competitiontribunal
SOUTH AFRICA

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CR164Sep17

In the matter between:

The Competition Commission	Applicant
and	
Stuttaford Van Lines Gauteng Hub (Pty) Ltd	First Respondent
Pickfords Removals SA (Pty) Ltd	Second Respondent
A & B Movers (Pty) Ltd	Third Respondent
Brytons Removals (Pty) Ltd	Fourth Respondent
Amazing Transport (Pty) Ltd	Fifth Respondent
Key Moves CC	Sixth Respondent
Bayley Worldwide CC	Seventh Respondent
Selection Cartage (Pty) Ltd	Eighth Respondent
Elliot Mobility (Pty) Ltd	Ninth Respondent
Crown Relocations (Pty) Ltd	Tenth Respondent
Magna Thomson (Pty) Ltd	Eleventh Respondent
Northern Province Professional Movers Association	Twelfth Respondent

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Panel	: Norman Manoim (Presiding Member) : Mondo Mazwai (Tribunal Member) : Medi Mokuena (Tribunal Member)
Heard on	: 03-05 June 2019; 10 June 2019; 12 June 2019; 20 – 21 June 2019;
Reasons Issued on	: 20 December 2019

Reasons for Decision and Order

Introduction

[1] On 22nd January 2014, various representatives of Gauteng based furniture removal companies held a regular meeting in Johannesburg of their industry association, known as the Professional Movers Association ("PMA") (Northern Region). The Northern region is a branch of the national body of the PMA, which itself is an affiliate of another industry body, known as the Road Freight Association ("RFA"). Thirteen people were present, representing thirteen different furniture removal companies.

[2] They discussed some of the customary business of such an association ranging from insurance issues to the organisation of a golf day. One item on the agenda attracted the attention of the Competition Commission ("Commission") and has led to this case. Under a heading 'E-Toll' the participants are recorded in the minutes as having discussed the impact of the newly operational E-Tolls on their business and its implications.

[3] The Commission decided to initiate a complaint and subsequently refer it against eleven of the firms that attended the meeting as well as the Northern Region of the PMA under whose auspices the meeting was held. The Commission alleges that the firms, being competitors in the furniture removal industry, entered into an agreement to fix prices in contravention of section 4(1)(b)(i) of the Competition Act 89 of 1998, as amended ("the Act").

[4] There is no dispute that the firms present were competitors, a necessary requirement for the Commission to prove in terms of the section.

[5] What is in dispute are two issues we must decide, namely:

a. Did the discussion that took place (which is not denied) amount to an unlawful agreement in contravention of the Act; and

b. If it did, since it took place three years prior to the date the complaint was initiated by the Commission, had the practice ceased by the date of initiation. Put differently, were there acts of implementation of the agreement (assuming there was one) that made it continue to some date within three years of the initiation date? In this case even the precise date of the initiation is subject to dispute as we discuss later.

[6] The Commission's case is that an agreement was reached at the meeting to recover E-Tolls and was subsequently implemented. As we shall go on to discuss, whether this has always been the Commission's case is subject to dispute, with the respondents alleging that the Commission has been inconsistent on this issue to their prejudice in defending themselves in the case.

[7] The respondents who actively opposed the case, all contended that (i) no agreement had been reached at the meeting and (ii) even if it had, that it was never implemented and thus the Commission's jurisdiction to refer the case is ousted by the limitation on action provisions contained in section 67(1) of the Act.[1] We discuss the provisions of this section later.

[8] Two of the respondents filed answering affidavits but did not appear at the hearing. It is not clear whether this was intentional or whether they were not made aware of the hearing date, since they were not in attendance at the last pre-hearing, where this date was set.[2] These respondents are Amazing Transport (Pty) Ltd and Selection Cartage (Pty) Ltd. The twelfth respondent, the association did not defend the matter.

[9] This raises an issue of terminology for us. For that reason, when we refer to the respondents in this case, we mean only those who opposed at the hearing. When we refer to the other two firm respondents, who did not oppose at the hearing, we will refer to them as the 'non-responsive' respondents.

Background

[10] On 13 December 2013, the South African National Roads Agency SOC Ltd ("SANRAL") introduced the E-Toll system on certain highways in the Gauteng Province. For the furniture removal industry this introduced a new cost. Different rates were set for different vehicles depending on their size. The second variable was the number of gantries a vehicle needed to pass to get to its destination. The greater the number of gantries crossed, the greater the cost to the vehicle passing through them. If a vehicle had a tracking device on it then this would be computed by the system and the owner would then receive an invoice at a later date reflecting the cost of that months' travel.

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[1] Some respondents entered into settlement agreements with the Commission, namely A&B Movers; Key Moves and Crown Relocations.

[2] In future cases where a respondent is not present at a pre-hearing where a pre-hearing date is set-down and the respondent does not confirm receipt of the minutes if distributed by electronic means, the Commission should have the notice of set-down served on the party by the Sheriff.

[11] The system presented a challenge to the furniture removal industry because it imposed a new cost on them.

[12] According to the evidence in the case, removal companies generally want to charge customers at the time of the move at the cost reflected in a prior quote. But quoting to provide for the exact E-Tolls cost incurred was not that simple. Usually when the representative went to the premises of the customer he or she travelled in a sedan. There might need to be more than one such visit required. The toll fee for a sedan is lower than that for a truck. Then if the customer gave the job to the company a removal truck would be needed. Depending on the size of the truck the fee would vary.

[13] The delivery truck might not follow the same route as the representative who gave the quote to the client since the delivery address in all likelihood was going to be different. Sometimes furniture was moved not to another home but was kept in storage. All these permutations complicated the calculation of E-Tolls for any particular customer with any precision.

[14] Of course, with use of technology these problems could be overcome. But at the time, the companies did not seem ready to deal creatively with the problem.

[15] Thus, the companies were faced with a problem. The first issue was whether they should simply absorb the cost themselves. If not, should they change their business model and pass on the exact cost later or charge the customer upfront some of the cost by way of a standard fee that might be higher or lower than the actual cost? How to do the latter was the problem that seemingly led to the discussion of this topic at the meeting of 22nd January 2014.

