



## COMPETITION TRIBUNAL OF SOUTH AFRICA

Case no.:CR205Mar14

In the matter between:

**THE COMPETITION COMMISSION OF SOUTH AFRICA**

Applicant

and

**ALVERN CABLES (PTY) LIMITED**

First Respondent

**SOUTH OCEAN ELECTRIC WIRE COMPANY (PTY)  
LIMITED**

Second Respondent

**TULISA CABLES (PTY) LTD**

Third Respondent

**ABEDARE CABLES (PTY) LTD**

Fourth Respondent

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Panel : Norman Manoim (Presiding Member)  
: Mondo Mazwai (Tribunal Member)  
: Medi Mokuena (Tribunal Member)

Heard on : 15,16 November 2017 and 24 November 2017

Order issued on : 15 January 2019

Reasons issued on : 15 January 2019

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### REASONS FOR DECISION

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#### Introduction

[1] This matter concerns a complaint referral brought by the Competition Commission (“the Commission”) against the first to the fourth respondents. The

fourth respondent, Aberdare Cables (Pty) Limited (“Aberdare”) is a corporate leniency applicant and no relief is sought against it.

- [2] Before the commencement of this hearing, the second respondent, South Ocean Electric Wire Company (Pty) Ltd (“SOEW”) concluded a settlement agreement with the Commission and this was confirmed as an order of the Tribunal on 30 June 2017.
- [3] The first respondent, Alvern Cables (Pty) Ltd (“Alvern”) concluded a settlement agreement on the morning of the first day of the hearing, 15 November 2017, which was confirmed as an order of the Tribunal.
- [4] Tulisa Cables (Pty) Ltd (“Tulisa”) is the only remaining respondent to oppose this complaint referral. These reasons relate to the case against Tulisa.
- [5] The Commission has alleged that Tulisa and the other respondents who have since settled with the Commission, are firms in a horizontal relationship and have engaged in conduct in contravention of section 4(1)(b)(i) to directly or indirectly fix the selling price of power cables, from May 2001 to 2010.<sup>1</sup>
- [6] The Commission also alleged that SOEW and Alvern together with Aberdare, respectively, engaged in a concerted practice in contravention of section 4(1)(b)(ii) to allocate customers in respect of the supply of power cables.<sup>2</sup> Since Tulisa is not implicated in the market allocation complaint, we do not consider this aspect of the complaint in these reasons.

## **Background**

- [7] The Commission initiated a complaint against the respondents on 16 March 2010, pursuant to information received from an anonymous informant.<sup>3</sup> The

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<sup>1</sup> Para 18.1 of the Commission’s complaint referral at page 8 of the record.

<sup>2</sup> Para 18.2 of the Commission’s complaint referral at page 9 of the record.

<sup>3</sup> In support of its application to obtain a warrant at the High Court against the respondents, the Commission indicated that its investigation arose from information it received from an anonymous informant at Para 22 of the Commission’s founding affidavit at page 606 of the record.

Commission, on 28 May 2010, expanded its investigation to include several more firms but this formed part of a separate complaint referral concerning what the Commission calls 'association conduct' and which is pending before the Tribunal and will not be addressed further in these reasons.<sup>4</sup>

*The Commission's case against Tulisa*

[8] The Commission obtained a search warrant on 4 May 2010 to conduct a dawn raid on Tulisa and the other respondents' offices. Following this and the Commission's subsequent investigation, the Commission referred the matter to the Tribunal on 18 March 2014.<sup>5</sup>

[9] In its referral affidavit, the Commission alleged the following:

9.1 An initial agreement was concluded between the respondents where they agreed to fix the price of power cables sold to wholesalers, distributors and "Original Equipment Manufacturers" ("OEM's") in May 2001.

9.2 After the initial agreement and during the period 2001- 2008, the respondents held regular meetings and telephone conversations to discuss adjustments to the price of power cables. The Commission alleged that although there were no further meetings after 2008, the respondents continued to fix prices until at least 2010.<sup>6</sup> The Commission's identified time period for contravention is thus May 2001 to 2010.

