to as low as 3%.[15]

[63] The Commission also called Ms Aleksandra Beverin ("Beverin"). She was a senior market analyst at AfriSam where she worked from 1998 to 2014 in various capacities. She was required to propose strategies to maximise profits and to restore industry value by better price management. She was also responsible for considering the macro industry as well as construction industry trends which involved, amongst other things, analysing the industry statistics to determine the direction of the business, pricing, and analysing the competitive environment.

[64] She understood that a legal cartel existed in South Africa until 1996. The cartel was managed by the South African Cement Producers Association ("SACPA") while distribution was centralised though the CDSA. Individual companies did not market or sell their own cement and pricing was uniform. SACPA collected and managed each

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[11] Transcript. Page 503.
[12] Ibid.
[13] Transcript. Page 542.
[14] Ibid. Page 549.
[15] Ibid. Page 550.

producer's production data up to the end of the legalised cartel when the responsibility was transferred to the C&CI which later appointed Deloitte to collect the information. The reporting framework used reflected the monthly sales by province. At the beginning of 2002, a schedule was added which showed sales volumes per province including sub-divisions of the Eastern Cape and KwaZulu-Natal and for the other SACU countries. In that year, two other schedules were added which showed monthly regional sales volumes by end use sector and for cement sales only and monthly total regional sales volume by end use sector for cement extender sales only.

[65] In 2003, it was agreed that each cement producer would supply data to the auditors within 4 days of the end of each month. The auditors would then, within a day, compile the aggregated report for distribution. In 2005, certain information was submitted on a weekly basis and the C&CI issued statistics on a weekly basis. In April 2007, the members started disseminating total regional sales volumes on a weekly basis in order to monitor the demand trend and plan for alternative supply sources. This lasted until the Commission initiated its complaint.

[66] In 2005 a schedule showing imports was also added. In 2007, according to Ms Beverin, the members decided to report any known imports into South Africa by third parties. Durban was monitored by NPC, while PPC monitored PE and Cape Town. AfriSam monitored East London and Walvis Bay and Lafarge monitored Richards Bay. When the C&CI stopped disseminating information in 2009, she was still able to model the data from plausible and public sources of data but to a lower level of detail.

[67] Much of what Ms Beverin had to say was common cause and was not seriously disputed by any of the parties. During her examination in chief she confirmed that Afrisam's market share remained the same until about 2009 and that the C&CI data was crucial as it formed the starting point of her analyses. During cross examination she stated that NPC's capacity limited their market share growth until 2008 when 0.6 million tons of capacity was added. At that time, the demand in the NPC area exceeded their capacity to supply so their market share probably declined. They could not sell more so their market share could not increase. She also confirmed that an optimisation strategy meant taking your existing capacity and selling it as close as possible to home to maximise the margin by saving on transport costs. She also confirmed that she did not see NPC as a credible threat in Gauteng because of the distance involved, but NPC could possibly pose a threat in the Border / Transkei region where AfriSam was strong. She also knew that until 2006/7 cement was produced by NPC in Durban and only when cement was produced by NPC at Simuma would it have been possible for

them to pose a threat to Afrisam in the Border / Transkei area, as NPC did not have spare capacity up to then.

[68] Mr Fourie who resigned from Lafarge in July 2003, was the managing director of Lafarge's cement division until January 2002. He also confirmed that a legal cartel had existed. When the legal cartel ended, PPC embarked on an aggressive strategy to increase its market share which resulted in the other producers losing considerable market shares. Lafarge's share dropped from 22% to 14%. PPC, according to him, was able to move quickly, because, at the time, Lafarge and AfriSam were focused on merging. Lafarge, as an international company, placed considerable emphasis on market share and in its calculations of what to pay for Blue Circle which it had acquired from Murray and Roberts,[16] Lafarge would have considered that it was buying a certain market share.

[69] Lafarge concluded that the profits which it earned in South Africa were not acceptable because the industry was not operating according to the global rules whereby maximising profitability could only be achieved by improved logistics and producers marketing their products near their plants and not chasing volumes in areas closer to their competitors' facilities. He attended a meeting in Paris which had been arranged by Mr Michelle Rose, the then Chief Operations Officer of Lafarge Paris where the rules were explained to him. Mr Elmor Leo, the then Chief Executive Officer of Blue Circle and Mr Alaign Lemeur, the President for Africa of Lafarge also attended.

[70] He had been told that according to the global rules of the cement industry, the market share should follow the capacity share in round numbers.[17]

[71] Fourie was instructed to convey the rules to the South African producers, particularly to PPC. He explained the rules to PPC, AfriSam and NPC and that it was relatively easy to do so, as the cement producers were all shareholders in NPC, and he was in contact with the employees of the other cement producers at the NPC and Slagment board meetings[18]. According to a footnote in his witness statement, between 10 and 15 board meetings were held but those ceased around 2002. However, he held numerous meetings with Colin Jones of PPC and Eugene Pienaar of AfriSam to discuss the market and ways of stabilising it. Higher level meetings were also held

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[16] Lafarge acquired Blue Circle, a cement producer from Murray and Roberts. That purchase gave Lafarge entry into the South African market. Blue Circle was renamed Lafarge.
[17] Transcript. Page 875. Line 4.
[18] Slagment (Pty) Ltd was also owned by the three cement producers.

between Leo and his counterparts at PPC and Afrisam, viz., John Gommersal and Mr Doyle. Fourie did not attend those meetings but was told about them by Leo. According to Fourie, all the producers agreed to abide by the rules.

[72] There is no suggestion on his part that NPC had agreed either implicitly or explicitly to abide by the rules.