The 22 January 2014 meeting

[16] The meeting held on the 22nd January 2014, at which the allegedly collusive agreement was reached, was that of the Northern Province region of the PMA. Its members were all firms based in the Gauteng Province, where E-Tolls had recently been imposed on several highways. The Northern Region is a sub-committee of the larger national body of the PMA. That organisation in turn is an affiliate of the still larger RFA. This relationship becomes significant as we detail the unfolding of the events, as these other structures intervened with the Northern Region in relation to what was perceived to have been decided on 22nd January by its members.

[17] The Northern region met infrequently, a few times each year. There was, according to the evidence, nothing special about when the meeting was held. No one was clear about whether an agenda was sent out in advance and even if it was, whether the ill-fated discussion of E-Tolls featured as an item.

[18] The Commission alleges that at this meeting, those present reached an agreement to charge customers a flat rate of R350 to recover the cost of E-Tolls. This was the most hotly contested issue in the case and the one to which most of the oral testimony related.

[19] The respondents, whilst not disputing a discussion of E-Toll pricing took place, deny any agreement was reached to either charge this uniform fee for E-Tolls or to agree on any common approach to passing on the cost of E-Tolls.

[20] Central to the Commission's case is a document which purports to be the minutes for the meeting of 22nd January. We will refer to these minutes as the draft minutes. (The reason for this hesitant description is that the accuracy of the minutes in this form is contested by some of the attendees, and second that these minutes were never subsequently ratified at the next meeting of the association; rather a second set of minutes was approved by that meeting, which was identical to the first in all respects, but the section on E-Tolls had been altered in material respects).

[21] Secondly, the Commission relies on correspondence between various of the role players, entered into subsequent to the meeting, which the Commission argues, are consistent with its version of what happened at the meeting viz. that the attendees had reached an agreement to fix prices.

[22] Thirdly, the Commission relied on the testimony of Martin Oosthuizen, who was present at the meeting and played a role in events subsequent to it. At the time Oosthuizen represented Pickfords, but he was also the president of the National body of the PMA.[3]

[3] At the time of his testimony, Oosthuizen was no longer working for Pickfords, but was with a smaller firm in the industry that was not implicated in the alleged agreement that is the subject matter of this case.

The draft minutes

[23] There is no dispute that the draft minutes were taken by Adele Vella, who was then an employee of Stuttafords and the secretary of Charl Pienaar, who chaired the meeting. Vella was not the usual secretary for the Northern Region's meetings. That person was Catherine Larkin who was an employee of the Professional Movers Association but was not available to take minutes that day. What is in dispute is whether Vella's minute accurately reflected the E-Tolls discussion on that day.

[24] First it is necessary to see what the draft minutes reflect. For the sake of completeness, we set out the entire paragraph below in capital letters as appeared in the original:

> *"4. E TOLL*
>
> *THE E-TOLL SYSTEM WAS PUT INTO EFFECT OFFICIALLY ON THE 2ND OF DECEMBER 2013. CP ADVISED THAT THE SUBSIQUINT [SUBSEQUENT] EFFECTS ON THE REMOVAL/TRANSPORT INDUSTRY BE DISCUSSED. THIS WOULD NOT BE A COLLUSION ISSUE. THE HANDLING OF THESE COSTS ARE CRUSIAL [CRUCIAL] AS IT WILL HAVE A LASTING EFFECT ON THE INDUSTRY. CP MADE MENTION OF THE TRACKING OF VEHICLES THAT HAVE BEEN USED TO ESTABLISH THE COST OF E-TOLLS FOR A VARIATY [VARIETY] OF VEHICLES FROM OLIANTSFONTEIN TO WILLIAM NICHOL [NICOL], INCLUSIVE WITH THE EXECUTIVE SALES CONSULTANT ATTENDING TO THE SURVEY, IT WAS NOTED THAT A MINIMUM TOLL FEE OF R250 HAD TO BE APPLICABLE – STUTTAFORD VAN LINES GAUTENG HUB.*
>
> *MARLANE BYSTYDZIENSKI (MB) CONFIRMED THAT THEY HAVE BEEN ADDING AN AMOUNT OF R350 PER QUOTE FOR BOTH LOCAL AND LONG DISTANCE CONSIGNMENTS TO COUNTER THIS COST- A&B MOVERS.*
>
> *DOUG FEAR (DF) ALSO ADVISED THAT THEY HAVE BEEN IMPLEMENTING A FLAT RATE OF R350 JUST TO COVER THE BASIC COSTING – BRYTONS REMOVALS.*
>
> *DS ADVISED THAT THEY FORMUALTED A PERCENTAGE CALCULATION TO ENABLE THEM TO COST THE TOLL FEES PER CONSIGNMENT MORE*

EFFECTIVELY – ELLIOTT MOBILITY. IT WAS AGREED THAT R350 SEEMS TO BE THE ACCEPTABLE AVERAGE.

IT WAS GENERALLY CONCURRED THAT A LEVIE [LEVY] OF R350 WILL BE ADDED TO THE REMOVAL COSTS PER QUOTE/CONSIGNMENT TO COUNTER THE EXCESSIVE EFFECTS OF THE IMPLEMENTED E-TOLL SYSTEM IN GAUTENG."

[25] The events subsequent to this meeting and the fate of the draft minutes are largely common cause because there is documentary evidence to this effect.

[26] After writing up the minutes Vella submitted them to Pienaar to check, as he was the chair of the meeting. According to him, he was busy at the time preparing for a move to Cape Town, so the minutes were sent on to Catherine Larkin at the national body, without Pienaar first checking them. Unlike Pienaar, Larkin read the minutes and must have become alarmed by their content as she alerted Oosthuizen to them.[4] Oosthuizen then emailed Pienaar. The content of this email is important as it is the first contemporaneous reaction to the draft minute (coming just over two weeks later from a person who attended the meeting.)

