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south africa

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No:65/CR/Sep09

In the matter between:

THE COMPETITION COMMISSION OF SOUTH AFRICA	Applicant
And	
RSC EKUSASA MINING (PTY) LTD	First Respondent
AVENG (AFRICA) LTD t/a DURASET	Second Respondent
DYWIDAG SYSTEMS INTERNATIONAL (PTY) LTD	Third Respondent
VIDEX WIRE PRODUCTS (PTY) LTD	Fourth Respondent

Panel	:	Norman Manoim (Presiding Member), Yasmin Carrim (Tribunal Member) Merle Holden (Tribunal Member)
Heard on	:	31 October – 04 November 2011 16 – 24 January 2012 20 and 21 February 2012
Order issued on	:	19 September 2012
Reasons issued on	:	19 September 2012

Reasons for Decision

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[1] This case involves an alleged cartel between four firms who manufacture roof bolts for the mining industry.

[2] The Competition Commission ('Commission') has brought this complaint referral to the Tribunal pursuant to information it received from one of the respondents as a part of a leniency application.

[3] The firm in question was the first respondent, RSC Ekusasa Mining (Pty) Limited ('RSC'), which received corporate leniency from the Commission through its Corporate Leniency Policy ('CLP'). The second respondent, Aveng (Africa) Limited, which trades as Duraset ('Duraset'), reached a settlement with the Commission prior to the matter being heard by the Tribunal. This settlement was made an order of the Tribunal on 25 August 2010. [1]

[4] The case before us therefore proceeded against the remaining two respondents who are the third respondent, Dywidag-Systems International (Pty) Limited ('DSI') and the fourth respondent, Videx Wire Products (Pty) Limited ('Videx').

[5] The Commission's case was that the four respondents had colluded around tenders and the allocation of customers in contravention of sections 4(1)(b)(ii) and (iii) of the Competition Act, Act 89 of 1998 ('the Act') In its complaint referral the Commission suggests that a cartel may have existed in this industry since the 1990's. It also alleges that the collusion may have continued until at least 2008. However the incidents referred to in the referral in relation to the two respondents in question, were limited to the 2004 to 2006 period.

[6] As we discuss below, the defence taken by both respondents is two-fold:

1) whilst they admit many of the contraventions, they allege that these practices ceased more than three years before the initiation of the complaint in this matter by the Commission and hence they are

[1] In terms of the settlement agreement Aveng Ltd agreed to pay an administrative penalty of R21 900 000 which was 5% of Duraset's total annual turnover for the financial year ending 2008. Duraset had also applied for a 'marker' in terms of the CLP, but was presumably second in line and did not benefit. See Commission initiation statement record C2 page 561

subject to the limitation on bringing an action set out in section 67(1) of the Act.

2) in relation to one of the contraventions, alleged to have occurred within three years of the initiations, they allege they were not involved and, alternatively, that as a matter of fairness, this aspect of the Commission's case was not initially brought against them in the referral, but against the two other respondents. Although the Commission sought to amend its referral to include them, it did so only at the close of the case. The respondents argued that the Commission was not entitled to amend its referral at such a late stage. [2]

Background

[7] On 26 September 2008, Murray and Roberts Limited filed a leniency application in terms of the Commission's CLP on behalf of RSC, which at that time was its wholly owned subsidiary.[3]

[8] Pursuant to this leniency application, the Commission initiated a complaint on 26 January 2009 against the four respondents.[4] This date becomes significant for the purpose of the section 67(1) defence.

[9] On 30 September 2009, the Commission referred the complaint to the Tribunal.

[10] We heard the case from 31 October to 04 November 2011 and then later, from 16 to 24 January 2012. Final argument was heard on 20 and 21 February 2012.

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[2] DSI had in its pleadings also raised a defence of non-joinder, alleging that acts attributed to it, were the acts of its one time subsidiary, Mandirk. This non-joinder point was abandoned at the commencement of the hearing. See transcript page 11.
[3] Complaint referral founding affidavit paragraph 31. RSC has since been sold to the Barnes Group by Murray and Roberts. Transcript page 20.
[4] Ibid, paragraph 34. See Record, Bundle C2 page 560-1.

[11] The Commission called the following witnesses; Allen Koszewski and Neville Henderson of RSC, Hannes Bornman of Duraset and Martin Cawood, formerly of RSC.[5] DSI called its managing director Nigel Henson and Lucas Van der Merwe, the latter formerly with RSC and now with DSI. Videx called its managing director Leon Le Roux.

[12] At the conclusion of the case, the Commission brought an application to amend its referral. The respondents opposed the application and filed replies. We did not hear oral argument on this application as we have concluded that we could decide this matter on the papers. [6] This issue is discussed more fully below.

Commission's case

[13] Although the referral deals with the actions of all four respondents, we confine ourselves to setting out the Commission's case against DSI and Videx.

[14] The Commission alleges in respect of DSI that:

i) It was involved in bid rigging in respect of two reverse auction tenders put out by Anglo Platinum in 2004 and 2005. (Complaint referral, paragraphs 52-57);

ii) It was involved in an attempt to collude with Duraset in respect of allocating the business of Sasol and Xstrata. (Referral paragraphs 58-60);

iii) It was involved in an agreement to bid very low prices for a tender from Goldfields in a bid to punish Duraset. (Referral paragraphs 63- 66);

iv) Although not alleged in the complaint referral, in the amendment application the Commission alleges that DSI attended a meeting in respect of an Anglo Coal tender in 2006 in which it allegedly agreed to collude and assist RSC to increase its margins at

[5] Earlier, the Commission had provided a witness statement from Johan Smit of Duraset, but it did not call him as a witness.

[6] Strictly speaking we heard some oral argument on the final day of hearing, but as the Commission had not yet filed its application to amend yet, the argument was limited.

Anglo Coal. (See amendment application, paragraphs 62.1 to 62-8); and

v) In June 2008 DSI was alleged to have been involved in a cover pricing arrangement in respect of a Goldfields tender involving RSC and Videx.

[15] The Commission alleges that in respect of Videx that:

i) It was involved in bid rigging in respect of two reverse auction tenders put out by Anglo Platinum in 2004 and 2005;

ii) It approached Duraset in an attempt to get an agreement on prices to be quoted for a tender put out by Lonmin in May 2004. (Referral paragraph 51);

iii) It was involved in an agreement to bid very low prices for a tender from Goldfields in a bid to punish Duraset (Referral paragraphs 63- 66);

iv) Although not alleged in the complaint referral, in the amendment application, the Commission alleges that Videx attended a meeting in respect of an Anglo Coal tender in 2006 in which it allegedly agreed to collude and assist RSC to increase its margins at Anglo Coal. Videx in particular is alleged to have put in a sham bid. (See amendment application paragraphs 62.1 to 62-8);

v) Attempted, albeit unsuccessfully, to fix prices with RSC on a bid for a tender from Harmony in October 2005 so that Videx could win the bid. (Referral paragraph 67-9); and

vi) In June 2008, Videx was alleged to have been involved in a cover pricing arrangement in respect of a Goldfields tender involving RSC, and DSI. (Referral paragraph 72).

[16] We have approached the Commission's case in three parts. First, we deal with agreements that are subject, on the respondents' case, to the defence that they are time barred and where we accept that the respondents are correct in their submissions on this point. Second, we

deal with one meeting and arrangements that followed it, that may not be successfully resisted on this ground, but where we have found that the Commission has not fairly made out its case on this aspect as against these two respondents. We refer to this as the Anglo Coal case. Finally, we deal with a bid rigging case in respect of Anglo Platinum where the defence that the claim is time barred is again raised, but we consider unsuccessfully.

Part 1

Allegations of cartel arrangements that are time barred

[17] In terms of section 67(1) of the Act:

> *"A complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased."*

[18] A '*prohibited practice*' is defined in the Act as *"a practice prohibited in terms of Chapter 2"* which includes all contraventions listed under section 4.

[19] The Commission initiated its complaint on 26 January 2009.[7] This effectively means that if unlawful conduct had ceased at any time three years prior to that date, no proceedings could be instituted against the firm responsible. We will refer to this date from now on as the cut-off date.

[20] In the complaint referral, the prohibited practices alleged, fall into two categories; contraventions of either sections 4(1)(b)(ii) or (iii) of the Act.

[21] We set out the relevant sub-sections below:

[7] See Bundle C2 page 560.

4(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).....

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

(iii) collusive tendering.

[22] There is no dispute that the agreements that underpinned most of these contraventions, were entered into on a date prior to the cut-off date. However that does not completely dispose of the question of whether the firms can still be held liable. Section 67(1) is carefully worded. Its emphasis is on when the practice 'ceased'. If an agreement in respect of a practice is entered into before the cut-off date, can the practice still continue after that date and in that sense, be deemed not to have ceased? If it can, what conduct must manifest itself for the practice to be said to continue?