9.3 Based on the discussions at these meetings, Aberdare would release a price list which would be circulated to Alvern, SOEW and Tulisa in order for price adjustments to be made accordingly.

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<sup>4</sup> Commission v Alvern and 12 other respondents CR125Nov14.

<sup>5</sup> Page 1 of the record.

<sup>6</sup> Para 28 of the Commission's complaint referral at page 12 of the record.

9.4 The Commission identified the following people who attended meetings on behalf of the respondents: Mr Chad Andrews (“Andrews”) for Aberdare; Mr Paul Ferreira (“Ferreira”) for SOEW; Mr Steven Liasaides (“Liasaides”) for Alvern; and Mr Johan “Tubby” Rundell (“Rundell”) or Mr Francisco Loureiro (“Loureiro”) for Tulisa.

9.5 In the complaint referral, the Commission submitted that there may have been instances when Tulisa was not represented at a meeting and that in such instances Ferreira of SOEW would inform Tulisa of the outcomes of the meetings.<sup>7</sup>

[10] The conduct mentioned above, the Commission alleged, was in contravention of section 4(1)(b)(i) and constituted an agreement or concerted practice to directly or indirectly fix the price of power cables.

#### *Tulisa’s submissions*

[11] Tulisa denied the allegations made against it, specifically that Loureiro and /or Rundell, attended any meetings to fix the price of power cables, as alleged by the Commission in its referral affidavit.

[12] Tulisa submitted that even if there was a possibility that Rundell attended such meetings, prescription would apply as Rundell passed away on 22 June 2006 and the Commission initiated its complaint on 16 March 2010.<sup>8</sup>

[13] It further denied having received price lists directly from Aberdare, instead it submitted that price lists, when received, were provided to Tulisa by customers. Using these price lists, Tulisa would then offer significant discounts on Aberdare’s prices in order to win sales as a new entrant in the market.<sup>9</sup>

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<sup>7</sup> Complaint referral at page 12 of the record.

<sup>8</sup> Para 72.4 and para 73 of Tulisa’s answering affidavit at page 582 of the record.

<sup>9</sup> Para 51.5 of Tulisa’s answering affidavit at page 570 of the record.

## Analysis

### *Evidence before us*

- [14] At the hearing, the Commission called Andrews of Aberdare and Ferreira of SOEW as its witnesses while Tulisa called Loureiro as theirs. As Alvern settled on the first day of the hearing no case was led against it during the hearing and its witness, Liasaides, was not called.
- [15] The Commission's allegations regarding Tulisa's involvement is two-fold: as mentioned, first they allege that Tulisa attended meetings with the other respondents in order to fix power cable prices and when Tulisa did not attend the meetings, any agreement reached at the meetings would be communicated to Tulisa through Ferreira of SOEW; second by basing its prices on Aberdare's price list, Tulisa was party to a concerted practice. At the hearing, the Commission submitted that if we cannot find direct evidence of an agreement, we should infer an agreement from the facts.
- [16] We have separated our analysis in the following way: first, we assess if there is evidence of an agreement either expressly or by inference. This entails assessing if there is evidence of Tulisa attending meetings with the other respondents and thereafter if information was passed on to it from Ferreira. Second, we consider whether Tulisa, in basing its prices off Aberdare's price list, was involved in a concerted practice.

### *Express or implied agreement*

#### *Did Tulisa attend any of the meetings itself?*

- [17] The Commission's witness submitted that these meetings were held infrequently and were sparked by the movement in material prices in the marketplace. Andrews in his testimony submitted that there were three inputs

required to produce power cables: copper; PVC; and labour, with copper being the most volatile, followed by PVC then labour.<sup>10</sup>

[18] As mentioned, the Commission alleged that Loureiro or Rundell attended meetings on behalf of Tulisa when meetings were called. Loureiro was a co-founder, director and shareholder of Tulisa in 1999 and at the time of Loureiro's witness statement (dated 10 November 2010), its sole director since March 2013. Rundell was the Sales Manager of Tulisa.