[27] Oosthuizen states:

"The matter relates to a discussion that took place on the E-Toll application and how to incorporate this as a line item on quotations. Kindly ensure that paragraph 4 of the minutes is amended prior to publishing it and reflect the following wording:

"We have taken advice on the matter and each party will act independently."

[28] Oosthuizen goes on in the same email to state:

"*Please take the previous statement out of the minutes as it is in contravention with the Competition Act and place the RFA in accordance with the Articles of Association at risk."*

[4] See First respondents' trial bundle, page 6, email from Oosthuizen to Pienaar dated 10 February 2014. In the email Oosthuizen refers to the fact that the minutes had been sent to Larkin.

[29] What is telling about this email is that it does not question the accuracy of the minutes; only the prudence in recording them in this way. Moreover, he suggests a drafting change as an amendment to paragraph 4 i.e. the one that deals with E-Tolls as follows:

> *"We have taken advice on the matter and each party will act independently."*

[30] Of course, this drafting change if it had been inserted in the minute would have been a post facto observation. Nothing of this sort was ever said at this meeting at the time on anyone's version.

[31] His final paragraph of warning is telling. If Oosthuizen believed the minute was inaccurate or at least substantially so, he would have simply asked for it to be rectified and not issued the warning that he had to report it to the RFA executive.

[32] We have Pienaar's response which is brief and cryptic. He states:

> *"This was a report and not circulated as yet. E-Toll will also not be a line item. The charges were based on factual information that is available to every citizen of this country. I will change the minutes to read accordingly before distributing."*[5]

[33] In his oral testimony Pienaar characterised his initial response as "cheeky". Why this is so is not that clear. What seems to have been operative in the lack of a more concerned response from Pienaar at the time, is some tension between Pienaar and Oosthuizen. While Oosthuizen was the more senior in terms of the organisation, he does not seem to have been so in relation to the commercial hierarchy. Both Pickfords and Stuttafords are subsidiaries of the Laser Group. According to Oosthuizen's oral testimony, in Group terms, Pienaar may have been seen as more senior.[6] This consideration would otherwise be immaterial to our decision, but it does explain two things. Why personal dynamics may have led to Pienaar becoming disinclined to give the problem more urgent and thorough attention, and why Oosthuizen at the meeting of 24th January mounted an ineffectual objection to the discussion taking place. (His version on this was more robust in his witness statement than during his oral testimony. However, the strange remark in the draft minute "...this would not be a collusion issue"

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[5] *Supra* page 5.

[6] See Transcript page 158, lines 3-9: "*That's why we discussed it with Laser Group, Stuttafords, Pickfords, AGS, all who belong to the Laser Group and the only party at that point in time that directly was aware of the situation was Mr Pienaar and Mr Pienaar at that point in time was just appointed to the Laser board.*"

was probably a reaction by Pienaar to Oosthuizen raising his concerns at the time of the meeting. It is unlikely that Ms Vella the minute taker would have invented this remark out of error.)

[34] Whatever that dynamic we know from the minutes that at a meeting of the National executive of the PMA, held on 13 February that year, where Oosthuizen was in the chair, he used the occasion to deliver a stern warning at the end of the meeting about members not *"engaging in anticompetitive behaviour as this would put the PMA and RFA at risk".* He included a warning of both the civil and criminal consequences.

[35] Given that Pienaar was at this meeting and had reported back on the meeting of 22nd January (the minute just states that he reported the meeting had inter alia discussed E-Tolls) it is undoubtedly a rebuke addressed to Pienaar about what had happened at the meeting of 22nd January.

[36] Clearly the pressure on Pienaar was paying off for Oosthuizen. On 14th February Pienaar addressed a letter to Sharmini Naidoo, the chief executive of the RFA, apologising for what he describes as the *"... incorrect report that was sent out regarding the E-Toll discussion."*[7]

[37] The apology is for not having read the minutes before they were sent on to the RFA. But he assured Naidoo the minutes had not been circulated.

[38] He then goes on to explain what the discussion was about. We set out these paragraphs in full below:

> *"It was never my intention to have a discussion about price fixing to recover, the very emotional, E-Toll. The intention was to highlight the costs involved and the bottom-line effect that E-Toll will have on the transport industry. I indicated to members the cost of travelling from Midrand to Bryanston as per the rates provided on SANRAL's webpage. This was only to illustrate what the extra expense would amount to and the effect on our very low margin industry. It was also for these reasons that I sent my initial communication that "the rates were available to every citizen of this country". I was still convinced, in my mind, that it was a discussion on actual cost rather than an agreement on charges. Obviously I realized, after the communication from Martin, the subsequent legal interpretation and actually reading what was sent out, that it certainly said more.*

[7] First respondents' trial bundle, pages 21-22.

The discussion ended, not with consensus, but rather that each company should look at fleet size, number of quotations, and actual E-Toll charges for a month and then only calculate their own cost to establish what they need to recover from the consumer. You can understand that this will automatically differ from operator to operator because we operate different size operations and we operate in different markets. We all also service a different mix of international and domestic relocations. It is for these reasons that you can never have a fixed recovery cost on E-Toll or for that matter, any other rates.

Notwithstanding all of the above, I should have called a stop to the discussion when certain members started mentioning what they are already charging. I again profusely apologize for this."

[39] At some stage around this time an opinion was sought from an attorney who specialised in competition law on the content of the minute. Both this opinion, as well as Pienaar's apologetic letter to Naidoo, were attached to an unusual letter from Nico van der Westhuizen, the Chairman of the Board of the Road Freight Association, which was circulated to all members of the Northern Region of the PMA.[8] We set out the contents in full below:

"1. We are addressing this letter to you on behalf of the Board of the Road Freight Association.

2. We acknowledge receipt of your letter of apology by Mr Charl Pienaar, and accept such apology.

3. The purpose of this letter is to share our concern with regard to the discussions that took place at the Northern Region Meeting on 22 January 2014.

4. You have already been provided with a copy of the legal opinion that we have obtained, which points to the risks of certain discussions at your regional level.

[8] First respondents' trial bundle, page 33.