[73] The Competition Board had required the producers to sell NPC, in line with the breaking up of the legal cartel. Although he had motivated that Lafarge should buy NPC, Lafarge did not do so. He, therefore, concentrated on preserving NPC's value and NPC's presence in the Southern KZN would achieve just that. In his examination in chief, he elaborated on this aspect. After the breakup of the cartel, Lafarge recognised PPC and AfriSam as their only competitors. A proposed merger between AfriSam and Blue Circle, which was ultimately refused by the competition authorities, was frowned upon by PPC which reacted aggressively by cutting prices and, in effect, starting a price war which resulted in Lafarge's market share dropping from 20% to 14%.

[74] He called for a meeting, which was arranged by Strauss and held at an hotel in Port Shepstone in about August 1998 and attended by him, Colin Jones, Eugene Pienaar and Strauss. At that meeting the respondents agreed that the market shares would remain those agreed upon under the legal cartel and would be calculated on the SACU market or the national market. Following the meeting, Lafarge decided to exit the Southern KwaZulu-Natal meeting, in line with the agreement between PPC and AfriSam to avoid eroding NPC's value.

[75] His evidence suggests that NPC was not a party to this agreement.

[76] Fourie had recollected a meeting held in Lisbon in early December 2002, just after Cimpor took over NPC. Lafarge International held shares in Cimpor and had representation on the Cimpor board. He recalls that at that meeting Straus motivated for capital for a new plant which NPC intended to build to develop clinker capacity. Whilst he could not specifically recall a meeting which took place in Paris on 1 April 2003, he confirmed that the minutes of those meetings suggest that a discussion took place around Lafarge supplying NPC with clinker which would delay the need for NPC to invest in more clinker capacity.

[77] In response to a question from Mr Gotz, Mr Fourie explained that he did not immediately set about explaining the global rules to NPC because NPC was jointly

owned by the other three producers and he did not view NPC as a competitor. He had made a proposal to Lafarge to acquire NPC, but that proposal was rejected. They then developed a strategy to increase the value of NPC to maximise their return under a sale by ensuring that NPC had maximum capacity utilisation, sales volumes and that their prices are maximised. He mentioned that the value of NPC was not discussed by the NPC board on which he sat, because value was a shareholder issue which the board did not discuss. He did, however, explain to his counterparts at PPC and AfriSam how NPC's value could be maintained to realise the best possible price in the event of a sale.

[78] The strategy to maintain NPC's value was probably successful, as Cimpor paid almost double what NPC was evidently valued at.

[79] Mr Fourie mentioned that cooperation would take place mainly in South Africa, but also in the region and more specifically in Mozambique and Zimbabwe. Cimpor was active in the former country and Lafarge in the latter. At that time, Lafarge had surplus clinker capacity in South Africa and wanted to supply NPC with clinker which would postpone the need for NPC to invest capital in more clinker capacity. Lafarge and Cimpor were already cooperating at a management level.

[80] There may also, according to him, have been a real desire on the part of Lafarge to save capital by postponing the investment in new capacity. There had been a disagreement with him about the growth prospects in South Africa. Lafarge was less optimistic about the growth in South Africa than he had been, but ultimately the growth in the following five years exceeded even his estimate. If NPC postponed its own development plans and Lafarge had additional capacity in South Africa, they could make some money in the short-term in South Africa and, amongst other things, by supplying ash to Mozambique. Although he dealt in some detail with these issues, they appear to be routine commercial issues and not competition related.

[81] Mr Fourie also explained that had additional capacity been created at the Simuma plant and growth did not materialise then logically NPC would move into other areas of Natal and into the Border area of the Transkei. That would have caused some market disruption. AfriSam supplied parts of the Transkei and he would have expected them to retaliate if NPC entered their markets. In respect of the statistics supplied to C&CI, he believed it contained too much information, even as to geographic regions, as it enabled producers to make assumptions about what the other producers were doing. In effect, the data allowed them to calculate and maintain market shares and to

determine where they were selling more than was reasonable. The amount of detail allows the producers to analyse behaviour in the market too closely and to understand one's own performance in relation to one's competitors closely.

[82] During his cross examination he clarified a number of issues. He confirmed that the producers submitted information to the C&CI, but that the information exchange between them took place after that. He recollected that the very first exchange of information happened when he received one of the submissions of AfriSam from Mr Elmor Leo, who advised him that he had received it from Mr Doyle. That allowed him to work out what PPC was doing. After that, information between AfriSam and Lafarge was exchanged but, at the time, they did not receive any information from PPC which did not want to share information. The exchange of information, though, always took place after the submission and the publication of information to the C&CI.

[83] According to him, the aggregate numbers would be published. He had his own submission and "after the event" he would have the submission of AfriSam and could work out what PPC's share was. PPC would not disclose their numbers formally, but he was able to work it out and knew when PPC was being dishonest about their market shares. Eventually the three ended up discussing what each was doing around a table.[19] They were high level meetings at which the global rules were discussed, and information exchanged which helped them to understand where and to whom they had lost market shares. He also clarified that several such meetings were held but Mr Strauss only attended the Port Shepstone meeting.

[84] He confirmed that PPC had decided to withdraw from the Northern Natal market and that the decision had been made at the level of the CEO's of the three companies. He was particularly concerned about preserving NPC's value if it was going to be sold to a third party and for that reason it would not make sense to compete with NPC in Southern KwaZulu-Natal. Following the Port Shepstone meeting, Lafarge also decided to exit the Southern KwaZulu-Natal market to avoid eroding NPC's value[20].

[85] He also confirmed that the exchange of information did not include NPC. NPC was owned by the three producers and they were privy to board minutes which contained details of NPC's volumes. Mr Fourie also confirmed that NPC had to operate at full capacity, but under competitive circumstances[21]. At the Port Shepstone meeting, the

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[19] Transcript pages 911 -12

[20] Transcript page 922.