[19] The Commission's first witness, Andrews who was, the Senior General Manager, National Sales for General Wire Products at Aberdare in the relevant period, testified that he was only aware of Rundell attending a single meeting of SOEW, Aberdare, and Alvern.<sup>11</sup> Andrews continued to maintain that while Tulisa never attended any meetings apart from this, the arrangement between SOEW, Aberdare and Alvern was communicated to Tulisa through Ferreira, the Commission's second witness, who was SOEW's Sales Manager and subsequently its CEO in the relevant period.

[20] The Commission argued that even though Rundell may have only attended one meeting where the prices were discussed, Tulisa had implemented the price fixing agreement subsequent to the meeting.<sup>12</sup>

[21] In oral testimony, Andrews poignantly remembered Rundell's attendance at one meeting as "*... Tubby [Rundell] got his name for one reason, he was a relatively large man. And when we had a specific meeting in Bedfordview... the particular chairs that day weren't very strong, and we were wondering whether the chair would actually accommodate Tubby [Rundell] because he was a large man.*"<sup>13</sup> This, memorably, places Rundell in the room of at least one meeting. However, it is not clear from the evidence when this meeting took place.

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<sup>10</sup> Page 52 of transcript dated 15 November 2016.

<sup>11</sup> Page 81 of transcript dated 15 November 2018. Andrews testified that Rundell regularly attended meetings prior to Tulisa's formation in 1999, on behalf SAPVC in a historical arrangement which does not form part of the conduct referred by the Commission at Transcript pages 44 dated 15 November 2017).

<sup>12</sup> Page 51- 52 of transcript dated 15 November 2017.

<sup>13</sup> Page 73 of transcript dated 15 November 2018.

- [22] What is clear is Rundell's attendance could be confirmed by Andrews through this memorable occurrence. We cannot however make a finding that Tulisa was party to an agreement contravening section 4(1)(b)(i) based on this piece of evidence alone as the meeting could only have occurred during Rundell's lifetime. As Rundell passed-away on 22 June 2006, the conduct would have prescribed when the Commission initiated its complaint on 16 March 2010.
- [23] Turning to the possibility that Loureiro could have attended any meetings, his testimony remained consistent through the pleadings and during the hearing that he did not attend any meetings.<sup>14</sup> This was not refuted by the Commission's two witnesses. Loureiro's explanation for his non-attendance is plausible. He was not in sales but on the engineering side of the business and was not client-facing.<sup>15</sup> He took over pricing responsibilities in 2006 when Rundell fell ill, and later on in that year appointed Ms Lindie Lourens ("Lourens") as Sales Manager to take over Rundell's role.<sup>16</sup> Absent any evidence placing Loureiro in the room, we accept that he did not attend any meetings on behalf of Tulisa.
- [24] Moving to the Commission's allegation that the price-fixing arrangement between the respondents continued after Rundell's death through Ferreira of SOEW who was passing on information to Tulisa,<sup>17</sup> it is important to briefly consider the history between Tulisa and the other respondents.

*History of Tulisa's relationship with the other respondents*

- [25] It is not in dispute that Tulisa did not have a good relationship with Aberdare. This to some extent had to do with Tulisa's formation. Aberdare was formed after a merger between its predecessor Voltex and Powertech.
- [26] Certain of Voltex's previous employees became disaffected after the merger and left Aberdare to form Tulisa as a rival. This led to acrimony between the

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<sup>14</sup> Para 40.2 of the Loureiro witness at page 114 of the record; page 138 of transcript dated 16 November.

<sup>15</sup> Page 158 of transcript dated 16 November 2017.

<sup>16</sup> Loureiro witness statement at page 107 of the record.

<sup>17</sup> Complaint referral page 12 of the record.

two firms, a fact confirmed by Ferreira. He testified that it was always Aberdare's intention to undermine Tulisa. Tulisa also had a similar level of animosity towards Aberdare.<sup>18</sup>

[27] Due to the bad relationship, according to Ferreira, Aberdare "*consciously and intentionally excluded Tulisa from any meetings which [it] called between competitors.*"<sup>19</sup>

[28] While Andrews denied that Aberdare consciously or intentionally excluded Tulisa,<sup>20</sup> he supported the version that Tulisa did not attend the meetings as an arrangement was reached for SOEW to pass information to it: "*Tulisa generally did not attend the meetings [and] where a representative of Tulisa did not attend a meeting Ferreira would inform Tulisa about the outcomes of the meetings and discussions.*" The reason for this arrangement Andrews said was because the employees of SOEW (Ferreira in particular) and Tulisa were acquaintances as they had worked together for a number of years in the days of a firm called SAPVC Cables,<sup>21</sup> before it was acquired by Aberdare, and before Tulisa was founded.