5. This letter therefore serves to remind all relevant parties, not to make themselves guilty of any acts of collusion or otherwise. This includes decisions on the pricing of toll gates, as well as any other matters which may constitute collusion or any breach of the Competition Act, 89 of 1998. Please note that such conduct also constitutes a breach of the RFA's Code of Ethics, signed by all members.

6. We trust that you will appreciate the seriousness of this matter."

[40] This letter is dated 10 May 2014. As we discuss later, the Commission initially argued that the collusive E-Toll agreement had, at the very least, subsisted until the date of this letter, because emanating from the most senior official of the parent body of the Northern Region of the PMA, it constituted a repudiation of the prior agreement. Since this letter was distributed within a period of less three years of the prescription date (8 February 2017), if this legal interpretation is correct, it would assist the Commission in dealing with the limitation of action defence.

[41] Another fact must also be considered that had taken place prior to this letter from the RFA. On 10th April the Northern Region of the PMA held a meeting. This was its first meeting since the 22nd January meeting. At this meeting the minutes of the meeting of the 22nd January were tabled and approved without comment. Present at this meeting were some, but not all of the respondents' representatives who had attended the meeting on the 22nd. Pienaar was still in the chair and Oosthuizen had attended. But the version of the minutes of the 22nd presented for ratification was not the Vella draft minutes. Recall that according to Pienaar's 14th February letter to Naidoo he undertook to circulate the "correct document" to members.[9]

[42] Recall as well that Oosthuizen had suggested the language that should be put into the revised minute.

[43] But in redrafting, Pienaar did not follow precisely Oosthuizen's suggested language. Instead he replaced it with his own so that it now read as follows still typed in caps:

[9] First respondents' trial bundle page 21.

"4. E-TOLL

THE E-TOLL SYSTEM CAME INTO EFFECT ON 2ND DECEMBER 2013. THIS IS AN EXPENSE TO THE REMOVAL/TRANSPORT INDUSTRY THAT NEEDS TO BE PASSED ONTO THE CONSUMER.

IT WAS SUGGESTED THAT EACH COMPANY DECIDES TO CHARGE OR NOT TO CHARGE AND TO CALCULATE BASED ON THEIR OWN COSTS HOW MUCH THEY NEED TO RECOVER. OBVIOUSLY THE RESPECTIVE COMPANIES OPERATE DIFFERENT FLEET SIZES AND OVERHEADS ARE DIFFERENT."

[44] As in the Vella minutes, this paragraph, inexplicably, is also typed in caps unlike the rest of the minute.[10] There are no other changes to any other items in the minutes a fact that the Commission places much emphasis on.

[45] Pienaar has omitted Oosthuizen suggestion that the minute must record that each party will act independently.

[46] Instead in his first sentence he passes on the message that this is an expense *"that needs to be passed on to the consumer."*

[47] The next sentence appears to be a concession to a weakened form of the Oosthuizen advice. But as opposed to the imperative tone of '*needs to be passed on*', this one is expressed as a suggestion that each firm decides to charge or not to charge. But the sentence continues in its second phrase, as if ignoring what has been stated in the prior phrase, to state *"... and to calculate based on their own costs how much they need to recover."* Why this gloss in the last phrase was necessary, the reader having told in the prior phrase that each should decide as to whether they should charge or not charge, was not adequately explained.

[10] We got no explanation for this anomaly at the hearing. Oosthuizen suggested that it might have been in caps in both versions so as to draw everyone's attention to it. If this is so it suggests that the meeting intended to reach an agreement and to communicate it to non-attendees who might otherwise not read the minute or glance at it cursorily.

[48] What seems to have happened is that Pienaar had in the revised minute taken a version that was a middle road between the Oosthuizen cautious text and the compromising text of the Vela draft. He seems unable to resist conveying the message that the cost of E-Tolls needed to be passed on to the consumer for the good of industry participants.

[49] Excised from the Pienaar draft are any references to the discussion that took place on 22nd January, during which precise prices were mentioned by various of the respondents, and which most agreed during the hearing had been mentioned, if not verbatim as per the draft minute, but in some form at the meeting.

[50] Thus, we can conclude that neither the Vella draft nor the Pienaar draft, contain an accurate version of the discussions that took place at the meeting. We need therefore to rely on what was said in the contemporaneous documents and the features of commonality to come to a conclusion of what was probably stated or understood at the meeting.

[51] But before we do so we must consider the oral evidence. This exercise can be done briefly. The witnesses who testified, it must be borne in mind, in fairness to all of them, were attempting to recall a meeting that had taken place more than four years earlier, and which for many, did not at the time hold much significance as some testified. Bayley, in his testimony stressed the point that the PMA meetings do not hold much significance:

> "*I just think it bears reminding to everybody and specifically to try and give the Commission a bigger picture of what this actually means in reality, because obviously you know, nobody in the Commission is from the removal industry. They don't understand the specifics of it or what PMA meetings are about. Now, a point on an agenda at a PMA meeting is really seldom there to find a resolution or to look for an answer or to try and pass some sort of … creates some rule. It's not about that.*
>
> *To give you an example, when I was the President of SAIMA and I had to set the minutes of our meetings, which are very similar in nature, I used to battle to come, and if you go through the minutes of the agenda of PMA meetings, I did this once with SAIMA, the same seven points that were on the agenda 10 years ago are the same seven points that are still on it now. It's basically a*

meeting of industry professionals to chat about what's going on in the industry."[11]

[52] The Commission also called Oosthuizen as its only witness. Unlike in most cartel prosecutions Oosthuizen was not offered as a witness to the Commission by a party seeking immunity. Indeed, no attendee at this meeting was given immunity. As a witness Oosthuizen proved a mixed blessing for the Commission. He confirmed most of what was said at the meeting, as minuted by Vella. He also mentioned in his witness statement that he had voiced his discomfort at the discussions taking place during the meeting but that Pienaar and the meeting resolved that the discussions were not collusive. This may explain the curious language in the minute that appears in the second sentence *"This would not be a collusion issue."* However, when he testified his version was equivocal and he stated that he could not remember if he voiced his discomfort or not.