[23] We deal with an analysis of what this means more fully later. For the time being we will examine each practice alleged, with an eye on when it may be considered to have ceased.

[24] If the case against DSI and Videx was that they formed part of a single conspiracy to rig tenders and allocate customers for a period that continued to have effects pursuant thereto for a period of time subsequent to the cut-off date, then an argument could be made the limitation section did not apply, as the practice – the single conspiracy - had not ceased.

[25] The Commission has not proved the existence of one single conspiracy involving all the respondents; although its complaint

referral, could, in parts, be read in this way [8]. Despite this approach in the referral, during the hearing it sought to prove each of these separate incidents as a self-standing contravention. Undoubtedly attempts were made by the respondents to carve the industry up by market share or product, on several occasions, but these discussions even the Commission's witnesses concede, foundered.[9]

[26] But in its heads of argument, the Commission appears to have persisted with its single conspiracy agreement. It argued that as there was evidence of the conduct persisting, post 26 January 2006 and that conduct of one form or another persisted into 2008, the prescription point was bad.[10]

[27] The submissions made in support of this point are sparse. We understand the Commission to be arguing here, although it does not say so expressly, that the cartel was a continuous agreement, and that if it's very manifestations from time to time, in the form of fresh acts of meeting or collusion, occur after the cut-off date, they pull past actions through the prescription gate; as there is a single conspiracy, manifesting itself episodically in subsidiary agreements, as opposed to episodic manifestations of collusion, not linked to a single conspiratorial agreement.

[28] Whilst such an argument may be correct theoretically, it is not the case that its witnesses have testified about. [11] Rather, their evidence

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[8] In the founding affidavit, various paragraphs can be read to suggest the existence of a single conspiracy; e.g. "*...a cartel in supplying roof bolts may have started during the 1990's*" paragraph 36; "*In more recent years the cartel was resuscitated ....*" (paragraph 38.1); and a reference to "*honouring old agreements*" paragraph 38.8; and then at the end *"... these cartel meetings continued until at least October 2007.. "* paragraph 70)

[9] An example of such an attempt can be seen in an email from RSC's Henderson to the other players in August 2004 addressed to all four respondents when he attempts to get each firm to make its volumes available on a spreadsheet. The email is headed "Roof bolt market share." See Record Bundle C2 page 595.

[10] Commission's heads of argument, paragraphs 155-8.

[11] As an example Koszewski testified that *"It became clear by the end of calendar year 2005 that the cartel activities had failed and also what had been proved is that the individual respondents, either singularly or collectively, could hurt each other...in June of 2005 RSC Ekusasa lost its remaining portion of the Sasol contract and also the Anglo Coal contract."* Transcript page 23.

confirmed by the respondents, were that there were a series of episodic agreements that constituted individual contraventions.

[29] For this reason the case has to be looked at as a series of single tender conspiracies, which occurred at different moments in time; mostly between 2004 and 2005.

[30] DSI admits to involvement in collusive activities, but only from May/June 2004 to May 2005.[12] The various tenders it admits to colluding on were; two Anglo Platinum tenders, and a tender for Xstrata in May 2005. It also admits colluding to prevent Duraset from winning a tender from Goldfields, but denies that this conduct is a contravention of the Act.

[31] DSI argued that by the time it entered the market in 2002, whatever was left of the earlier cartel had failed. It relied for this proposition on the evidence of – Allen Koszewski from RSC and Hannes Bornman of Duraset who were called as Commission witnesses.[13] DSI argued that any later arrangements to which it acceded were *ad hoc* in nature and that *"...for the rest there was no cartel."*[14] DSI also admitted that it attended meetings during 2004 at which the four respondent firms attempted to divide the market up, but states that these endeavours were unsuccessful and did not result in an agreement to divide the market.

[32] We now consider the *ad hoc* arrangements it admitted to.

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[12] Answering affidavit, record page 64, paragraph 56.1.

[13] Koszewski transcript page 23 and Bornman transcript pages 719, 755-6 and 763. Bornman's clearest formulation in his oral testimony on this point is the following: *"Look all I can say is that I don't think that at any point in time a cartel existed as in the stricter sense of the word. There were (sic) co-operation during tender processes, but in the sense that we have got a formal agreement amongst parties that now we are going to work together that's going to happen that never existed.* (Transcript 719)

[14] DSI Heads of argument, paragraph B I 1 page 25.

Xstrata contract

[33] DSI had concluded a contract with Sasol Mining in June 2004.[15] It claims to have won this business before any collusive activity on its part. In terms of the arrangement it had secured the right to supply 75% of Sasol Mining's roof bolt requirements. The remaining 25% was awarded to Duraset in May 2005. It was a term of the agreement between Sasol and DSI that Sasol could take away 15% of DSI's contract entitlement and award it to another firm, if DSI could not match the latter's prices. Duraset quoted prices which were lower than those of DSI. DSI could not match them. In August 2005 Sasol awarded 15% of the contract to Duraset.[16]

[34] Versions on what happened next differ. According to Nigel Henson of DSI he then made a collusive offer to Duraset. He said that DSI would not contest the award of the 15% to Duraset, by offering lower prices to Sasol, if Duraset would not bid on a forthcoming Xstrata tender. Henson says his offer was a bluff as he never intended to pursue the lost 15%.

[35] Hannes Bornman of Duraset never says what his response was to this proposal. Henson says that Bornman agreed to the proposal, but that Duraset nevertheless did not honour the undertaking and tendered for the Xstrata work, but ultimately the game of deception did not pay off for either of the schemers – Xstrata did not award a tender.[17]

[36] Bornman says Duraset tendered for the Xstrata contract at what Bornman terms his normal price.[18] Less clear is whether this was Duraset quoting a cover price or reneging on the agreement. In any event Xstrata did not award the tender, although Henson admits it made ad hoc purchases from DSI.[19]

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[15] See Bundle C3 page 849, letter from DSI's attorneys to Sasol, dated 7 July 2005.
[16] Bornman witness statement, record page 144 paragraph 32.
[17] See DSI chronology statement witness statement file page 216(17).
[18] Transcript 712.
[19] Henson transcript page 974.

[37] DSI argues that the collusion related to the Xstrata contract and that as this took place in 2005, it has prescribed.

[38] However the analysis needs to be taken further than this. Firstly, the question is what the collusion related to. If DSI would, but for the *quid pro quo* of Duraset standing back from the Xstrata contract, tendered a lower bid than Duraset to retain the 15%, then the arrangement has had an anticompetitive effect on Sasol. We do not know the answer to this. Henson, the only person who can tell us, suggests he was bluffing with Duraset and never intended to go lower to get the 15%. Bornman does not take the matter further and no witness from Sasol was called; besides them it seems no one else could. Although, as we discuss more fully later, respondents bear the onus to prove that a practice has ceased, Henson's evidence on this aspect was not challenged by the Commission and has to be accepted.

[39] From the Xstrata side, the question is whether it received genuine tenders from both firms and if it did, why it did not award the tender. We do not have answers to these questions either, nor any admission from Bornman that his firm's bid to Xstrata was a cover bid. Nor was a witness from Xstrata called. Since the tender was not awarded in any event, the next question is whether the collusion had any effect on the final prices Xstrata reached with those it made the ad hoc purchases with. We have no evidence on this point. [20]

[40] Thus we do not have evidence to suggest that the subsequent ad hoc supply to Xstrata by DSI, and the price for the 15% of the Sasol business by Duraset, were themselves the product of the earlier collusion between DSI and Duraset. Although the agreement was of a collusive nature i.e. for DSI to desist from contesting the Sasol 15% and for Duraset in turn to hang back on Xstrata, there is no evidence it had effects that subsisted beyond the cut-off date.

[20] This is the key difference between the Sasol/Xstrata episode and that of Anglo Platinum that we deal with below.

[41] For this reason, we find that the collusive agreement reached in respect of Xstrata and Sasol in 2005, although unlawful, was concluded more than three years before the complaint was initiated and is subject to the limitation on bringing this action in terms of section 67(1).

Goldfields

[42] In 2005 Goldfields put out a reverse auction tender for the supply of roof bolts in lots. At that time Goldfields was being supplied by DSI, RSC and Videx. These three firms met to discuss the bid. Their concern was that Duraset, which at that stage was not supplying Goldfields, was going to bid, as according to Moshe Josef, it was engaged in an aggressive pricing strategy.[21] Henderson ascribes the concerns to Duraset's aggressive pricing to Sasol to win its business. Prior to the tender the three firms met to thwart Duraset by agreeing to tender so low that Duraset would not win a single lot. Henderson says they quoted below cost pricing.[22]

[43] As a result Henderson states that Duraset did not win any business at Goldfields.[23] Josef suggests that Duraset had already got work from Goldfields, but the strategy worked for the three *"...to win some of the Goldfields business away from Duraset."*[24]

[44] Clearly the act of collusion to punish Duraset was perpetrated in 2005. That act was unlawful but the agreement was made before the cut-off date.