[29] Andrew's understanding was that Ferreira of SOEW would 'take care' of Tulisa after each meeting. While the Commission argued that this meant that the agreement was communicated to Tulisa by Ferreira, Ferreira flatly denied that he did. Andrews conceded that he did not know what was actually discussed between Tulisa and Ferreira as this extract shows:

*Mr Andrews: But Paul Ferreira was the person who ultimately always interacted with Tulisa so (intervention)*

*Ms Engelbrecht: Well you don't know that.*

*Mr Andrews: Well he told me so.*

*Ms Engelbrecht: Ja. Well you don't know what he actually did. You only know what he told you he did.*

*Mr Andrews: Correct.*

*Mr Andrews: Okay. The awareness would be, firstly, that I attended the meetings and that one of the meetings was attended by Tubby. The second*

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<sup>18</sup> Para 33.1 of SOEW Answering affidavit at page 487 of the transcript and para 56 of SOEW answering affidavit at page 494 of the record.

<sup>19</sup> Paragraph 33.1 and paragraph 56 of SOEW answering affidavit at page 487 of the record.

<sup>20</sup> Page 81 of transcript dated 15 November 2018.

<sup>21</sup> Page 105 of transcript dated 16 November 2017.



*part of it is the fact that in the meetings that we subsequently had where Tubby Rundle was not involved, Paul Ferreira and Steven Liasides were, the question always came up “what do you think Tulisa would do”. Paul Ferreira stated that “don’t worry, I will take care of Tulisa”. So that is the level of my awareness”*

*MS ENGELBECHT: Yes. So it seems to us that your evidence as regards Tulisa is entirely dependent on your understanding that Mr Ferreira communicated with Tulisa?*

*MR ANDREWS: Correct.<sup>22</sup> [our emphasis]*

[30] Ferreira denied that he provided Tulisa with pricing information in order to make it complicit with a cartel.<sup>23</sup> In fact both in Ferreira’s oral evidence at the hearing and during his interrogation by the Commission, he was consistent in maintaining that Tulisa (i) never attended the meetings<sup>24</sup> and (ii) that he did not communicate with Tulisa to pass on information.

[31] Ferreira’s testimony provides a different interpretation of “taking care” of Tulisa. During his testimony, he relayed that the “taking care” of Tulisa was by taking out Tulisa’s capacity through a manufacturing agreement. He indicated that SOEW had limited capacity and had concluded a manufacturing agreement where SOEW would provide the raw materials to Tulisa for the latter to manufacture power cables for SOEW under the SOEW brand.<sup>25</sup> None of the other competitors were aware that Tulisa was manufacturing for SOEW.<sup>26</sup>

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<sup>22</sup> Page 81 of transcript dated 15 November 2017.

<sup>23</sup> Ferreira interrogation on 5 June 2006 at record page 184 bundle E.

*Mr Mudimeli: Okay. And then after this meeting, did you communicate with Tulisa, just to convey what was discussed at those meetings?*

*Mr Ferreira: Did I communicate with Tulisa?*

*Mr Mudimeli: Yes, Tulisa*

*Mr Ferreira: No.*

*Mr Mudimeli: You did not convey any...*

...

*Mr Ferreira: I said no. I said no. No.”*

<sup>24</sup> Ferreira interrogation on 5 June 2006 at record page 160 bundle E “*We need to be fair, Tulisa, to my recall, Tulisa never attended meetings. You know, we talk about Tulisa, Tulisa never attended meetings. When I say meetings, coffees, coffee summons to a certain extend.*”

<sup>25</sup> “*In this arrangement, which SOEW and Tulisa did not disclose to the market or competitors, SOEW would provide raw materials...and Tulisa would manufacture the required cable to SOEW’s specification and the cable would be marked as an SOEW product...*”

<sup>26</sup> Paragraph 32 and paragraph 56 of SOEW answering affidavit and transcript page 104-106 dated 16 November 2017.