[21] Transcript page 938.

agreement was that NPC would be allowed to operate at maximum capacity to maximise NPC's sale value.[22]

[86] He conceded that it would be fair to say that ultimately the agreement in respect of the national market shares was reached by all the respondents, i.e., PPC, Lafarge and AfriSam, but that the agreement included allowing NPC to operate at full capacity.[23]

[87] NPC, which was a joint venture between PPC, Lafarge and AfriSam, its shareholders, enjoyed no autonomy at all as its direction was determined by the three shareholders which were represented on the NPC board which they controlled. Thus, any liability for what NPC did would be the liability of its controllers, i.e., its shareholders.

[88] In *Wasteman*[24], we came to a similar conclusion, when we said:

> *"It is not difficult to imagine how liability for collusion could be avoided if competitors could sanitise what would otherwise be a collusive arrangement by changing hats. Whilst as a matter of legal form, the director of the downstream competitor may sit in the boardroom as a director of the upstream supplier when the agreement is struck. But for the purpose of competition law this is fiction. The real economic relationship remains one of two competitors reaching an agreement. While the proverbial smoke-filled room has been replaced by the sanitised atmosphere of the boardroom, the effect is the same – two competitors, sitting on an upstream JV, have reached an agreement on pricing in their respective downstream operations through the means of a corporate vehicle over which both exercise unfettered control. We thus find the fact that firms which are otherwise competitors may reach agreement in some other venture of separate legal form to their competing ventures does not, solely for that reason alone, constitute a bar to liability in terms of section 4(1)(b) of the Act."*[25]

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[22] Transcript page 940.
[23] Transcript page 941.
[24] *Competition Commission v Wasteman Holdings (Pty) Ltd and another* [2014] 2 CPLR (CT). Case No: CR210Feb17.
[25] *Wasteman.* Paras [34] and [35]. Here the shareholders had established an upstream waste disposal site, Visserhok, in the Western Cape and each shareholder s was entitled to appoint two directors to the Board.

[89] The Port Shepstone Agreement was technically an agreement between PPC, Lafarge and AfriSam. NPC was obliged to adhere to the agreement, because of the agreement between the shareholders and not because NPC had independently agreed to do so.

[90] Mr Fourie was referred to an extract from the transcript of his interrogation by the Competition Commission and confirmed that there were discussions relating to cooperation between Cimpor and Lafarge and about Lafarge grinding for Cimpor at Richards Bay. These, too, appear to be routine commercial discussions. More significantly, though, he stated that he did not have a good working relationship with Mr Strauss who he regarded as an obstructive anti-Lafarge person who had once been the MD of Blue Circle but never implemented anything that was agreed upon. It was Mr Strauss who had suggested at the meeting in Lisbon that Lafarge sell the Richards Bay mill to NPC.[26] The characterisation of Mr Strauss as being obstructive and anti-Lafarge and not implementing what was agreed upon is important because it gives credence to Mr Strauss' own testimony that he did not give instructions to anyone at NPC to carry out the agreements reached at the Port Shepstone meeting.

[91] During questioning by the Chairperson, he stated that he had asked for the Port Shepstone meeting to be arranged because his main objective was to get an agreement from Lafarge, PPC and AfriSam to withdraw from the Southern Kwazulu-Natal market to maximise the NPC value and that the second part of the agreement related to the national market shares.[27] Mr Strauss was not party to the agreement relating to the withdrawal from Southern Kwazulu-Natal by the other producers.[28]

[92] Mr Doyle who made a lengthy statement on 28 February 2011 and who has since died, gave a detailed account of the workings of the legal cartel and the arrangements made between the producers post that cartel. His statement was introduced as evidence and while NPC agreed to that, it made it clear that it did not necessarily agree with everything contained in the statement. Mr Doyle does, however, deal with much of what was tendered in evidence by various witnesses and elaborates on some of the evidence.

[93] According to him, at the end of the legal cartel, PPC, AfriSam and Lafarge ostensibly set themselves up to compete with each other, but concluded a secret agreement, which had been confirmed to him by the then deputy managing director of AfriSam, Mr

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[26] Transcript page 946.
[27] Transcript page 964.
[28] Transcript page 967.

Ronal Searle, not to compete but to preserve their respective market shares. They had a trial run to test the arrangement agreed on. The producers agreed to reconcile their figures at the end of 1996 and a producer which had increased its market share would compensate whichever producer had lost market share by between R70.00 – 75.00 per tonne.

[94] In January and February 1996, AfriSam incorrectly reported that it has increased its allocated market share. Lafarge and PPC particularly believed that AfriSam did not intend to adhere to the arrangement. John Gomersall, the new PPC managing director, expanded PPC sales. PPC, he explained, could afford to do so, because it had substantial excess capacity and had secured a monopoly in the Western Cape. PPC took market shares from both Lafarge and AfriSam with the latter losing 350 000 tonnes of volume to PPC. In February 1997, PPC compensated the two producers for their loss of market shares.

[95] In July 1998, he and Elmor Leo the managing director of Lafarge attended a meeting in Zurich where they were told to regain market shares without reducing industry value. He did in fact restore AfriSam's market share. Thereafter he and the two producers exchanged their volume data, by product and by area. He confirms that Mr Eugene Pienaar received and sent the information on behalf of Afrisam. The information enabled him to determine with accuracy what PPC was selling as he had access to the NPC data.

[96] According to Mr Doyle, by 1999 the market had largely stabilised and there was no longer any reason for the three producers to meet, although he periodically confirmed the need to retain market stability.

[97] Apart from encouraging NPC to adopt similar strategies, he had no input into NPC's strategies and did not tell Strauss about his meetings with Lafarge. It was unnecessary to include NPC in the understanding because it did not have the ability to disrupt the market.