[45] The question then is whether the effects of that collusive practice have ceased. Although the evidence on this aspect was not developed further, we can assume that this was a classic cartel punishment strategy. The agreement was for each of the incumbents to tender

[21] Josef affidavit, Videx answering affidavit, page 88, paragraph5.5.9.
[22] Henderson witness statement paragraph 20, record page 131.
[23] Henderson witness statement paragraph 21, record page 131.
[24] Josef ibid, paragraph 5.5.510.

sufficiently low prices to ensure that Duraset did not win any new business.

[46] Absent another tender after the cut-off date, where it can be shown that Duraset now complied with a cartel agreement on another tender, we cannot find that this act of collusion continued beyond the time it happened in 2005. It's possible relevance to Anglo Coal we discuss later. However had the Commission pursued a single ongoing cartel theory, as we discuss in the postscript below this event would have been more consistent with such an explanation, than the set of intermittent conspiracies advanced by DSI and Videx. The punishment strategy appears to be undertaken to enforce a previously agreed to and adhered to market division.

Later Goldfield's collusion

[47] During the course of oral testimony it emerged that Videx having won the Goldfield's business at an unattractive price, sub-contracted this work to a firm called Mandirk. Mandirk, about which much was said during the hearing, was a subsidiary of DSI at the time, a BEE company which had been established at the behest of Anglo Coal. Mandirk was making so little from this sub-contract that it gave notice of termination to Videx. Videx in turn gave notice of termination to Goldfields. Goldfields put the work out for tender (it concerned a standard roof bolt product known as a shepherd's crook) and the tender was won by Mandirk.

[48] The Commission's case did not deal with this latter event of an arrangement between Videx and Mandirk. It is not clear why Mandirk took over a subcontract on behalf of Videx, which it appears was kept concealed from Goldfields. Le Roux was less than convincing when asked about this. He said he could not recall. However he confirmed

that DSI had delivered the products to Videx who had then delivered them to Goldfields.[25]

[49] This episode is not adequately explained by either Henson or Le Roux. Why would the one firm bid for an uneconomic tender then sub-contract it to another, seemingly without the knowledge of the customer. Again this might have been another collusive strategy to punish Duraset by driving prices down. However, absent further evidence from the Commission on this point they have not established a collusive agreement which the two respondents might be obliged to rebut.

[50] Thus even this more recent Goldfield's evidence does not prove collusion. What emerged in evidence as well was an attempt by Henson to collude with Duraset's parent, Aveng, to ensure that another Aveng company, Steeldale did not bid for the contract Mandirk was contending for. This however is not part of the case before us and the only evidence we have is from Henson who says he did this on behalf of Mandirk – who are not a respondent in this case.

Harmony Gold

[51] In 2005, Harmony also put out a tender. At that time according to Henderson it was supplied mainly by Videx, with RSC and DSI doing a smaller amount of business with it.

[52] The three firms met to discuss the tender. All agreed that they would tender in such a way as to retain their respective existing business with Harmony.[26]

[53] But again double crossing occurred. This time the perpetrator was RSC. Koszewski and Cawood decided to compete for the contract and

[25] See transcript pages 1608 -9.
[26] Henderson witness statement paragraph 25. See also the testimony of Koszewski, who supports this (see transcript page 251).

won it. However Videx was to have the last laugh. RSC was advised on technical grounds that it would no longer be awarded the tender and the business was awarded to Videx.

[54] Le Roux for Videx suggests it regained the business *"...nearly at cost price..."* as he says it was crucial for Videx to retain the critical mass this customer gave it. The implication is that the contract was regained at a lower price than before.[27] Although one may be sceptical about why Videx, if it was now the only contender for this contract, could not obtain a higher price, the explanation that loss of a significant customer may have threatened its economies of scale and hence it had to offer a lower price than perhaps previously, is reasonably possibly true.

[55] Certainly the agreement to collude between the firms was unlawful, but it was concluded on a date prior to the cut-off date. Pursuant to that agreement breaking down, due to RSC cheating to win the bid, and then immediately losing the contract on technical grounds, the chain of causation between the unlawful agreement and the final price at which Videx, who were awarded the business, but not at its prior tender price, but at a lower price, has been broken. Le Roux's evidence, the effect of which was to de-link the final price at which it obtained the re-awarded business, from the prior agreement price, was not challenged by the Commission, nor was any evidence from Harmony led to suggest the contrary. Videx's version on this aspect is the only evidence we have and has to be accepted.

[56] Again we conclude that there is no evidence that this collusive act extended beyond the cut-off date.

Market division agreements

[57] Although both Videx and DSI admit attending meetings at which market division was discussed amongst the four respondents they

[27] See comments on Exhibit 12, page 5.

deny that any agreement was reached. The attempts therefore occurred before the cut-off date and there were no such discussions after that date. Although the Commission attempted to get this evidence out of Henderson and Koszewski neither could provide any specific recollection of meetings that post-dated the cut-off date. For this reason we accept the Videx and DSI version that the market division agreements were unsuccessful and pre-dated the cut-off date.

Part 2

Anglo Coal

[58] Allen Koszewski of RSC, the key witness for the Commission, testified that in 2006 he invited all four respondents to a meeting to rig a tender that had been put out by Anglo Coal. (We will follow the convention of everyone at the hearing and refer to this from now on as the Anglo Coal meeting.)

[59] What is alleged to have been agreed at this meeting, and its aftermath, became the major focus of the hearing. The reason for this is that Koszewski places the date of the meeting after the cut-off date and further alleged that subsequent to the meeting all four respondents co-operated on other tenders. If Koszewski's evidence was accepted it would mean that Videx and DSI had been involved in collusive activity that would not be subject to prescription because it post-dated the cut-off date.

[60] As a consequence there was much dispute about the date of the meeting, whether there were subsequent agreements or understandings that followed that meeting, as alleged by Koszewski, and further in the case of DSI, whether Henson who attended that meeting, was wearing his DSI hat or his Mandirk hat.[28]

[28] Henson, a director of both companies, testified that only Mandirk was likely to get business from Anglo Coal which wanted to deal with an empowerment firm. However when asked whether any of the

[61] Further dispute arose over whether the Commission had properly pleaded this meeting in its referral in respect of Videx and DSI.

[62] The two respondents allege that the case made out against them in respect of Anglo Coal and its subsequent consequences, has either prescribed, or not been proven, and if none of the above, has not been fairly pleaded as a case against them.

[63] Koszewski alleged that RSC embarked on a carefully thought out strategy to get the four respondents into a properly working cartel over tenders. Koszewski described how when he joined RSC in 2005 it was in serious trouble. It had lost out on the Sasol contract of which previously it had 100%, almost lost its key customer Anglo Coal to Duraset and had only re-secured this work by agreeing to a disadvantageous pricing regime.

[64] Koszewski testified that RSC decided that the only way to get back to sustainable margins was to end the price war and re-establish the cartel. Given that in late 2005 trust had broken down between the four firms, trust had to be rebuilt. His strategy was to call a meeting with the other respondents. At the meeting he announced that RSC was going to give notice of termination of its contract with Anglo Coal, relying on a hardship clause.[29] He anticipated that Anglo Coal would put the contract out for tender again and invite all the others to tender. He asked the others not to tender against RSC which he said was going to try and get back its margins by tendering for the work back but at higher prices. [30]

[65] He said RSC asked the other firms to respect its pricing and to submit cover bids above this price or not bid at all. Anglo Coal was RSC's

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other firms were aware he was there representing Mandirk, not DSI, at this meeting, he conceded that they would not have. (See transcript, page 1016).

[29] Four months notice of termination was required in terms of the contract.

[30] He refers to this as a 30% material contribution giving an effective earnings before interest and taxes (EBIT) of 8%.By the term 'material contribution' we understand from his evidence that if a product cost R70 for the inputs and was sold at R100 the material contribution was 30%.

major customer and if it lost its work, it would have been catastrophic.[31] By demonstrating that it was willing to expose itself to considerable risk, RSC hoped to build up trust amongst the others. As a *quid pro quo,* RSC would then back the other cartel members in respect of their pricing on tenders.[32] In that way the firms would regain the margins that they had before the price war. He testified that the others accepted this proposal at the meeting.

[66] Videx and DSI accept that they were invited to the meeting and that Koszewski had proposed rigging the Anglo Coal tender. Videx disputed agreeing to the proposal. DSI states that Henson attended, but that in doing so he was wearing his Mandirk hat, and also does not accept that it agreed to the proposal.

[67] It is common cause that Anglo Coal re-tendered in response to RSC's cancellation and that RSC won the tender again, securing higher prices. It is by no means clear if Videx or DSI tendered at all for this contract, let alone submitted cover pricing. The Commission did not produce any tender documents from other competitors nor was anyone from Anglo Coal called to testify.