- [32] In this way, SOEW was able to appease the other cartel members through its own secret plans to take out Tulisa's capacity thereby reducing the appearance of Tulisa as a threat. The understanding that Ferreira took care of Tulisa by passing on information from the meetings is thus not borne out by the Commission's own witness whom it had called to prove this aspect of its case.
- [33] In conclusion, there is no evidence that Loureiro attended any meetings. While Rundell may have attended a single meeting, the conduct would have prescribed as he passed away in 2006. There is, further, no evidence to indicate that any agreement reached at this meeting was ongoing beyond 2006 when Rundell passed because the only witness, Ferreira, who was allegedly the conduit in passing information to Tulisa to keep Tulisa in the cartel, denied that he did.
- [34] There were two further pieces of evidence relevant to the Commission's case that arose from documents in the record. The first is an SOEW minute of a MANCO meeting dated 21 July 2003 ("SOEW Minutes").<sup>27</sup> The second is a weekly report dated 25 January 2008 produced by Lourens, Tulisa's Sales Manager who took over Rundell's role after his passing.
- [35] The relevant extract from the 21 July 2003 SOEW Minute is:  
*"Tulisa had a meeting with Aberdare and requested them to increase the price by 5%. Aberdare refused to increase the price for no known reason. It is clear that Tulisa is struggling".*
- [36] Ferreira was present at this meeting. At the time he was the Marketing Manager, and the extract above appears under the heading "Marketing Manager" suggesting that it was his report. When asked about this extract during the hearing, he said he could not remember it nor its source. He could not take this piece of evidence any further.
- [37] Without more, this minute is inconclusive. Whatever discussion may have preceded it, it indicates Aberdare's refusal to fix the price as requested by

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<sup>27</sup> Page 11 of the Record, Bundle D.

Tulisa. Moreover, the date of the minute (21 July 2003) falls outside the three-year period within which the Commission may initiate a complaint. As mentioned, the Commission's initiation was on 16 March 2010, some seven years from the date of this e-mail.

[38] Turning to the Tulisa report, it is a weekly report compiled by Lourens as Sales Manager to Loureiro. It provides feedback to Loureiro by Lourens regarding her client visits in that week. The relevant extract concerns a discussion Lourens had had with a customer of Tulisa a person called Owen from Eastside Electrical. The extract reads:

*"Owen got so excited about my discounts that I offered (-15% for GPwire, -20% SU, FE and -12.5% for BCEW) that he just wanted to give me their entire stock order for Feb. After careful consideration and discussion with his boss, they confirmed that they will be giving us the bulk order for Flat and Surface. I suggested that he should do that to keep SOEW calm, just in case they want to start a price war." [our emphasis]*

[39] The extract is from a weekly report dated 25 January 2008 and would fall within the three-year period within which the Commission may initiate a complaint.

[40] What this report suggests is that despite an employee of Tulisa's customer (Owen) wanting to give it an order for all its stock, Owen after discussion with his manager, limited the size of the order seemingly to obviate a price war with rival SOEW. The question is whether this constitutes circumstantial evidence of a cartel agreement.

[41] The Commission raised the Tulisa report with Lourens at her interrogation. The report was later raised by the Tribunal during the hearing.

[42] During her interrogation, Lourens explained the extract by saying a price war would be to Tulisa's disadvantage and therefore it suited Tulisa to not receive the entire order.<sup>28</sup> By not receiving the entire order, SOEW would still receive some orders and would not notice that Tulisa was offering better prices to the customer and then start a price war against Tulisa.

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<sup>28</sup> Page 99-107 of the record, Bundle F.