[98] Mr Doyle seems to confirm that NPC was never a party to the agreements reached on market shares, even though NPC was co-owned by the producers. Mr Doyle's specific instruction was to regain and to retain AfriSam's share and to do that he needed the cooperation of Lafarge and PPC, not NPC.

[99] Strauss testified on behalf of NPC. He joined Blue Circle in 1977. He was appointed the managing director in 1992 and was later appointed to the board of directors. In

1998, he was appointed as the managing director of NPC. He also represented NPC at the Association of Cementitious Product Manufacturers ("ACMP") and the Cement and Concrete Institute ("C&CI"). He confirmed that NPC was acquired by Cimpor (Cimentos de Portugal) in October 2002. In 2005, he was appointed as the country manager for the South Africa and Mozambique business areas of Cimpor. In 2006 he was appointed as the Chairman of Cimentos de Mozambique. In 2010, he became the Regional Head for Sub-Saharan Africa for Cimpor.

[100] In his witness statement, he explained that cement cannot be easily stockpiled. Therefore, NPC sought to maximise its production levels and to sell all its production as soon as possible. It kept stock for only a few days. He also explained that while efficient production was important, transport costs play a significant part in the successful running of a cement business. The recovery of transport costs is a major consideration in relation to both the transport of the cement to customers and the transport of the inputs used during the manufacturing process.

[101] To illustrate this point, he mentioned that a producer of clinker would try to locate the kiln as close to the limestone quarry as possible. A producer needs approximately 1.6 tons of limestone / clay mix to produce one ton of clinker and transporting the limestone / clay mix over long distances would increase the cost of the clinker. NPC could realise better margins in Durban and the surrounding areas than in areas closer to its competitors because of the transport costs involved. A factory located in Durban or Simuma which is hundreds of kilometers away from its nearest competitor's factory has a locational advantage because a significant transport cost would be incurred by inland producers in bringing cement to Durban.

[102] Mr Strauss also outlined the history of NPC. By 1983, Cape Lime Holdings, PPC, Afrisam's predecessor, Anglo Alpha and Lafarge's predecessor, Blue Circle had consolidated their various holdings in KZN under NPC in which the four acquired a 25% share each. Cape Lime sold its shares to the other three which then held a third share each in NPC.

[103] He elaborated on the legal cartel which existed up to 1995, pointing out that the arrangements in KwaZulu Natal and the Western Cape were different from the inland cartel arrangements. The cartel arrangements were administered by the CDSA. The CDSA used a centralised sales and distribution system for PPC, Alpha and Blue Circle who manufactured cement inland. Pricing was standardised using a Twycross pricing

model with standardised rails transport costs determined by the South African Cement Producers Association.

[104] The CDSA allocated sales to the inland producers based on the respective production capacities. At the end of the year, an exercise was undertaken to ensure that each producer received its fair share of the inland market. NPC did not participate in the cartel arrangements because NPC was owned by the other three producers, who participated in the KZN market through NPC which was the sole cement producer in that province. PPC, on the other hand, had the only production facilities in the Western Cape and its sales in that province were made through Cape Sales (Pty) Ltd.

[105] Mr Strauss makes the point that the capacity of the producers was never secret and was in the public domain. Prior to 1996, the capacity of each producer was taken into account in the cartel arrangements. After 1996, the producers would make media announcements regarding their new investments and that allowed the other industry players to work out what additional capacity would be available.

[106] The consequences of the end of the legal cartel were the dismantling of the CDSA and related structures, each producer having to market and sell their products themselves and the beginning of competition between the producers. In 1996, the C&CI assumed the information collection and collation functions, after the Competition Board's approval had been sought. The permission was subject to a number of conditions, one of which was that an independent third party should collate the information. Deloitte was appointed to perform that function.

[107] Mr Strauss dealt at some length with issues pertaining to NPC. NPC's information was not confidential but was given to its shareholders until 2002. However, NPC did not have access to the information supplied by its shareholders to Deloitte.

[108] The following information is pertinent to NPC:

a. It operated a kiln at Simuma, which operated at full capacity, produced about 500000 tons of clinker per year which was railed to Durban to be milled into cement;

b. It had a milling and blending plant in Durban which produced about 1.2 million tons per annum of product consisting of 50% clinker and 50% extenders;

c. It had a milling plant, solely for the milling of slag and a separator blending plant at Newcastle. Cement which was supplied by the NPC upcountry shareholders was

blended with the milled slag produced in Newcastle. When the shareholders stopped supplying cement, cement produced in Durban was used;

d. About 500 000 tons of slag was purchased from Iscor in Newcastle and milled at the NPC plant there. Most of the produce was sent to Durban to be blended at the NPC plant there;

e. From about 1996, NPC was operating at full capacity at both its Durban and Simuma plants and its market share was a function of that capacity; and

f. When the shareholders stopped supplying cement to the Newcastle plant and began selling in that and the surrounding areas, NPC needed to compete more aggressively with them in order to sell volumes produced at Newcastle. NPC sales personnel in Newcastle marketed and sold cement in that area and often absorbed the transport costs.

[109] Rail played an important part in the production process as clinker and slag had to be transported to the various production facilities and the shareholders used rail to transport their cement from inland to the Newcastle factory for blending purposes. The rail siding which fed the NPC factory in Durban was owned by Alpha up to 2002. As a result, NPC was wholly dependent on the use of that siding in order to load and offload from the Durban factory. Mr Doyle hinted that Alpha could block the use of that siding by NPC if NPC did comply with the shareholders' instructions.

[110] Prior to 2002, employees of the shareholders were members of the NPC board. Apart from receiving, amongst other things, directors' reports and NPC's financial details, they also had full access to any other NPC information which they wished to have sight of. Strauss believed that it would have been difficult for them to ignore the NPC information when planning their own targets and strategies.