[68] As we stated earlier, one of the issues in dispute is whether this evidence could be led against these two remaining respondents on grounds of procedural fairness. If this defence is good, we do not need to go into the other factual disputes that arose.

[69] In its complaint referral the Commission alleged in respect of this meeting that:

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[31] In a business plan discovered by Murray and Roberts the following remark is recorded in respect of RSC: *"All Anglo Contracts have been won back and contributed well to this year's result. RSC has recently been chosen as one of Anglo's suppliers of the year."* See Record Bundle C page 511.

[32] In his witness statement Koszewski suggests that the benefit would also accrue to non-contract customers as prices would generally increase in the market. See witness statement file, page 137, paragraph 12.

"During May 2006, RSC and Duraset also discussed the supply to Anglo Coal of z-bar resin bolts. At that meeting, RSC and Duraset discussed prices at which they were going to bid once Anglo Coal had issued the tender. In particular it was agreed that they will not go in with low prices thereby undercutting each other."[33]

[70] Note these allegations are only made against RSC and Duraset, not DSI or Videx. Although Videx wrote a letter to the Commission requesting further particulars, it did not ask any in respect of these paragraphs although it did in respect of others.[34] Presumably it would have, had the firm been mentioned in these paragraphs. The Commission in any event declined to give any further particularity.[35]

[71] Not surprisingly, DSI and Videx did not take issue with this meeting in their answering affidavits, since they assumed, the meeting did not concern the case against them. Thus, DSI in its answer notes the content of these paragraphs and says nothing more.[36] Videx does the same thing, but adds, "... *Videx was not a party to any collusive activity in respect of this tender."* [37]

[72] The Commission did not file a reply, so by close of pleadings the two respondents could reasonably have assumed that they were not being implicated by this meeting. After the close of pleadings witness statements were then filed, including the statements of Koszewski, Henderson and Bornman, all of which discuss the Anglo Coal meeting.

[73] In Koszewski's witness statement he elaborates on the Anglo Coal meeting. His statement is at variance with the facts in the referral in that he locates the meeting in February 2006, (the referral placed it in

[33] Complaint referral, paragraphs 61-62, record page 23.
[34] See Bundle C, pages 721-730.
[35] See fourth respondent's replying affidavit in amendment application, annexure AJ1, being a letter from the Commission to Videx's attorneys, dated 17 December 2009.
[36] DSI answering affidavit, paragraph 51, page 62.
[37] Videx answering affidavit, paragraph 7.3.7, page 106.

May 2006) and then, significantly, he implicates Videx and DSI in various respects. First, he alleges that all four respondents would participate in the new Anglo Coal tender by providing agreed prices above those of RSC on the clear understanding that RSC would be awarded the contract.[38] He then states that this was on the clear understanding that the benefit to the other respondents was *"...that they would roll out similar prices to non-contract customers and price increases in the market were co-ordinated and agreed upon among the respondents."* [39]

[74] Then crucially for this case and the issue of prescription, he states the following which we set out in full:

> *" After it was established that the first respondent (RSC) managed to achieve reasonable rates in respect of the Anglo Coal contract, the other respondents attempted to follow the same route, in respect of their own contracts by serving the requisite termination notices, re-tendering for such contracts and the remainder of the respondents provided cover quotations which resulted in each of the respondents retaining their contracts but (sic) obtained reasonable rates i.e. rates higher than those which they were receiving prior to terminating the contracts."*[40]

[75] Upon receiving the witness statements and before filing its own, Videx's attorneys again requested particulars from the Commission, inter alia, suggesting that some events in the referral could not be found in the witness statements and vice versa.[41] They sought clarity on certain points. Amongst the issues on which clarity was sought was the paragraph in Koszewski's witness statement quoted above. Specifically they asked for details as to the contracts he refers to. Note

[38] See Koszewski witness statement paragraph 11.
[39] Koszewski witness statement ibid, paragraph 12.
[40] Koszewski witness statement ibid, paragraph 13.
[41] The letter dated 19 July 2011, is exhibit 14.

Koszewski does not indicate which respondent and which customer he is referring to – the allegation is wholly lacking in particularity.

[76] The Commission wrote back declining to do so stating that these were matters for evidence at trial. [42]

[77] At the commencement of the hearing counsel for Videx again signalled an objection, but did not pursue it at that stage although he indicated he might do so at the end of the case. The Commission did not respond to this criticism by an amendment.

[78] During closing argument the Commission indicated for the first time that it was considering filing an amendment. However it was only after closing argument was concluded by all parties that the amendment was tendered. The respondents both objected, and raised what they said were preliminary objections as they had only just received the amendment. We directed that the Commission file a formal application for amendment and that it deal with the objections raised in oral argument by the respondents, as well as explain the lateness of the application.

[79] This was duly done and the respondents both filed opposing papers. We indicated that unless we were inclined to grant the amendment we would not need to hear oral argument on this issue.

[80] The amendment provides for the following paragraphs to be added to paragraph 62, to be inserted as paragraphs 62.1 to 62.8.

> *"62.1 The meetings to discuss the Anglo Coal contract were initiated by RSC. They were attended by all the respondents."*

[42] See fourth respondents replying affidavit in amendment application, annexure AJ2, being a letter from the Commission to Videx's attorneys, dated 30 August 2011.

62.2 The purpose of these meetings was for all the respondents to agree to collude and assist RSC to increase its margins at Anglo Coal."

62.3 During the section 49A proceedings, Nigel Henson, of DSI, informed the Commission that at these meetings, it was agreed inter alia, that DSI would maintain its portion of the Anglo Coal business and that in respect of the balance of the business, it was sorted out among the respondents, which was understood to be RSC and Duraset. DSI was at that stage, responsible for Kriel Collieries."

62.4 "In addition, I must mention that Moshe Josef of Videx, during the section 49A proceedings, informed the Commission that there was a number of meetings which were held in 2006, regarding the Anglo Coal contract."

62.5 "Videx informed the parties that it was not going to bid. It seems however, that Videx eventually put in a token bid, while it was not expecting and was well aware that it was not going to be awarded the contract."

62.6 "In respect of Duraset, it took a view that it was not going to assist RSC to get excessive prices and, it was also not going to assist Anglo Coal erode the market value as it had previously done in respect of their earlier tender."

62.7 "Based on the agreement which RSC had reached with all the respondents, it held negotiations with Anglo Coal, which culminated in the contract being terminated. The remainder of the respondents honoured the agreement and RSC was not attacked in the intervening period between the notice of termination and the re-awarding and/or renewal of the contract."

62.8 "The parties achieved their objective in that RSC regained the contract at margins which were higher than at the time when it had been undercut by Duraset, previously."

Can the Commission lead evidence on matters not covered by the referral?

[81] At the time this matter was argued the leading case on this issue was the Supreme Court of Appeal ('SCA') decision in *Senwes*. There, the SCA held that the Tribunal was a creature of statute and that *"... its hearings are subject to the overriding limitation that the hearing must be confined to matters set out in the referral."* [43] That decision has since been overturned by the Constitutional Court which has held that the SCA had conflated matters of jurisdiction and procedure. The Court went on to hold:

> *"...the construction given to section 52(1) of the Act by the Supreme Court of Appeal is at odds with the scheme of the Act, including the structure of section 52, when read in its entirety. This section gives the Tribunal freedom to adopt any form it considers proper for a particular hearing, which may be informal or formal. Most importantly, it also authorises the Tribunal to adopt an inquisitorial approach to a hearing. Confining a hearing to matters raised in a referral would undermine an inquisitorial enquiry."*[44]

[82] In *Senwes* the Commission had not sought to amend its referral, but sought to rely on evidence of an alleged margin squeeze a proposition that was not contained in the referral. Here of course the Commission seeks to amend the referral, although it has only done so at the close of the case. Given how late the referral has come – after all the

[43] *Senwes Ltd v Competition Commission* [2011] 1 CPLR 1 (SCA) at paragraph 52.
[44] *Competition Commission and Senwes Limited* Case CCT 61/11 [2012] ZACC 6, Paragraph 50.

evidence has been led and final argument concluded – the respondents are no better off than if it had not been made at all.

[83] Although the Commission argued that an amendment could be made at the eleventh hour, this one occurred at the stroke of midnight. But even if, theoretically, one could accept an amendment at such a late hour in the proceedings, there must be proper justification for doing so. The Commission offers scant justification for its lateness.

[84] It explained that it had made an assumption that the referral would be read in conjunction with its witness statements as well as the 'section 49A' proceedings.