- [43] Although Loureiro was not the author of the extract, his version of it at the hearing was that Tulisa could not take the entire order due to its limited capacity. He indicated that Tulisa's approach with orders was to "cherry-pick" higher margin products, and therefore receiving the entire order may not suit Tulisa.<sup>29</sup>
- [44] According to the Commission, the Tulisa report is reflective of the agreement reached between Tulisa and the other respondents to fix prices.
- [45] It is not possible on the basis of this extract to conclude that Tulisa was part of the agreement, or to infer an agreement which was ongoing. This is firstly because it appears from the extract that it was the customer, Eastside Electrical that decided not to place the entire order with Tulisa with Lourens affirming the decision in order to avoid a 'price war' by SOEW.
- [46] Even if 'price war' was to be interpreted to imply an agreement by Aberdare and Tulisa, the evidence taken as a whole, is insufficient to support the conclusion of an agreement as there may well be other explanations for Tulisa's pricing other than price fixing. This leads to the Commission's submission that by following Aberdare's pricing, Tulisa was party to a concerted practice.

### *Concerted practice*

#### *Did Tulisa conduct itself in a manner indicative of it being a member of a cartel?*

- [47] It is common cause that all the respondents, Tulisa included, based their prices for various types of power cables off Aberdare's circulated price lists.
- [48] Aberdare circulated its price lists on the 1<sup>st</sup> of every month. According to Andrews, the price list was automatically faxed to its customers and to SOEW and Alvern. During his testimony he could not, however, confirm that Tulisa was a recipient of the price list from the automated fax machine.<sup>30</sup> Given the animosity between Aberdare and Tulisa; and Andrews' testimony that Ferreira

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<sup>29</sup> Page 154 of transcript dated 15 November 2017; Page 181 of transcript dated 16 November 2017.

<sup>30</sup> Page 58 of transcript dated 15 November 2017.

was meant to be the intermediary between Aberdare and Tulisa, it is plausible that Tulisa was not on the Aberdare mailing list.

[49] Tulisa argued that it never received the Aberdare price lists from any of the respondents and instead received prices from customers. According to Tulisa, it would use the Aberdare price list as a basis off which it would offer further discounts to customers. The record reflects, at various instances, that Tulisa had sometimes actively requested price lists from customers. Tulisa's explanation for why it based its prices off Aberdare's prices was in order to protect itself from releasing prices which Aberdare would later undercut.

[50] Loureiro testified that when Tulisa entered the market, it came in with one product. In response, Aberdare being the largest player in the market cut prices on that product. This forced Tulisa to expand its product range to produce a different size of the product, to which Aberdare responded with a price cut for that product too. This happened again with other products.<sup>31</sup> Being a small and new entrant it had to protect itself against the large incumbent.

[51] This explanation is a plausible one in an oligopoly market. It is common cause that Aberdare was the largest manufacturer and supplier of copper cables, with Alvern and SOEW being relatively smaller. It is also common cause that the inputs for the manufacture of copper cables are copper – a commodity based on the Rand/Dollar exchange; PVC whose pricing is driven by oil prices; and labour.

[52] Further, power cables are manufactured in accordance with SABS standards which all manufacturers are required to meet and must contain the same volume of copper and PVC as per the SABS specifications.<sup>32</sup> Consequently, production costs, which have an impact on price, are similar across the manufacturers.

[53] We now consider whether by following Aberdare's pricing, Tulisa was party to a concerted practice.

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<sup>31</sup> Pages 141-142 of transcript dated 16 November 2017.

<sup>32</sup> Page 53 of transcript dated 15 November 2018.

- [54] What has been canvassed in the evidence thus far is that: all the other respondents attended the meetings or at least some of them, where price fixing occurred; all the other respondents received Aberdare's price list directly from Aberdare up until at least 2008; they all offered discounts based on Aberdare's price lists; and they have admitted their involvement in the alleged price fixing.
- [55] Insofar as Tulisa is concerned, there is no evidence of its attendance at meetings since June 2006. Tulisa was not a recipient of Aberdare's price lists unlike the other respondents, and Aberdare confirms that Tulisa was not on its mailing list due to the sour relationship between them. However, Tulisa like the other respondents based its pricing on Aberdare's price lists which it obtained from customers.
- [56] There is no evidence on the facts before us that Tulisa was in agreement with the other respondents, in the way in which the other respondents were by their attendance at meetings and direct receipt of Aberdare's price lists.
- [57] Tulisa's actions appear to be consistent with those of a player in an oligopoly market acting rationally and independently of its competitors but well alive to the actions of the competitors (referred to in literature and case law as 'conscious parallel behaviour' or 'conscious parallelism'). It is generally accepted that conscious parallel pricing is unlawful if it is the result of a collusive arrangement but is lawful if it is unilateral as a consequence of the market structure. Where the line is drawn between the two is a matter of fact and evidence.<sup>33</sup>
- [58] On the facts before us, there is insufficient evidence of Tulisa acting in concert with the other respondents in furtherance of a cartel. There is further no other evidence to rebut the rational explanations by Tulisa for its pricing decisions.