[111] There was no meaningful competition between NPC and its shareholders, and they could not be considered to be in a horizontal relationship because NPC was selling and making profits for its shareholder. NPC was not independent of the shareholders who decided what NPC would buy from them and the price of those purchases. Management was unhappy about this fact but could not do anything about it. Part of the reason was that by 1996, the shareholders wanted to expand their own sales and were using NPC to do so. Post the legal cartel the shareholders wanted to sell in the

Northern Natal area and did not want to be hamstrung by subsidised pricing out of Newcastle and by NPC expanding its production to take over a greater share in KZN.

[112] According to Strauss, PPC and Alpha (AfriSam), particularly, imposed their will on NPC, although Blue Circle (Lafarge) because it was smaller in terms of market share than the other two, benefitted from increased NPC sales as it received 33% of the NPC profits and did not sell large volumes in the Newcastle area. Mr Strauss also referred to a minute dated 26 March 1996, referenced in his witness statement, which detailed how the shareholders had simply decided to supply NPC with rapid hardening cement at R21.00 per ton more than it was paying. According to Mr Strauss, Slagment, which was also co-owned by the NPC shareholders, was treated similarly to NPC as the shareholders wanted to ensure that they would have equal opportunities to supply cement to Slagment at the same price.

[113] In 1997, acting on a proposal from NPC, the C&CI had finalised the boundaries for Northern and Southern Natal, to ensure that more reliable statistics could be obtained. The shareholders, too, appreciated that there was little incentive for them to supply from their facilities into Southern natal which was geographically ideally suited for NPC, whereas Northern Natal was more accessible to them.

[114] From 2001 – 2004, NPC's market share in Northern Natal decreased because the shareholders stopped supplying cement to the Newcastle factory and because of Lafarge's construction of a milling and blending facility at Richards Bay.

[115] In his witness statement, Mr Strauss mentions that various proposals had been made to the shareholders to expand the NPC facilities at Simuma by building a second kiln. By December 1997, the expansion plans had been abandoned. According to Mr Strauss he was Blue Circle's representative on the NPC board and from their perspective, the expansion of the kiln made sense because Blue Circle was the smallest of the three shareholders with only a 20% market share and received one third of NPC's profits. By contrast, PPC, with a market share of about 40%, would have wanted to use its own capacity to grow its profits rather using NPC's capacity.

[116] According to Mr Strauss, NPC, prior to 2002, did not act independently of its board or shareholders in determining marketing and pricing strategies. Its board had oversight and control over those things. The shareholders, through their representation on the NPC board, had insight into NPC's selling prices, sales tonnages and its business strategy. According to Mr Strauss this shows that they weren't independent

competitors of NPC and relied upon NPC to maintain production levels and sales in KZN. The incentive scheme reinforced that. He did not believe, however, that the shareholders had access to NPC's detailed pricing which NPC offered to different customers. Reference in NPC documents to a "competitive adjustment" relates to sales in distant locations where NPC had to absorb some of the transport costs.

[117] In December 2002 (after NPC's takeover by Cimpor), in Algarve, he presented a paper to a Cimpor conference on the South African cement market and the opportunities for expansion and development. At an NPC board meeting held there he also presented proposals for the expansion of the NPC operations similar to those which had been rejected by the previous shareholders. A key element of the proposal was the expansion of the kiln at Simuma. At a board meeting on 7 February 2003, management was requested to prepare a strategy based on the expansion of the kiln in a Southern African context. Cimpor had a broader view of NPC's role in the region which included NPC taking a controlling shareholding in Cimentos de Mozambique by the end of that year. NPC adopted a Southern African view of its operations. NPC was required to complement Cimpor's interests in the region and not only in southern KZN.

[118] The strategic plan identified that production capacity, certified product and competitive prices were critical to NPC's success. NPC was well positioned for growth. Investment in expansion was justified and vertical integration was advisable. These issues had all been rejected by the previous shareholders, presumably, according to Mr Strauss, because those shareholders were focused on their own interests. NPC was no longer shackled and could act independently of its previous shareholders.

[119] After the takeover of NPC by Cimpor in October 2002, NPC was independent of its founding shareholders and stopped providing its former shareholders with its company, financial and sales information. It submitted the latter only to the C&CI, confidentially, through Deloitte. It saw only the published C&CI statistics which it used independently to plan its production, sales and marketing. It also prepared a flash report each month which provided the directors and management with an overview of the expected monthly results. Cimpor focused on national and not regional markets and staff were incentivised to grow national market shares.

[120] Post the Cimpor takeover, NPC was susceptible to a possible contravention of the Act in its own right. However, there is no evidence that the newly constituted NPC implemented the prior market sharing arrangements. There is also no evidence of collusive meetings involving NPC of the kind that characterised the pre-2002 period

where the founding shareholders met to reach an agreement or to confirm the so-called global rules.

[121] From then onwards, according to Mr Strauss, concrete steps were taken by NPC to increase its volumes within the Southern African market and not in any specific regional or national market. At the board meeting held on 11 July 2003, the expansion of the production facilities was discussed. Consideration was given to buying the Lafarge milling plant at Richards Bay. The board also discussed increasing clinker production at Simuma to supply Mozambique. These discussions took place without regard to the other cement producers. The lead time for the construction of a new kiln is about four years and various factors need to be taken into consideration when embarking upon a growth strategy including ensuring that the market could absorb the additional products.

[122] While new kiln and production facilities were being designed and built, NPC maximised its production and sales from its existing facilities by optimising extender rations and other technical innovations. It also imported cement from Brazil under the NPC name. The market was growing.[29] NPC took steps to find additional capacity and to import clinker.