[53] However, Oosthuizen disputed the final sentence of the minute. This is the sentence that says: *"It was generally concurred that a levie (sic) of R 350 will be added to the removal cost per quote/ consignment to counter the excessive effects of the implemented E-Toll system in Gauteng."*

[54] He testified repeatedly, whilst being cross examined, that no agreement had been reached.

[55] He was in the final analysis vague on the most essential points. Oosthuizen would also have been relevant to the issue of implementation. His own company Pickfords had held an internal meeting on 19 March 2014 to discuss how they would approach E-Toll pricing. Since this meeting was after the 22nd January, the meeting would have been highly relevant to the Commission's case, given its prescription problem, to link the discussion of this meeting to the 22nd January discussions. However, Oosthuizen testified he was not at this meeting. Interestingly Naik for Pickfords testified that he was, although he cannot recall his contribution.

[56] The Commission was able to extract some advantage out of one of the respondent's witnesses, Deon Small of Elliot Mobility, the ninth respondent. Small departed from the blanket denial version of all the other respondents witnesses by this gloss on what occurred in his interrogation by the Commission on 5 October 2017 where he stated the following:

[11] Transcript page 527, lines 17-20 & page 528, lines 1-11.

"Commission interrogator: I'm saying it was discussed and suggested at the meeting that members of the association must recover E-Toll fees?

Deon Small: Yes."[12]

[57] Elsewhere during the same interrogation, in answer to a question from the Commission as to what discussions tool place at the meeting, Small said they first asked if everyone was tagged and then he went on to state as follows:

"Deon Small: " ... second, of all are you sitting up and realising the cost associated is and if you are so how are you recovering it and therefore ...take those expenses and insure (sic) that you do recover them in whichever way you want."

[58] This version of Small is consistent with the version that appears in the first line of the Pienaar version of the minute of the 22nd January.

[59] The other respondents who gave oral evidence and who had attended the meeting all denied two aspects of the Commission's version. First, they denied that there had been any 'concurrence' as recorded in the Vela minute or that using other language that there was any agreement reached. Second, they denied specifically that there was any agreement around an amount of R350.

[60] The respondents, who could remember, did concede that the Vella minute was accurate, to the extent that it records that the various members quoted had mentioned these amounts.

[61] After some prodding from the Tribunal, the first respondent called Vella as witness. She was very nervous and appeared distraught that her minute had become the foundation of the case. She was led on whether there had been any agreement. She said there had not been. Asked the central question as to why she had used the phrase "*it was generally concurred*" if that had not indeed been mentioned, she said her training as minute secretary was that one should always sum up in the minute what may have been agreed. She had of her own initiative minuted that there had been an agreed course of action flowing from the discussion, despite there not having been one.

[12] *Supra* page 324.

[62] The Commission's approach to the cross examination of these witnesses was twofold. To challenge what non-collusive explanation they had for why there was even a need for the discussion on E-Tolls and second, how it was that the minute which was accurate in every other respect, had only gone wrong in the last sentence i.e. the one that stated it 'was generally concurred'.

[63] On the issue of why the minute recorded concurrence the respondents could not take the matter further other than to deny there had been any agreement. They then all relied on the disavowal of Vella. On why the discussion took place and why the specific examples were used, the respondents were not consistent. Some stated it was to ensure that everyone was aware of E-Tolls. Others that it was just a gripe session. Neither explanation was credible. As Pienaar himself stated in his 10 February email to Oosthuizen, everyone was aware of E-Tolls and what the tariffs were.[13] Pienaar did not dispute that the minute accurately recorded that he gave as an example of what it would cost in E-Tolls from his firms' depot in Olifantsfontein to William Nicol avenue.[14]

[64] But he was unconvincing in explaining why he needed to give this example that was specific to his firm, that destination and his vehicles. Pienaar was after all the one who maintained in his version of the minutes ratified on 10 April that each firm faced its own costs. If there was nothing unique about the costs a firm faced what was the purpose in mentioning them unless it was to suggest a price range to the others.

[65] Least plausible of all was the explanation given by Mr Fear of the Fourth respondent who stated that he gave as an example what it would cost to drive the whole ring road of highways around the outskirts of Johannesburg and he arrived at the amount of R350. He conceded however that no actual journey would amount to travelling all that way around and this was used just as an example.[15] When challenged on why he

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[13] First respondents' trial bundle, page 5. There Pienaar states:" *The charges were based on factual information that is available to every citizen of this country."*

[14]Transcript page 207, lines 5-17.

[15] See Transcript page 400, lines 12-20 & page 401, lines 1-15 In this extract Mr Bayley of the seventh respondent who represented the firm himself in the case is questioning Mr Fear from the fourth respondent about what the latter had said at the meeting.: "*MR BAYLEY: ... Mr Fear, can I just clarify, the example that you gave driving around the ring road and the amount of 350, that was an example ... was that an example of what it would cost taking into account all the toll roads going around the ring road, it wasn't actually, it's my understanding of it, it wasn't actually about a move, it didn't include where you go off to do a move or ... it was exactly what the discussion was meant for and I'm trying to help your understanding here for your question, in that that 350, am I right in saying that you were just saying what SANRAL published costs were if you drove under all of their gantries on the ring road around Jo'burg?*

MR FEAR: Correct.

MR BAYLEY: No removal would ever do that, because at some point they would go off into a suburb and if they went off into a suburb one E-Toll of after that one E-Toll it would change that. So the example

should choose as an example an entirely hypothetical journey, he was unable to come up with a plausible answer.

Analysis

[66] The Commission version that the meeting was there to achieve an understanding of how to deal with E-Tolls expense is a more plausible explanation of the events. The evidence of Oosthuizen, Small and the later Pienaar minute are at least consistent on one point. That faced with the problem of a new cost the respondents had reached an understanding that this cost should be passed on to consumers possibly as either a flat rate or percentage. Second the sums mentioned gave each an indication of the ball-park for what this amount was.