[85] We need to briefly explain what this refers to. After it had initiated the complaint, but prior to the date of the referral, the Commission exercised its powers under the Act to summons two of the respondent's representatives to an interrogation at its offices. This power is exercised in terms of section 49A of the Act hence the reference to section 49A proceedings.[45] On 4 May 2009 it interrogated Henson of DSI. On 25 May 2009 it interrogated Moshe Josef, the Managing Director of Videx Wire Products. Transcripts of these proceedings form part of our record.[46]

[86] The interrogation consisted of a series of questions to the respective witnesses from Commission staff, as well as interjections and comments by the legal representatives of the two firms. During the course of both interrogations reference was made by the Commission investigators to the Anglo Coal meeting and the two representatives gave their account of the meetings. This is what the Commission relies on when it says that it understood these proceedings to be incorporated into the referral.

[45] In terms of this section the Commission may summons for interrogation any person believed to be able to furnish any information on the subject of an investigation.
[46] See bundle C2. For Josef, pages 349 to 394. For Henson, pages 411 to 460.

[87] However there is no reference in the complaint referral to the section 49A proceedings or that any reliance was to be placed on them. The 49A proceedings are no more than a transcript of an interrogation of witnesses. This is not a document capable of being relied on to supplement a referral. It is in many parts incoherent and contradictory. Sometimes the witnesses support what the Commission seeks to rely on, at times they contradict it. It cannot serve this purpose and it is indeed surprising that such a contention is even made.

[88] We find no justification has been made out for why the amendment was made so late and find that its late submission is procedurally unfair and is accordingly refused.

[89] Even though we have refused the amendment, there is still a question of whether the Commission is entitled to rely on evidence adduced at the hearing and in the witness statements to make its case against these two respondents in respect of the Anglo Coal meeting and its alleged consequences.

[90] As a matter of law based on the Constitutional Court decision in *Senwes* this is possible. The Court there observed that *"Senwes was afforded adequate opportunity to deal with those matters and raise whatever defence it desired to advance."*

[91] So the remaining question we have to answer is whether on the facts of this case, Videx and DSI could have reasonably understood what case was being made out against them in respect of Anglo Coal and secondly, whether they had an adequate opportunity to deal with it.

[92] If one looks at the question only from the vantage point of opportunity, then the answer is that they were. As the record shows, both counsel spent much time in cross- examining the Commission witnesses who testified about this meeting. They also had the witness statements of

Koszewski, Henderson and Bornman in advance of the hearing, in which all three dealt with the Anglo Coal meeting.

[93] The real objection is that the case in respect of DSI and Videx was never consistent and coherent through the mouths of these witnesses. In *Senwes* the Commission's witness statements advanced a coherent theory of harm, albeit not one found in the referral. In this case, taking only the Commission's witnesses, the same cannot be said.

[94] This case presents a perfect example of why this reliance on matters not in the original referral can, in certain circumstances, be unfair.

[95] When Videx and DSI read the complaint referral they were entitled to assume that they were not implicated in a contravention of the Act in relation to the Anglo Coal meeting and events subsequent to that.

[96] In this case, unlike in *Senwes*, it is not so much the lack of mention in the referral that creates the unfairness; it is the fact that Anglo Coal was mentioned as a meeting on which the Commission wished to rely, where only Duraset and RSC, but not DSI and Videx, received express mention. More significant is the fact that at the time of the referral the Commission knew that DSI and Videx representatives had attended the meeting. This after all had come up in the earlier section 49A interrogations which we discussed earlier. During these interrogations, both Josef and Henson had been asked expressly about this meeting and they proffered an explanation. We don't have to decide whether these explanations were credible. The point is that fully aware of this, the Commission chose not to allege that they were implicated by the Anglo Coal meeting when it framed the referral. (Indeed during our hearing the Commission spent much time cross examining Henson and Le Roux about what was said during the interrogations. If it became so central to the Commission's case at the time of the hearing, then why was it not earlier, since when it drafted the referral it had this information.)

[97] Videx and DSI at this stage - the stage of pleading - were entitled to believe that despite their presence at the meeting, the Commission knowing of this, had decided not to charge them with it. This is consistent with how they framed their answering affidavits as we noted earlier. The Commission did not cast any doubt on this in reply – it did not file one. Nor were Videx's two letters to the Commission the cause of any new consideration on this point.

[98] The next event in the sequence was the filing of the Commission's witness statements. Even at this stage a rethink might have been defensible as the respondents would have had an adequate opportunity to react. But the witness statements did not advance a consistent thesis. Koszewski and Henderson, arguably sing from the same song sheet in alleging that further collusion followed the Anglo Coal meeting. Yet, even so, they do not between them advance a coherent factual case. On Henderson's version, which is the more detailed one, post the Anglo Coal meeting, the respondents agreed on a 'price role out' agreement. They were to cover each other on other tenders such as Sasol and Lonmin, and in respect of non-tender work to agree not to undercut one another.[47] Henderson does not link a specific respondent to each of these contracts. He refers in general terms to all the respondents.

[99] Koszewski states that after it was evident that RSC had succeeded in gaining reasonable rates in respect of the Anglo Coal contract, the other respondents followed suit, and attempted to get higher prices on their tenders by serving the requisite notice of cancellation, re-tendering for them and obtaining higher prices because the other respondents provided covering bids.[48] Koszewski does not mention which tenders this relates to nor does he specify which respondent did what. They are all referred to in general terms. Unlike Henderson he

[47] See Henderson witness statement record page 133, paragraph 35.
[48] See Koszewski witness statement, record page 137, paragraph 13.

makes no reference to Sasol and Lonmin contracts or to collusion in respect of non-tender agreements. For his part, Henderson does not refer to the mechanism of cancelling and re-tendering which is Koszewski's point of emphasis.

[100] Just one aspect of the inconsistency between these statements is worth emphasising to illustrate the concern of having an imprecise case following an absence a pleaded case on this point. Henderson refers to Sasol and Lonmin as examples. Is Henderson confusing events that precede the Anglo Coal meeting, as we know that collusive acts in respect of Sasol and Lonmin took place in 2005 not 2006 when the Anglo Coal meeting took place or is he referring to a subsequent event in 2006? Given that the respondents rely on prescription to meet this charge, if it was not specified in a pleading nor more clearly set out in the witness statements, how do they know which defence to raise; should it be prescription if it was confusion about the dates or an admission or denial if it referred to some subsequent act of collusion relating to those firms. Why does Koszewski not mention Lonmin and Sasol in his witness statement, as acts of later mutual reciprocity, given the centrality of such an allegation to the case being made?

[101] The two Duraset witness statements from Smit and Bornman confound the problem. Bornman refers to the meeting and to Duraset's attitude at the meeting. He makes no mention of the other two firms or any subsequent *quid pro quo*. Smit of Duraset, who on everyone's version is present at the Anglo Coal meeting, makes no mention of it at all in his statement. It's not clear why, as Smit was never called by the Commission.

[102] The omission in the referral is now compounded by an inconsistent, imprecise and incoherent version, viewed from the vantage point of the four witness statements. Whilst after the Constitutional Court decision in *Senwes* we know the Commission is not confined to the case it has pleaded in its referral, where it seeks to rely on subsequent testimony,

written or oral, to make out an additional charge against a respondent not found in the referral, or at variance with the referral, that must be made reasonably clear to the respondent facing that charge, as early as possible, so that it can fairly respond to it.

[103] Again the issue of the confusion was raised by counsel for Videx at the commencement of argument. Again the Commission refused to clarify its position. Its witnesses were led and by the end of oral testimony its case was no clearer. Indeed it was hard to understand what reliance was being placed on Bornman who appeared to exculpate the two respondents in his evidence of the meeting.

[104] Whilst Koszewski and Henderson were good witnesses on the rationale for the meeting and the strategy adopted, they became very hazy on any subsequent detail associated with the *quid pro quo.* It is not necessary then to even consider the credibility of the evidence of Henson and Le Roux in respect of this meeting. The case of the Commission produced oral testimony inconsistent with the thesis advanced in Koszewski's witness statement and was wholly confusing on the question of the conduct of the DSI and Videx representatives at the meeting. What they did or said at the meeting, let alone what they did afterwards, is an issue that Henderson and Koszewski grappled with. But again without a case made out in advance in the referral these deficiencies exacerbated the unfairness of the situation. If the Commission knew these firms had attended the meeting, but did not rely on this fact for the referral in respect of those firms, why had it later changed its mind? On what did it subsequently rely to hold them liable, which it did not rely on at the time of the referral? The respondents in fairness were entitled to know.

[105] Even the amendment, if we had allowed it, would not have cured the confusion. It fails to allege the *quid pro quo* understanding post Anglo Coal, despite the fact that this was the centre piece of Koszewski' s evidence that pulled these two respondents into collusive activity after

the cut-off date. Indeed if the referral was amended as sought it presented an internal contradiction. In paragraph 62 – the original pleading – Duraset is alleged to have agreed with RSC not to undercut one another when Anglo Coal issued the new tender. The amendment then adds in the following paragraph as 62.6 " *In respect of Duraset it took the view that it was not going to assist RSC to get excessive prices and it was also not going to assist Anglo Coal erode the market value as it had previously done in the earlier tender.*"[44] These two propositions seem inconsistent.