[123] Lafarge had excess capacity at its Richards Bay plant. NPC entered into a toll milling arrangement whereby NPC supplied clinker to Lafarge who milled, blended and then packaged it in NPC bags. NPC's overall volumes increased but its market share did not, as the entire market was growing. Additional milling capacity was introduced at Simuma and more clinker was imported to feed that mill which went online about 18 months before the kiln. Mr Strauss makes the point that the import of clinker and the development of the mill in advance of the kiln allowed NPC to grow its markets to such an extent that when the kiln went online in 2008, there was a market to take up the capacity.

[124] Mr Strauss stated that by 2008, two kilns were in operation at Simuma which could produce about a million tons of clinker per year. For the very first time, a final cement product could be distributed from Simuma. NPC started using fly ash in its operations in case Arcelor Mittal stopping or reducing the supply of slag to NPC. A number of changes in the production process at Newcastle were also made to provide a cost-

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[29] The 2010 soccer World Cup had been awarded to South Africa and the demand for cement was going to increase as new stadia and infrastructure were to be constructed.

effective extender. Changes were also made to optimise transport arrangements and to save costs by backhauling between Durban and Newcastle.

[125] All of these things enabled NPC to open the market south of Simuma and to sell in places as far afield as Mthatha and Kokstad. It could also supply the market south of Durban and in some cases north of Durban. Mr Strauss stated that there were no agreements, arrangements or understandings with any of the competitors on how NPC would operate its business.

[126] NPC bought the railway siding and proposed expansion to the new shareholder immediately. Targets were set and the board discussed ways of producing concrete through the acquisition of quarries and concrete plants. The acquisition of a company called South Coast Stone Crushers was approved by the Cimpor exco at a meeting in Lisbon on 14 July 2003, just a few months after Cimpor acquired NPC. On 1 January 2007, NPC which had been the operating company sold the business to Cimpor, to become NPC-Cimpor

[127] Mr Strauss also provided details about industry meetings and the submission of statistics by NPC. According to him, after the demise of the legal cartel, information was exchanged in accordance with the directives of the Competition Board. NPC was obliged to share its information with its shareholders who then had full insight into NPC's sales and statistics. At one of the SACPA executive meetings, the proposal to delineate into two distinct regions was discussed and approved, although it was opposed by PPC. He surmised that Blue Circle and Alpha wanted NPC to operate at full capacity and did not want NPC's market to be eroded by PPC.

[128] In February 2002, a meeting was held to discuss the C&CI and SACPA, because the members wanted to establish an industry body but they, including NPC, were alive to the competition law issues. During February 2002, NPC announced that Cimpor was interested in purchasing NPC. NPC did not think that the exchange of information through the C&CI and Deloitte would breach competition law

[129] The first meeting of the statistics committee was held on 05 November 2002. NPC was not invited to that meeting, but the minutes reflected that since Cimpor had acquired NPC, NPC would be invited to and did attend future meetings. The statistics would be used by government, industry players, economists and others. According to Mr Strauss, NPC used the information published by C&CI for competitive purposes only to evaluate the market, its own position in the market and to assess opportunities.

[130] NPC always tried to economise on transport costs and sold cement locally, particularly during the period 2005 – 2008 when supply was constrained due to a significant increase in demand. It also maintained relationships with its traditional customers. New customers were not readily accepted if that could compromise the arrangements with long term customers. At times of extremely high demand, NPC used a supply method which treated its customers fairly by reducing each customer's order proportionately. That then is a summary of the evidence contained in Mr Strauss' witness statement.

[131] During his evidence, Mr Strauss confirmed much of what was contained in his witness statement. He confirmed that he had attended meetings in Lisbon in December 2002 where he addressed specifically NPC's existing capacity, the size of the market and their projections of the need for more clinker and cement milling capacity. All the clinker was produced at the Simuma factory in Port Shepstone and transported to Durban where it was ground into cement, together with blast granular, ground slag or slagment.

[132] He also confirmed that the shareholders received sales information and other NPC information, but NPC never received their sales information and statistics. He also confirmed how and for what purposes NPC used the statistics it obtained from the C&CI. Mr Strauss was also cross examined at length and while he may have made a few concessions, he did not stray too far from the information supplied by him in his witness statement and his evidence in chief.

[133] He dealt extensively with the Port Shepstone meeting in his witness statement and during evidence. NPC was co-owned by the other three cement producers. In effect, according to him, they made the decisions on behalf of NPC which had to implement those. His recollection of the meeting was that he had been requested by Pieter Fourie to arrange facilities for the meeting and had done so at the Selbourne Golf Estate. Although he could not recall who attended that meeting, he accepted that Colin Jones, Pieter Fourie and Eugene Pienaar were present.

[134] Most of the discussions took place between the others and he had very little to say about NPC. He does recall the discussion centered on the national market shares of the other producers. NPC was not considered to have a national market share at all, as it operated mainly in the Southern KwaZulu Natal region and had a regional market share. The outcome of the Port Shepstone meeting was that NPC had to operate at full capacity and to sell in the most efficient manner. NPC sales at the time included sales from Newcastle and blending and bagging the cement delivered by the other producers from their inland plants.

[135] The other producers received revenue from those sales to NPC. During his evidence, he confirmed that he was not present throughout the meeting and that he did not feel the need to convey any instructions arising out of the meeting to internal NPC staff. He also did not convey details of the meeting to NPC staff and stated that none of the decisions made by the other producers required NPC to change the way it conducted its business. Mr Strauss appears to have been rather frustrated at having to carry out the instructions of the other producers and having to respond to their whims and appears to have been disinterested in the discussions.

[136] His attitude to the meeting is probably consistent with Mr Fourie's characterisation of him as being obstructive. This is hardly indictive of an active participant in cartel behaviour. His own recommendations to increase NPC's capacity had also been turned down by the shareholders which must have rankled him.