[67] What the Commission has not established with sufficient certainty is whether the agreement was reached on the specific amount of R350. Given the disavowal on this point by its own witness Oosthuizen we must conclude that agreement on this figure has not been established. What appears to have happened is that Pienaar had sounded them out at the R250 mark and that others had suggested a higher amount closer to R350.

[68] Were the respondents' version correct that there had been no agreement, the degree of concern shown by Oosthuizen, which precipitated the urgent response by the officials of the RFA, would not likely have happened. Pienaar doubtless would have got Vella to explain she had been at fault and Oosthuizen who had been at the meeting would have been easily able to confirm it. Moreover, Pienaar could not fully resist recording the essence of the agreement – it is necessary to pass this on to the consumer – even at a time when he knew this was a sensitive issue and had been advised to record that each firm was making an independent decision.

[69] As a legal issue the Act makes it clear that an understanding is sufficient to constitute an agreement.

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was ... was the example just you joining a discussion where the members that were there were trying to understand SANRAL's costs and how they would impact our industry and was the 350 mentioned in the toll road just simply an amount from their website that it would cost and not actually a move or did not include the details of a move, that a move would have to include for you to get to an actual cost? MR FEAR: Correct, it was just an illustration of driving around the circle."

[70] In terms of the Act an agreement is defined as: "*when used in relation to a prohibited practice, includes a contract, arrangement or understanding, whether or not legally enforceable.*"

[71] As the literature of the United States jurisprudence suggests, even a nod and a wink can constitute evidence of an agreement.[16] What is relevant is that competitors replace their independent action – in this case how to deal with a new expense – with interdependent action reached as a result of an understanding with competitors. This is the only credible explanation for why the discussion took place in the first place and why the amounts and the mechanisms for recovering were mentioned. What the respondents were doing was classic price signalling to competitors at what level they might pass on Significantly Pienaar's ball park figure of R250 was the first mentioned, according to the chronology of the minute – which was not challenged – was 'talked up' by two others, to the figure of R350. Whilst we cannot find that everyone agreed on that figure, what the respondents were doing was signalling what price level they felt comfortable to let others know they might charge.

[72] This is in the overall conspectus of all the facts is sufficient to constitute proof of an agreement to fix prices in contravention so section 4(1)(b)(i) of the Act. That it was not an agreement to fix a price in precise terms, does not detract from the conclusion that there was an agreement. When competitors reach an understanding to raise prices to consumers, whether by reference to an agreed price or an agreed price raising form of conduct, consumer welfare is adversely affected.

[73] In the present case the competing firms were not even obliged to pass on the cost of E-Tolls to consumers. That decision to do so by agreement, is, on its own, a contravention of the Act, because such a decision excluded independent action by the firms, which in a competitive market may have led to different responses.

[74] Second, it is also clear that the firms reached agreement to pass on the cost not by the actual amount incurred, but by way of a general fee. Third, the firms signalled to one another what the range of that fee might be, albeit that we have not found they agreed on a precise amount, contrary to what the Commission alleged in the referral,

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[16] See William Page in "*Tacit agreements under section 1 of the Sherman Act,* University of Florida, Levin College of Law, Legal Studies research paper series paper No. 16-45 Page quotes one US court as holding: " the law forbids nonverbal agreements in restraint of trade as well as express ones; otherwise the law would be emasculated as competitors accomplished the forbidden goal with a nod and a wink." See page 18 of the article and the several other US cases using the same terminology, quoted in footnote 68.

although, as we discuss later, it came to more nuanced conclusion at the end of the hearing.

Section 67(1) defence

[75] As we mentioned earlier the respondents have all raised as a defence in the alternative that the referral is barred by the provisions of section 67(1) of the Act, which provides as follows:

> *"67. Limitations of bringing action*
>
> *(1) A complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased."*

[76] In this case it is common cause that the meeting of 22nd January 2014 took place more than three years prior to the initiation of the complaint. This is so despite some dispute as to the date of the initiation.[17] Even if we find the initiation took place on the earlier of these two dates, nothing much turns on this. On either date the initiation takes place three years prior to the meeting of 22nd January. Nor does any relevant event take place between these two dates that makes the choice determinative.

[77] It is clear from case law that merely concluding an agreement, even without implementing it, suffices to constitute a contravention of section 4(1)(b).[18] But if agreement was concluded prior to the three-year limitation period, then the respondents are not liable, unless the conduct continued beyond that date to a date less than three years after the initiation date. In this case we will assume that the complaint was initiated on the date the Commissioner appears to have signed it which was 08 February 2017.

[78] In the Complaint referral the Commission alleged in paragraph 28 that the conduct was still continuing.

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[17] It was either initiated on the date signed by the Commissioner which was the 08 February 2017 or the later date when the initiating document was stamped by the Commission's registry which was 08 March 2017.

[18] See See *Competition Commission v Primedia and Avusa Ltd T/a Nu Metro Cinemas* CAC Case number 161/CAC/Feb18 at para 39 where it references *Reinforcing Mesh Solutions (Pty) Ltd & another v Competition Commission & others* (84/CR/DEC09)[2013) CAC Case No. 119/120/CAC/May 2013 at para 31: "*this court endorsed the European Commissions' position that implementation is not a requirement to found a contravention of s 4(1)(b) of the Competition Act. As aptly observed in MacNeil the definition of an agreement extends to the concept beyond a contractual agreement*".

[79] But when the Commission opened its case, on the first day of the hearing, Mr Motshudi for the Commission, in response to a question from the Tribunal stated unequivocally that the Commission would not rely on any evidence of implementation.[19]

[80] Mr Motshudi went on to explain during opening that the Commission would contend that the agreement reached on 22nd January remained in force until the respondents were told by the RFA, the umbrella body, to desist. This was a reference to the Van der Westhuizen letter we referred to earlier. Since this letter was sent on 10 May 2014 it was communicated to the respondents within the three-year period. This appeared, at least at the commencement of the hearing to be the way the Commission was going to establish that the conduct had not ceased at the time of initiation.