[106] However we are not here to do an analysis of them. The point is that if the respondents had the amendment at the time they came to cross-examine witnesses, particularly Koszewski, they would have been able to test which version was correct. Alternatively, this may have led to a request for more particularity prior to the hearing. The reason paragraph 62 suffers this apparent contradiction is that the Commission was forced to patch up its case on this meeting post facto. Bornman had destroyed their case on this point. Whether his evidence on this aspect is truthful we do not know. But the respondents were at least, *ab initio,* entitled to know the theory of harm advanced against them from the outset. The case they met was a shifting target because RSC and Duraset witnesses had given the Commission different irreconcilable versions.

[107] These differences are material not differences in nuance between witnesses. The crucial aspect of Koszewski's testimony is the post Anglo Coal *quid pro quo,* more crucial given the prescription problems the Commission was facing. Yet this aspect appears neither in the referral nor in the amendment. This means that the respondents in the course of the proceedings would reasonably have assumed they had to deal with this aspect as they indeed attempted to – yet when the amendment was produced it was not an allegation made out there. This again demonstrates why the lack of the averments in the referral

or more timely amendment has made the Commission case difficult for the respondents to fathom.

[108] We find that it would be unfair to accept this evidence against the respondents in respect of Anglo Coal and the events that followed it because the respondents did not have a coherent case made out against them which they could meet. Absent an allegation in the referral and with inconsistent written and oral witness testimony subsequently, the respondents prejudice was such that they could not adequately defend themselves on this aspect of the case.

[109] We make no finding against the respondents in relation to their attendance at the Anglo Coal meeting in 2006 and whether they entered into collusive agreements or arrangements on any date subsequent to that meeting, because this aspect of the case was not proceeded with against them on a fair basis.

[110] Given this finding, it is not necessary for us to decide a number of issues raised by the Anglo Coal meeting including; whether the issue has prescribed. [49], whether Henson represented Mandirk or DSI at the meeting, whether Videx tendered a sham bid in response to the request from RSC and whether, pursuant to the meeting, Videx, DSI or both, gained a benefit or *quid pro quo* from RSC in return for

[49] There remained confusion as to whether the Anglo Coal meeting had occurred prior to or after the cut –off date. Correspondence from Anglo Coal introduced late in the hearing appeared to push the probable date of the meeting to before the cut-off date. See Exhibit 7, a letter from RSC to Anglo Coal which is dated 23 January 2006, ironically the cut-off date. This letter sets out the hardship claim and refers to an earlier meeting with Anglo on 16 January 2006. This letter was not available when Koszewski testified, but on Koszewski's evidence this letter would only have been written after RSC had met with the other respondents and knew that it had their support. If this surmise is correct, then the Anglo Coal meeting probably precedes the cut-off date in which case the *quid pro quo* evidence is all the more central to what remained of the Commission's case on this point. Notice of termination appears to have been given on 1 March 2006 according to a subsequent letter from Anglo Coal to RSC confirming that the contract would terminate on 1 June 2006. Thus the only possibility that the Anglo Coal meeting might have taken place later than 23 January is if the hardship notice preceded the meeting with the respondents and that meeting took place sometime between 23 January and 1 March i.e. RSC was willing to risk the hardship letter, before getting the others on board, but not the termination. We can't be sure which is correct. Why RSC did not produce this correspondence earlier is also unclear.

supporting them on the Anglo Coal bid and if so, in respect of what bid or tender.

Part 3

Anglo Platinum tenders

[111] In 2004, Anglo Platinum surprised the market by putting up the contracts to supply it with roof bolts for tender by way of a reverse auction. This process had not been used before. In a reverse auction, suppliers bid to supply the company that holds the auction, with products at a particular price. Instead of bidders who are buyers, bidding the price up over time as with a conventional auction, in a reverse auction, the bidders are sellers of a product, who bid one another's prices down, hence the name.

[112] In this particular reverse auction the bid took place over the internet in real time. Anglo Platinum was thus able to see each respective bid and to see what was happening to prices as the auction proceeded.

[113] Since the bidding process was complex, Anglo Platinum called in foreign experts to help them run the auction. This included providing training to the bidding firms, amongst them, the four respondents.

[114] The four respondents felt very threatened by this process. In 2004 steel prices had gone up and those firms that had supplied Anglo Platinum on pre-auction contracts found that their customer was unwilling to allow them to pass on these increases or pass on the full increase. Already resenting the fact that their margins had been eaten into by Anglo Platinum's attitude, they felt even more threatened by the proposed reverse auction. The firms got together and decided to rig the auction. The approach was straightforward. Each firm would attempt to retain its existing business with Anglo Platinum in terms of volume, but would try and increase prices so as to offset the margin squeeze.

[115] The only way to ensure this would happen was if there was elaborate planning by the firms to rig the bid. They produced a spread sheet which each had during the bidding, indicating; which firm would bid for a particular lot, which would open a bid and at what price, and then at what price rivals would bid down. Cawood in his evidence described the process in the most detail. Whilst the bidders were required to be in telephonic contact during the bid with Anglo Platinum, its bidders were also in constant telephonic contact with one another, unbeknown to the latter, to ensure they were all following the same script. The result was that the firm that was planned to win the bid would succeed in having no-one bid below its price, whilst the higher prices, bid sequentially lower by the others, made the auction appear genuine to Anglo Platinum. The reality was that these higher bids were a sham in conformance with the pre-agreed strategy.

[116] The bid rigging process worked. However, Anglo Platinum decided not to award any of the bids; no doubt because the lowest tenders were still made at higher prices than Anglo Platinum enjoyed on existing contracts.

[117] In 2005 sometime eight months to a year after the first reverse auction, Anglo Platinum held a second reverse auction. History repeated itself. The respondent firms again colluded to rig the bid to get higher prices and protect their volumes. Again the bid rigging scheme worked. Anglo Platinum again decided not to award any of the tenders. Instead it negotiated with the individual firms.

[118] According to Henderson, RSC succeeded in getting its original contract terms honoured. This meant that both its volumes and prices remained the same. It is less clear if this was the case for the other firms. Bornman who was otherwise an unhelpful witness for the Commission, was firm that the Anglo Platinum collusion was successful. *"There was only actual in. and that was with the Anglo*

Platinum reverse internet auction that was the only time I can recall that we fully co-operated and gave our word and exchanged prices and went the whole thing"[50]. In his witness statement Le Roux says Videx had to reduce its prices to retain its market share because it was discovered that Duraset had reduced its tender prices to get business from others. He does not make it clear which price is being reduced – the price submitted in the rigged tender or the pre-tender price. [51] (Note that Videx did not cross examine Bornman on Anglo Platinum nor did it put to him that post the second reverse auction, there was competition in the individual negotiations around some products) DSI appears to have retained prices and volumes. Cawood from RSC surmises that if conditions had changed for any firm he would have known given the industry grapevine.

[119] Why did Anglo Platinum not bargain harder? Henderson suggests that because of the failure of the two expensive reverse auctions the Anglo Platinum people *"...had a lot of mud on their faces..."* and were relieved to be able to get away with retaining the status quo.[52] Recall that under both reverse auctions prices had not decreased as would have been expected, but because of the bid rigging, had gone up. Small wonder that it accepted with alacrity the crumbs offered it by the collusive bidders.

[120] It is common cause that the bid rigging agreements were entered into in 2004 and again in 2005, and thus before the cut-off date. The question as we explained earlier in this decision is whether the practice continued after the cut-off date.

[121] This involves first a factual question and secondly a legal question. We deal with the factual question first.

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[50] Transcript, page 763.
[51] See Le Roux witness statement record page 174, paragraph 48.
[52] Transcript, page 453.

[122] It has not been disputed that the individual negotiations that followed the abortive second reverse tender were still in operation as of the 26 January 2006. In its chronology statement DSI states that the next occasion that Anglo Platinum held a tender was in 2009. According to it, *"... the effect of the contract that DSI had with Anglo Platinum could be said to have ceased only then."* [53]

[123] Videx has not contradicted this evidence so we can safely assume that it is correct.

[124] The next question is whether these subsequent prices can be regarded as collusive. More specifically are they the outcome of the bid rigging agreements?

[125] There is no evidence that after Anglo Platinum had rejected the outcome of the second reverse auction that the respondents met again on this aspect.

[126] The evidence of Henderson, who was the only witness to give detailed evidence on this point, was that the bid rigging had two objectives. The first was to achieve higher prices. This objective failed because Anglo Platinum did not accept the outcomes of the tender. The second was to prevent the prices then in place from being eroded by virtue of the reverse auction. On this Henderson is clear – the respondents achieved this objective or what we will refer to as Plan B.