[137] Although the Port Shepstone meeting took place before the Act commenced, the agreement reached at that meeting remained in place for several years and was adhered to by PPC, Lafarge and Afrisam. Mr Strauss was present during some of the discussions. What is less clear is what discussions he participated in. It is Mr Strauss' presence at that meeting which creates the suspicion that NPC was a party to the Port Shepstone agreement.

[138] The Commission argues that Mr Strauss' active participation in the Port Shepstone meeting, "as a representative of NPC," brought NPC into the present cement cartel.[30] Whether he was an active participant is doubtful. He had been the managing director of Afrisam, one of NPC's co-owners, prior to being appointed as the managing director of NPC. He was obliged to carry out the instructions given to him by the other three and had to implement the decisions taking by them in relation to NPC. He appeared to resent that and the fact that his recommendations to the shareholders were not acted upon.

[139] The Commission relies on *MacNeil Agencies*,[31] in which the Competition Appeal Court ("the CAC") confirmed that:

> "*... the basic rationale of the European and American cases, namely that passive participation without public distancing is sufficient because it creates in*

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[30] Commission's Heads of Argument. Para 11. Page 8.
[31] *MacNeil Agencies (Pty) Ltd vs Competition Commission of South Africa* 121/CAC Jul 12.

the minds of the other participants the belief that the passive participant has subscribed to the arrangement and intends to comply with it, is not inconsistent with South African law. It has long been accepted in our private law of contract that a person cannot escape from an apparent agreement merely because his subjective intention differed from the apparent agreement."[32]

[140] *Omnico*[33] in which the issue for determination was whether the silent participation by firms at a meeting where cartel activity was discussed amounts to a contravention of section 4(1)(b)(i) of the Competition Act 89 of 1998 was also referred to by the Commission. The CAC noted, with reference to a passive participant, that:

> *"Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs."*[34]

[141] We now turn to consider the various issues raised by the matter.

Analysis

[142] In its heads of argument, the Commission in its overview of its case, states that following a price war which was devastating for the producers, they held a series of meetings between 1997 and 1998 which culminated in the Port Shepstone agreement in the Winter of 1998. It argues that a consensus was reached at that meeting which constituted a cartel and that included NPC. In support of this latter proposition, the Commission relies on Mr Straus's "active participation in the Port Shepstone meeting, as a representative of NPC". It's important to consider what else the Commission regards as pertinent to its case.

[143] The Commission states that the producers agreed, inter alia, to target particular market shares in the SACU region. It also adds that the evidence suggests that they agreed to target market shares based on their historical productive capacities, viz;

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[32] *MacNeil* at para [63].
[33] *Omnico (Pty) Ltd and Another vs The Competition Commission of South Africa and Others* 142/CAC/June 16 (19 December 2016).
[34] *Omnico* at para [56].

a. PPC targeted a market share of 39%;

b. Afrisam targeted a market share of 31.6%;

c. Lafarge targeted a market share of 18.5%; and

d. NPC targeted a market share of between 10 – 12%.

[144] The Commission argues that although there is some evidence to suggest that NPC was merely expected to maximise output, NPC's output represented a SACU market share of 10 – 12% which does not mean that NPC was not a party to the cartel arrangement and knowingly derived the benefit of the collusion [between the other three].

[145] The Commission also argues that the exchange of information, as described by Mr Colin Jones, the PPC executive director for sales and marketing, was a critical part of the cartel arrangement and allowed participants to monitor market shares. According to Jones, by the early 2000's, the information exchange mechanisms enabled the parties to maintain the agreement without having to meet in person and made market share monitoring more accurate. The Commission also argued that the Port Shepstone agreement also allocated territories amongst the producers.

[146] The evidence is clear on a number of issues. These are:

a. NPC was co-owned by Lafarge, Afrisam and PPC until about November 2002 when it was acquired by Cimpor;

b. The legal cartel which existed with the approval of the then Competition Board, did not include NPC;

c. Prior to the demise of that cartel, Lafarge, Afrisam and PPC met during 1995 to discuss the maintenance of market shares, based on the shares each enjoyed under the legal cartel;

d. NPC was not part of those discussions;

e. A price war broke out because of a dispute about market shares, which diminished value for the three producers, and they met again in the Winter of 1998 at Port Shepstone to recommit themselves to the original market shares;

f. Strauss was asked to arrange the meeting and did so;

g. Although much was made by the Commission about Strauss' presence in the meeting, he was clearly not very active and was decidedly disinterested in what was discussed by the others;

h. At the first meeting of the new board of NPC Cimpor on 23 October 2002, the management and Strauss proposed steps to break links with the previous shareholders and to increase capacity and expand production;

i. In December 2002, at a meeting in Algarve attended by the CEO's of all of Cimpor's international operations and at an NPC board meeting held there, he again presented proposals for expansion similar to those rejected by the previous shareholders;

j. The proposed expansion was again discussed at a board meeting on 7 February 2003 and sometime later that year the NPC management was asked to develop a strategic plan which included expansion and an increase in production;

k. From October 2002, NPC stopped providing information to its previous shareholders, but confidentially submitted to Deloitte; and

l. By 2008 production facilities had been expanded.

[147] While it is true that a reasonable suspicion may exist that Strauss played a greater role in the Port Shepstone meeting than may appear at first blush and that he may have involved NPC in cartel arrangements, the facts don't adequately support such a suspicion. Mr Strauss' actions post the takeover of NPC by Cimpor are hardly indicative of a person either involved in cartel arrangements or trying to maintain those arrangements.

[148] Mr Strauss stated that the Port Shepstone meeting discussed matters pertaining to the other producers, not to NPC. Those producers had wanted stability in the market and had agreed that one way of achieving that was to maintain national market shares. NPC's market was regionally based, but its regional market share was converted into a national share, because market shares are always calculated on a national basis. The other producers had agreed and decided that NPC should continue to operate at full capacity to protect its value, as NPC was going to be sold and was ultimately sold

to Cimpor. They instructed Mr Strauss to continue to operate at full capacity. NPC was a joint venture of the three shareholders, and they made decisions on behalf of NPC which was already operating at full capacity.