[81] But at the end of the case the Commission did not persist with this argument and we therefore don't need to decide whether it is correct as a matter of law. Instead the Commission argued that because the respondents at the meeting had indicated variously what they might charge, and that these amounts hovered around the R350 mark, that influenced their later charging. The respondents, it argued, had the benefit of exchanging pricing information and so any subsequent act of implementation was likely to have been influenced by this prior unlawful exchange. As the Commission put it, the respondents could not '*unthink*', what they had learned. This argued the Commission even included those who had not charged any fee because *"...this might be construed as cheating on the agreement."*

[82] There are several problems with this argument. First, coming right at the end of the case – indeed not even appearing in the Commission's final heads of argument – this is unfair to the respondents who were entitled to meet the case as pleaded viz. that the conduct was ongoing.

[83] But even if we grant the Commission some latitude in the interpretation of what ongoing conduct meant, this argument still has problems.

[84] Granted we have found for the Commission that an agreement was reached to implement an administration type of fee that did not reflect the true cost of the E-Tolls for the service. We found further that the respondents had sounded one another out at this meeting. This finding of ours is close to the Commission's contention that this fee as the Commission put it 'hovered' around the R350 mark. We will assume for the

[19] See transcript pages 7 onwards.

Commission's benefit that the agreement reached went as far as the 'hovering 350 mark'.

[85] But even if the prescription problem did not loom as it does in this case, there still needs to be some proof of a nexus between an agreement and its implementation.

[86] This was the approach taken by the Competition Appeal Court (CAC) in the *Prime Media* case. Although in that case the court was not dealing with an agreement that may have prescribed it was an agreement entered into before the commencement of the Act in 1999. Here the court held that it was necessary to show that the agreement had been implemented after the new Act had come into force.

[87] As the court stated: *"...the Commission failed to make the required showing that the settlement agreement was implemented."* [20]

[88] This is also the reason why we needed to decide what the content of the agreement was. Without knowing this it is not possible to test if the agreement was implemented because although the respondents may have implemented certain charges it would not be possible to know if they were in consequence of the agreement, unless one knew what its terms were.

[89] It is clear then on the settled case law that when the date of the agreement precedes the commencement of the Act, or as in this case, falls on a date when action cannot be taken because it is limited by the time periods in the Act, there needs to be evidence of implementation that travels beyond the prescription date.

[90] Second, we find that in testing the evidence of subsequent implementation there must be evidence that the subsequent act is causally linked to the alleged collusive agreement.

[91] The real issue in the case is not whether there must be a nexus between the agreement and its implementation – it is clear that there must be- but on whom the evidential burden to establish or negate the nexus rests.

[92] It is possible depending on the nature of a cartel agreement that implementation does not need to take the form of some positive act of conduct. Thus, a market sharing agreement or customer allocation agreement, might be implemented because the

[20] See *Competition Commission v Primedia and Avusa Ltd T/a Nu Metro Cinemas* CAC Case number 161/CAC/Feb18 at paragraph 56.

firms concerned simply have done nothing to show non-adherence to the agreement and in this sense, one might say the conduct had continued.

[93] On the facts of this case, the agreement was to implement a price for E-Tolls that hovered in the amount of R 350.This means that for there to be evidence of a nexus, some positive act of implementation needed to be shown.

[94] Without deciding the point in this case, we will assume, again in the Commission's favour, that as the respondents had reached an unlawful agreement to charge an E-Toll levy, in the manner described, they bear the evidential burden of establishing that there was no nexus between this agreement and the respective respondent's subsequent conduct.[21]

[95] In our view all the opposing respondents who led evidence on this point discharged this burden.

[96] Each of the respondents had a different version on implementation. They fell into three categories:

a. Those that had implemented charges prior to the meeting and did not alter their charging pattern despite the meeting setting the price at a higher amount; (Respondent number 4)

b. Those that implemented a charge after the meeting but did so in different amounts and at different times to one another; (Respondents numbers 1, 2, and 11)

c. Those that never implemented at all. (Respondents number 7, and 9)

[97] The 4th respondent testified that it had charged an amount of R230 prior to the meeting on 22nd January and continued to do so after the meeting. It was able to refer us to its invoices to confirm this practice. One might have expected it to increase its E-Toll charge after the meeting, given that if the going rate was to hover around R350, there was more fat for it to gain. But it did not. Whilst it is possible as well for a competitor in such a situation not to change its own price, but to ensure others move up to its own,

[21] Note we haven't previously decided this point. The previous cases on the evidential burden dealt with situations where there had been proof of implementation but the dispute was about the time of its cessation. See *Competition Commission v Pioneer Foods (Pty) Ltd* (15/CR/Feb07, 50/CR/May08) [2010] ZACT 9 (3 February 2010), the consolidated exception and joinder applications in *Competition Commission v Bank of America Merrill Lynch International Limited and 22 Others* (CR212Feb17), and see *Pickfords Removals SA (Pty) Ltd And Competition Commission* (CR129Sep15/PIL162Sep17).

lest it has to move down to meet the competitive price, the Commission did not establish any version to gainsay that of the respondent and its version must be accepted.

[98] There were three respondents which did implement an E-Toll charge after the meeting namely, the First, Second and Eleventh respondents –

a. The First respondent charged a fixed levy of R300 from the beginning of April 2014;

b. The Second respondent had a formula to calculate an appropriate levy after the 19 March 2014 meeting it had. The formula reads as follows:

   i. Local moves and transport to warehouse: the JHB and PTA branches would add an additional levy of 2%;
   ii. Long distance moves: 2% levy added to the costs of quotations with a minimum of R100 per quote; and
   iii. It would be left to the respective branches to decide whether or not to implement the R100 minimum charge.

c. The Eleventh respondent charged a fixed levy of R290 from April 2014.

[99] However, there is no evidence that the subsequent charge had come about as a result of the meeting on 22nd January. The evidence was that different people in the firm to those who had been at the meeting were responsible for the decision and the Commission was not able to challenge this version.