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<sup>33</sup> See: Whish and Bailey's discussion on the European Court of Justice cases of Dyestuffs, Züchner v Bayerische Vereinsbank, and Wood Pulp in Whish & Bailey *Competition Law* 9<sup>th</sup> ed. (Oxford University Press, Oxford, 2018) at p578-581; Areeda and Hovenkamp's discussion of the American Theatre Enterprises, Matsushita, and Toys 'R Us cases, in Areeda & Hovenkamp *Fundamentals of Antitrust Law* 4<sup>th</sup> ed. Loose-leaf (Wolters Kluwer, New York 2019) at p14-49-14-55; and Kovacic 'Plus factors and Agreement in Antitrust Law' (2011) 110 Mich, L Rev. 393.

[59] The Commission submitted that since Tulisa did not distance itself from the alleged price fixing it was party to the agreement. It relies on Pioneer<sup>34</sup> for this submission.<sup>35</sup> In our view, Pioneer bears no relevance in this case since there is no evidence of anyone from Tulisa attending a price fixing meeting since 2006. The principle in Pioneer was that when the Tribunal is in a position to find that a respondent was a party to a collusive agreement but said respondent wants to avail themselves of a prescription defence, that party assumes an onus to prove that they had terminated their participation in the collusive agreement prior to the cut-off date for prescription. There is no evidence of Tulisa attending meetings (within the prescribed period or at any time thereafter following Rundell's passing) and therefore the obligation to distance itself was not triggered.

[60] In closing argument, the Commission submitted that we should grant a declaratory order against Aberdare, the leniency applicant to the effect that it has contravened section 4(1)(b)(i) and (ii) of the Act. However, since Aberdare was not a participant in the proceedings before us other than as a witness for the Commission pursuant to its leniency application, we cannot grant such an order. As mentioned in the introduction, no market allocation evidence was canvassed in these proceedings since Tulisa to whom this matter relates, was not implicated in market allocation. It is open to the Commission and Aberdare to enter into a consent order which can be confirmed by the Tribunal as a consent order in terms of section 49D.

## **Conclusion**

[61] We conclude on the evidence before us that the Commission has not established that Tulisa was a party to an agreement or concerted practice, express or inferred, to fix the price of power cables as alleged by the Commission.

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<sup>34</sup> The Competition Commission v Pioneer Foods (Pty) Ltd [2009] 2 CPLR 323 (CT).

<sup>35</sup> Page 204 of the transcript dated 24 November 2017.

[62] This is because Tulisa ceased to attend the price-fixing meetings in June 2006 when its representative at the meetings died. Unlike the other respondents who received price lists directly off Aberdare's automated fax machine, Tulisa did not. Furthermore, there is no evidence that Tulisa basing its prices on Aberdare's price lists was pursuant to a collusive agreement. Rather, the pricing appears consistent with rational behaviour by a rival in an oligopolistic market.



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**ORDER**

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- [1] Tulisa is found not to have contravened section 4(1)(b)(i) of the Act under case no. CR205Mar14.
- [2] No order as to costs.



**Ms Mondo Mazwai**

**15 January 2019**

**Date**

**Mr Norman Manoim and Mrs Medi Mokuena concurring.**

Tribunal case manager : Ms A Ravat

For the Commission : Adv. T Mafukidze

For the third respondent : Adv. G Engelbrecht instructed by SWVG Inc.