[127] We see this from the following exchange with the Tribunal:

> *MS CARRIM: But you said earlier that the desired outcome was achieved, what was the desired outcome then? Was it that you*

[53] See Third respondents (DSI's) narrative on effects of alleged collusive tendering. This is described as a supplement to Henson's witness statement. See witness file page 216(1). The passage quoted comes from paragraph 17 of this statement, witness file page 216(10).

wouldn't lose the business or that prices would have been driven down further?

MR HENDERSON: Prize A would have been to get the increased prices. The next one was to get our business back at the same prices.

MS CARRIM: Was that part of the plan?

MR HENDERSON: Yes.[54]

He is pressed on this point further in cross examination by DSI's counsel. His answer to the question if there was any point in just keeping existing market share was *"...second prize was better than third prize."* [55]

[128] As became clear third prize was that the parties would have been forced into a price war and that prices may have gone lower.[56] Indeed Henderson had illustrated what this fear might be. He testified that Duraset competed for a product called a long anchor against another firm called M&J that was not a party to the collusive arrangement and as he put it the *"...prices went so low it was cut-throat."* [57]

[129] Henderson's proposition that without collusion, prices would possibly have been driven lower than they were in the existing contracts was not challenged.[58]

[130] DSI in cross-examination concedes this proposition. Counsel put it; *"So there is potential benefit, because the prices may have gone lower,*

[54] Transcript page 454.
[55] Transcript page 454.
[56] Transcript 455.
[57] Transcript 451.
[58] See exchange between Tribunal and Henderson transcript page 450-1.

not necessarily, but they may have – that was the only benefit really as it turned out." Henderson confirms this.[59]

[131] Videx, who cross-examined after DSI, did not challenge Henderson's version on this aspect.

[132] Cawood in his witness statement states that Anglo Platinum had failed to obtain the benefit of the lower prices they had anticipated. Thus he is consistent with the testimony of Henderson on this aspect. Although he could not comment on what the respondents had achieved in their individual negotiation with Anglo Platinum he surmised that no business changed hands as if it had, given the industry grapevine, he would have got to know of this.[60]

[133] Neither Henson nor Le Roux challenged this version.

[134] In his witness statement Henson confirms that in the individual negotiations DSI did not get any new business but nor did it concede any business to anyone else or raise it prices.[61]

[135] During his testimony he conceded that DSI managed to maintain its prices in the individual negotiations. [62]

[136] Although Videx in its answering affidavit admitted the collusion it stated that it was forced to compete aggressively to retain its existing business at lower prices. [63] However Le Roux, who was not the deponent to the answering affidavit, admitted during testimony that the firm had received huge benefits for Anglo Platinum as it had retained its business.[64] When it was put to him that Videx, like DSI, had

[59] Transcript, page 455.
[60] Transcript, page 818.
[61] Henson witness statement, paragraph 9.5, page 190.
[62] Transcript, page 1116.
[63] See answering affidavit paragraph 7.3.4.2 at page 105.
[64] Transcript, page 1531.

received a benefit from the collusion in that others did not destroy prices, Le Roux confirmed this.[65]

[137] Thus we have no evidence to contradict the version of Henderson on this point. What Henderson is saying is that but for the agreement to rig the bidding, the prices subsequently negotiated by the respondents, albeit as a result of individual negotiations, would, like the prices of the long anchors, have been much lower. Therefore the prices achieved are a direct consequence of the bid rigging. Put another way, if the bid rigging had not occurred, Anglo Platinum would have achieved lower prices though its reverse auctions and the respondents would have had to accept these prices and indeed, some may have lost their contracts to rivals.

[138] Thus the final prices, although ostensibly individually negotiated, are the direct result of the collusive bid and inextricably bound up with them. The correct counter-factual, if there had been no collusive bid, would not have been these prices, but prices achieved in a competitive reverse auction – prices that as a matter of probability would have been lower than those achieved in the individual negotiations.

[139] The evidence further is that these prices subsisted post the cut-off date. DSI has stated that there was no new tender from Anglo Platinum until 2009.[66] We know from both respondents that they sold roof bolts to Anglo Platinum in the period after the cut off date because they have given turnover figures up to that year. Given the evidence of the nature of these contracts as evergreen contracts, there would have been orders and purchases from Anglo Platinum pursuant to the individually negotiated contracts that persisted after the cut–off date. The respondents certainly did not suggest that no orders had been placed

[65] Transcript 1533.

[66] See supplementary statement of Henson page 216(10) paragraph 17 where it is stated, *" The first time that Anglo Platinum tendered again was in 2009. The effect of the contract that DSI had with Anglo Platinum could be said to have ceased only then."* (Our emphasis).Henson goes on to state that the prices achieved under the contract did not inflate as a result of the collusion.

on them after the cut-off date and if that was the case, the onus would have been on them to establish this fact. [67]

[140] The legal question therefore is whether the negotiated prices, which on the facts we know subsisted past the cut-off date, constituted, in respect of DSI and Videx, a continuation of the prohibited practice of collusive tendering.

[141] DSI argues that collusive tendering is a once-off event. The practice is the collusive tender and once the collusion has occurred it ceases. The practice does not subsist for the period during which it has its effect. On this argument the collusive tender took place sometime in 2004 and then again in mid to late 2005, but thereafter it did not continue and hence it ceased more than three years prior to the cut-off date.

[142] DSI concedes that the other practices referred to in section 4(1)(b), price fixing and market division, may continue after the date of the agreement that established them, but argued that collusive tendering was different. It relies for this proposition on the fact that collusive tendering is mentioned in a separate sub-paragraph in section 4(1)(b) and hence this separate treatment is justified. [68]

[143] However it is hard to see why the fact that collusive tendering forms part of a separate sub-paragraph in a sub-section dealing with the species of so-called per se horizontal contraventions, justifies an inference that it enjoys separate consideration for considering the

[67] See our decision in *Pioneer* 15/CR/Mar10, paragraph 86 where we stated *"Moreover it is for a party invoking prescription to allege and prove the date of inception of the period of prescription. Hence Pioneer, if it wishes to rely on the provisions of s67(1) is required to allege and prove, on a balance of probabilities that the conduct complained of by the Commission in its complaint of referral of 2007 ceased three years before this date. Such an approach to section 67(1) is entirely appropriate in the context of the secretive nature of cartel activity, where respondents engage in meetings held behind closed doors, at restaurants, pubs and hotels, keeping virtually no paper trail and where proof of these arrangements lie squarely and solely within the knowledge of co-conspirators."*

[68] Collusive tendering is mentioned separately to other per se offences and has its own sub paragraph in 4(1)(b) (iii).

limitations section. The disparate architecture of section 4(1)(b) sub-paragraphs is no indication of disparate legal consequences as a matter of statutory interpretation. Rather it is an indication of the different forms of conduct that constitute per se abuses. Given that there is no defence of justification for 4(1)(b) offences the legislature sought to enumerate clearly what those offences were. Thus price fixing, market division and collusive tendering, receive separate sub-paragraphs as a matter of elucidation, not to otherwise signify them for separate treatment as to consequence. If they were one might expect this to have been stated.

[144] Nor is there any policy rationale for treating the consequences differently. In price fixing and market allocation, as with the collusive tender, an agreement may also be a moment in time. All three species of per se horizontal practice under section 4(1)(b) should be treated in same way. Collusive tendering produces the same outcome as customer allocation (section 4(1)(b)(ii)). If DSI is correct about its moment in time argument, enforcement action against bid rigging would grind to a halt, because most of these practices operate covertly and may only emerge more than three years after the agreement that founded them had "ceased". Yet we know from experience that the fruits of collusive tendering can persist well after the agreement that founded them had occurred.

[145] The implication of DSI's argument is that if a customer calls for a tender for a period exceeding three years – say 10 years – and the tender is awarded to a firm as a result of a rigged bid, but is only detected by the Commission three years and one day after the date of the tender being accepted, no complaint can validly be initiated against it, even though the tainted tender is still in operation through continual purchases in terms of the tender contract, for seven years hence. This cannot be correct. Further, given that the customer can only recover damages from the bidders if there is a prior finding of a prohibited practice by the Tribunal, civil claimants too would be without a

remedy.[69] Nor, it seems, could the contract be voided on this ground either.[70]

[146] It is highly unlikely that the legislature would have intended such a limited meaning to the phrase the "*practice has ceased*". Quite clearly the legislature contemplated the practice as having ceased when its effects have ceased.[71] That interpretation is not only more consistent with the language of section 67(1) but is a more sensible one as well. The reason the limitation exists is to avoid the pointless prosecution of practices that have ceased some time before the initiation of the complaint. This consideration does not arise if their effects remain alive and well at the time of initiation. Consider further the use of the term practice had ceased. The choice of the term "*ceased*" in preference to a word that might have otherwise been used, like *"occurred"*, suggests a practice that is ongoing or continuous in nature, and that has ended, and not an act which occurred only in a moment in time.