[100] There were two respondents (seven and nine) who never charged customers for E-Tolls. They provided a credible explanation for why they didn't. They were in the export market and, more often than not, used a third party to transport for them. Since it was the third party which incurred these expenses, not them, they had no interest in charging and recovering costs from their own clients. They simply passed on whatever invoice they received to the client. This conduct does not appear to be cheating on fellow cartelists as we discuss more fully later, so despite the Commission suggesting it was possible it does not seem plausible on this record. Without another version from the Commission we have to accept this version.

[101] Finally, we consider whether the economic evidence in the case suffices to shift the probabilities in favour of the Commission or the respondents. Some of the respondents had contended that because the charge for E-Tolls was so low, in relation to the average total cost to the customer of a move, the firms would have no incentive to collude on these charges. However, the letter from Pienaar does not support this. He justified why the respondents had discussed E-Tolls on the basis that margins in the industry are low and an additional cost imposed on firms was thus of consequence.[22] One must not confuse the relationship between the cost of E-Tolls and total revenue and its relationship to profit margins. In relation to the first the charge was insignificant but not in relation to the second.

[102] Nevertheless, even if the respondents had an incentive to collude to protect their low profit margins from further erosion by the introduction of a new common cost it does not follow that that they did so.

[103] In this case although there is direct evidence of the agreement, for the reasons we have explained, there is a break in the causal chain between its conclusion and the alleged acts of implementation. In most cases this chain of events is seamless and the inference between agreement and action is irrefutable because the elapse in time between the two is brief.

[104] But in this case the causal link is much less compelling. Had the evidence shown that the meeting led to an inflection point in the E-Toll recovering behavior of the respondents, the economic evidence of causality would have been highly probative. But here there is no evident inflection point and so the evidence of implementation is far less evident. Some who had implemented before the meeting did not change, some never implemented and of those who implemented after the date of the meeting, there was no coincidence in time or the price, suggestive of collusion.

[105] The key question where one has no direct evidence and is relying on inference, is to ask which theory affords a more probable interpretation of the known facts. Firms may exhibit pricing outcomes that are similar but are the product of independent action and thus not unlawful. Firms may also exhibit pricing outcomes from interdependent action, where the inference of collusion may be more likely, but not necessarily conclusive as this may be the outcome of conscious parallelism.

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[22] See First respondent's trial bundle page 21. Pienaar states; *" This was only to illustrate what the extra expense would amount to and the effect on our low margin industry."*

[106] All the respondents in this case have contended that they took pricing decisions independently of one another. Even those who only leveled an E-Toll charge subsequent to the meeting sought to state that the decision makers in the respective firms were not aware of what had been said at the meeting. On this basis we can rule out conscious parallelism as a possible theory and simply ask whether the outcome was plausible as an independent decision.

[107] We know from the facts that all firms faced a common charge from the same date the previous December. We know as well that in a low margin business firms would likely pass the charge on to customers if they could. Given that the charges were only known to the firms sometime later, when E-Toll monthly billing came through from SANRAL, the tolling company, (unless firms had sophisticated systems to calculate this in real time which most did not in 2014) it was likely that firms might want to charge customers prior to the date on which the actual charge became known.

[108] There was oral testimony that it was desirable to charge a final invoice to customers at the time of the move, to avoid a bad debt situation. Thus without certainty about the exact cost of E-Tolls at the optimal time of invoicing, it is probable that acting independently, firms might adopt a charge based on a flat fee or percentage of the total invoice to recover the E-Tolls and perhaps to make some premium for themselves given that invoices from quotations we were given sight of, were far from transparent as to all costs. Thus, acting independently, firms may have considered that imposing a flat charge was possible without them incurring consumer resistance to this practice. This is not a case about fair consumer practice but collusion.

[109] In relation to the two respondents who did not charge for E-Tolls the Commission's theory that they might have been cheating is also not borne out from the economic evidence. For instance, to advance such a theory the Commission would have needed to demonstrate that knowing the other respondents were going to charge for E-Tolls in the region of R350, they used this to win customers by promoting their no-charge policy. But there is no evidence that they ever did so.

[110] We thus conclude that the Commission did not succeed in rebutting this evidence. The reason it had difficulty in doing so is that the agreement it sought to rely on was no longer as precise as it was in the complaint referral. The more blurred the terms of an agreement are, the greater the difficulty in using economics forensically to identify its fingerprints thereafter.

[111] Thus, the evidence of independent non-collusive implementation of E-Toll charges by the respondents is plausible. This means on both the factual oral testimony of their witnesses and an economic analysis, the respondents have rebutted any adverse inference that their acts of implementation or non-implementation, were causally linked to their prior collusive agreement.

Conclusion

[112] Although the respondents may well have concluded an agreement with regard to the charging of E-Tolls at the meeting of 22nd January 2014, they cannot be held liable because the agreement was concluded more than three years prior to the initiation of the complaint and the limitation or action provision in terms of section 67(1) applies. Put more colloquially the claim for this count has prescribed.

[113] Second, the Commission could have avoided the limitation of action problem, had it established that the agreement had not *"ceased"* and was in existence within the three year period after initiation. On the facts this has not been shown.

[114] The case must be dismissed against all the respondents.

ORDER

1. The case is dismissed against all the respondents including those which did not oppose the relief sought.

2. There is no order as to costs.

p.p. MM Ngwai

Mr Norman Manoim

20 December 2019
DATE

Ms Mondo Mazwai and Mrs Medi Mokuena concurring

Case Managers	: Kameel Pancham and Helena Graham
For the Applicant	: Ofentse Motshudi, Maanda Lambani and Dineo Mashego
For the First, Second and Eleventh Respondent	: Adv. M Norton SC and Adv. F Pelser instructed by ENSAfrica
For the Fourth Respondent	: Adv. Tonia Carstens instructed by Fullard, Mayer and Morrison Inc
For the Seventh Respondent	: Liam Bayley
For the Ninth Respondent	: Adv. G Engelbrecht instructed by Nochumsohn and Teper Attorneys