[149] Strauss' actions are distinguishable from the actions described in both *MacNeil* and *Omnico.* He had nothing to distance himself from. The discussions were not about NPC, but about the other three producers.

[150] For completeness, we consider another aspect of the Port Shepstone Agreement in that *Netstar* reminds us:

> *"… agreement arises from the actions of and discussions among the parties directed at arriving at an arrangement that will bind them either contractually or by virtue of moral persuasion or commercial interest. It may be a contract, which is legally binding, or an arrangement or understanding that is not, but which the parties regard as binding upon them. Its essence is that the parties have reached consensus. … 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 both 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."*[35]

[151] It is common cause that PPC, Lafarge and Afrisam had reached consensus on maintaining market stability according to the international cement rules and that the price war engaged in by the three had hurt all of them financially. The Port Shepstone Agreement resolved those issues amongst the three of them. NPC was never involved in the price war. There was no need for it to get so involved. It was operating at maximum capacity which it could not increase and operated mainly, almost exclusively, in Southern KwaZulu-Natal where the others had only a limited presence and where selling cement at competitive prices was challenging because of the transport costs in doing so.

[152] It is reasonable to accept that NPC had no interest in the discussions which were held by the others and explains why Mr Strauss was in and out of the meeting and felt no

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[35] *Netstar (Pty) Ltd and others v Competition Commission and another* [2011] 1 CPLR 45 (CAC) at page 56.

need to report on the meeting to NPC staff members. Under those circumstances it could not be said that NPC was a party to that agreement.

[153] After the Cimpor takeover NPC became independent of its shareholders and thus could be held liable in its own right it if had engaged in collusive agreements with its erstwhile owners.

[154] We have already mentioned Mr Strauss and the management's proposals to Cimpor post the takeover of NPC by Cimpor and do not deem it necessary to repeat that again, except to say that recommendations were made to expand NPC's capacity and that ultimately the recommendations were acted upon and NPC's capacity did increase. This evidence, which was not contested, suggests that NPC Cimpor did not engage in any kind of cartel activity after NPC was acquired by Cimpor.

[155] Much was made by the Commission about the information exchange and the submission of data to the C&CI. In its heads of argument, NPC points out that the Commission's own witness, Ms Corrie had stated, without contradiction, that it was not possible to manage the national market shares without contacting her competitors, Afrisam and Lafarge, without also considering the regional shares, without exchanging directly private sales statistics and without discussions of individual areas and customers.[36] Ms Corrie met with her peers at Afrisam and Lafarge regularly to monitor developments and to resolve market share issues, but never with NPC. There was no need to. There is no suggestion at all that NPC was engaged in any form of customer allocation.

[156] Ms Corrie's evidence raises two issues. If the official information exchange had sufficed to further the collusive arrangement, the meetings described by her would have been unnecessary. In other words, the information exchange fell short of the information required by the three firms to further the market sharing arrangements and, hence, they needed further, clandestine, meetings to gain additional information and to facilitate communication by direct contact. NPC was never a party to those meetings. It was not even present at the first meeting of the industry body's statistics committee. We were not told why NPC was excluded. This was an issue which the Commission, not NPC, had to explain. This also suggests that absent any other evidence of direct contact outside the official industry information exchange, that NPC was excluded from the arrangements between the other three.

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[36] NPC Heads of Argument at para [162].

[157] NPC took steps to expand its capacity after the takeover by Cimpor. Prima facie that was inconsistent with a capacity-based market sharing agreement. The expansion did take some time, but the steps taken were outlined by Mr Strauss and his evidence was never contradicted by other witnesses.

[158] There was also a great deal of publicly available information, as confirmed by Ms Beverin. PPC, AfriSam and Lafarge had benefitted from and had agreed on market shares and had adhered studiously to those. When it became clear that NPC was to be sold, they also realised that they had to maintain NPC's value by not eroding NPC's market share. However, NPC had historically operated in mainly the Southern KwaZulu-Natal market. Cement must be sold as close as possible to the manufacturing plants as it is very costly to transport. Ms Beverin's evidence in this regard is important.

[159] According to her, an optimisation strategy meant using existing capacity and selling it as close as possible to "home" to maximise margins by saving on transport costs. She also confirmed that NPC could not be a credible threat in Gauteng because of the distance involved and only when it produced cement at Simuma round about 2006/ 07 would it have been able to pose a threat to Afrisam in the Border / Transkei area. Ms Corrie also confirmed that transport considerations were important in determining cement prices and that Lafarge, Afrisam and PPC's operation could not affect NPC in the Durban area where it sold most of its cement. The discussions between Lafarge, Afrisam and PPC centered around the allocation of their market shares, transport costs and profits and not NPC's.

Conclusion

[160] For these reasons, we have decided to dismiss the Commission's complaint against NPC-Cimpor.

[161] NPC-Cimpor did raise several other defences. Whilst there may be some merit in those, we do not deem it necessary, in the light of our conclusion, to consider those.

ORDER

[162] The following order is made:

1. The Commission's complaint against NPC-Cimpor is dismissed.

Mr Enver Daniels

04 December 2019
DATE

Mr Norman Manoim and Mrs Medi Mokuena concurring

Case Managers	: Kameel Pancham and Helena Graham
Tribunal Economist	: Karissa Moothoo-Padayachie and Lumkisa Jordaan
For the Applicant	: Adv. A Gotz SC, Adv. T Marolen and Adv. Anisa Kessery
For the First Respondent	: Adv. H Maenetje SC and Adv. D Turner