[147] In the United States, the Supreme Court held in the *Zenith* case that: *"In the context of a continuing conspiracy ....each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover damages caused by that act and as to those damages, the statute of limitations runs from the commission of the Act."*[72]

[148] Areeda goes on to say that a private plaintiff therefore may bring a treble damages action long after the inception of an antitrust conspiracy, as long as it can prove that *"...its damages were proximately caused by an overt act occurring within the statutory time*

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[69] See section 65(6) and 65(9) of the Act.

[70] See section 65(1) which allows the Competition Tribunal or the Competition Appeal Court to declare void a provision of an agreement but this must presuppose the jurisdiction to find that the agreement involved prohibited practice which presupposes jurisdiction to hear the matter i.e that it was not precluded from doing so by virtue of section 67(1).

[71] According to Butterworths *Dictionary of Legal Words and Phrases*, the word cease *"... implies the discontinuance of something already in operation as in 'the wicked cease from troubling'. (Cradock's Estate v Cradock 1951(3) SA 64 (N)").*

[72] *Zenith Radio Corp v Hazeltime Research, 401 US 321.*

period. The overt act could be a price-fixing conspirator's elevated price ..."[73]

[149] In the United Kingdom case, a similar approach was adopted. Although this again is a damages case the court held that even if the unlawful activity started outside the limitation period, an action could be brought for those acts within the limitation period. [74]

[150] It might be different if the tender was itself a once-off purchase, but where the tender has set the price for subsequent purchases over a period of time, all those subsequent purchases are tainted by the prohibited practice of collusive tendering, because the prices have not been obtained by competitive market conditions, but rather are the fruit of the collusion, and in that sense, the practice of collusive tendering must be conceived of not as a single moment in time, but one that has an initial agreement to conspire, followed, if the relevant facts show this, by subsequent acts of execution, each time goods are purchased pursuant to the tainted agreement. Even if the initial agreement precedes the cut-off date, if the subsequent acts of execution have effects that succeed it, the practice has not 'ceased' but is continuing after the cut-off date and therefore is not barred in terms of section 67(1).Whether there are effects, and what constitutes 'effects', is a matter for evidence in each case.

[151] We know that the prices that prevailed after the cut-off period were not based on those set in the collusive tender but came as a result of subsequent individual negotiations. However Henderson's evidence was that the collusive bid had two aspects to it. Having not achieved higher prices, the so-called Plan A, the respondents protected their pre-existing volumes and prices from downward erosion, Plan B.

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[73] See Areeda paragraph 160 page 112. Relying on *Hanover Shoe v United Shoe Mach* Case 1968 at 502 n 15.

[74] *Arkin v Borchard Lines Ltd* (Preliminary issue)[2000] Eu LR 232 (Comm).This extract is from a summary of the decision as quoted in *Competition Litigation, UK Practice and Procedure*, edited by Mark Brealey and Nicholas Green, page 76-7.

Without the collusive bidding they could not have done so. In that sense the collusive bid continued to determine the prices arrived at in the individual negotiations – without the bid rigging firms would have been forced to accept lower prices as an outcome of the tender and the tenders would have been accepted. Plan A might have failed the collusive bidders but not Plan B. The customer wanted Plan C. The respondents subverted Plan C because they destroyed two tender processes and forced Anglo Platinum to agree to existing pricing and allocations. The individual price agreements are therefore a product of the outcome of the collusive bid.

[152] The next issue is whether there were acts of execution pursuant to the cut off date in terms of these contracts. We know from the evidence of the contracts generally in this case that contracts were of an evergreen nature on which essential pricing and supply quantities were set out and then orders were made from time to time pursuant to these contracts. The evidence is of continuing sales after the cut-off date by both respondents. Indeed, DSI, in its narrative statement, goes to great lengths to justify certain price changes that occurred in 2006 as being occasioned by input cost increases and not further collusion.[75]

[153] Accordingly the prescription defence fails and since both respondents, relied solely on this defence, they are liable for contravening section 4(1)(b)(iii) of the Act, in respect of the Anglo Platinum reverse tender in 2005.

Remedy

[154] Given that we have only found a single contravention against the respondents, in respect of the Anglo Platinum second reverse auction, the affected turnover we take into account must be confined to this tender. Each respondent has provided turnover evidence in this regard.

[75] See narrative statement op cit, paragraph 15.

[155] We have approached the setting of an administrative penalty in the same manner as we did in our *Aveng* decision, i.e. a six step approach.[76] This approach states:

> **Step One**: determination of the affected turnover in the relevant year of assessment;
>
> **Step two**: calculation of the 'base amount' being that proportion of the relevant turnover relied upon expressed as a percentage of the affected turnover obtained in step1;
>
> **Step three**: where the contravention exceeds one year, multiplying the amount obtained in step 2, by the duration of the contravention;
>
> **Step four**: rounding off the figure obtained in step 3, if it exceeds the cap provided for by section 59(2);
>
> **Step five**: considering factors that might mitigate or aggravate the amount reached in step 4, by way of a discount or premium expressed as a percentage of that amount, which is either subtracted from or added to it;
>
> **Step six**: rounding off this amount if it exceeds the 10% total turnover cap provided for in section 59(2). If it does, it must be adjusted downwards so that it does not exceed the cap.

Step 1

DSI

[156] DSI has provided turnover figures in respect of Anglo Platinum over a three year period from 2004 to 2007 based on sales per quarter. In heads of argument it suggested that the affected turnover be made up

[76] *Competition Commission vs Aveng (Africa) Ltd and Others*, Case No: 84/CR/Dec09. This followed a earlier decision of the CAC in *Southern Pipeline Contractors and Conrite Walls (Pty) Ltd vs The Competition Commission,* Case No: 105/CAC/Dec10 and was also used by the Tribunal in a more recent case of *The Competition Commission vs DPI Plastics (Pty) Ltd and Others,* Case No: 15/CR/Feb09.

of the last two quarters of 2004 and the first quarter of 2005.[77] Given our finding on the facts, the last year of affected turnover would be more accurately reflected by taking an average of the sales in 2005 and 2006. This is because the individual agreements would have been implemented sometime late in 2005. An average for both years is therefore the most appropriate. We have treated Videx in the same way.

[157] For DSI, this average would be R 9 334 858.00.[78]

[158] Videx argues that notwithstanding this amount, none of its Anglo Platinum sales in that period can be considered affected turnover. There are two reasons for this. First in respect of certain products it was the only supplier; hence the collusive tendering would have had no bearing on the price. These products, set out in Exhibit 12, are lacing bolts and combo and coupling roof bolts.

[159] In relation to the remaining product, flexible eyebolts, Videx argues that this turnover was also not tainted by the collusion, as it was bid down to a competitive price, because it had to compete with another supplier who was not party to the collusion. Hence the very low margins it earned on this product as shown in Exhibit 12.

[160] Thus whatever turnover it earned on Anglo Platinum was unaffected; either earned as a result of an uncontested monopoly or as a result of a competitive bid that fell outside of the bid rigging conspiracy.

[161] Of course this begs the obvious question. Why did it bother to collude at all? If it had no benefit from the collusive bidding as this argument suggests, why risk such a strategy for no gain. If it was mistaken about whether others would bid against it the first time round

[77] This added up to R 6 742 455. Taking a figure of 10% of that, DSI suggested in argument a penalty of R 674 245.
[78] Calculated as follows: (2005 turnover **R7 620 490)** + (2006 turnover **R11 049 225) /2 = R9 334 858.**

it would surely have not been in its interests to go through the same exercise the second time round, but it did.

[162] Firms do not engage in gratuitous collusion. There is no warrant for such a piecemeal approach to affected turnover. The bidding was divided into lots and the products that Videx supplied were part of the bid. The evidence is that the bid as a whole was rigged to ensure higher prices and the resumption of the status quo. None of the witnesses for the Commission was cross-examined by Videx to suggest that these products were deserving of special exception. Were these products even if solely supplied by Videx in the bid, 'must- have' products for the mine – could they have been substituted by another product or in lesser quantities; but for the collusion would the other firms have been able to source these products through supply side production shifts or imports? These are issues that the likes of Henderson, Koszewski, Bornman *et al,* might have been able to comment on. They were not asked.

[163] If this was Videx's case then that was the moment for it to have done so. Nor was the Commission alerted to this fact in Videx's pleadings which have a section on the level of profit it gained from the contravention nor in its subsequent witness statements, nor in Josef's section 49A testimony. Videx's criticism that Le Roux's version was not challenged under cross-examination whilst correct as an observation is not a fair one. Fairness is not a one way street only applicable to respondents and not to the Commission. It too is entitled, representing the public as it does, to be treated fairly in presenting its case. If Videx wished to raise such a defence it was obliged to do so timeously so the Commission could put its version to its own witnesses for comment.

[164] Secondly, the evidence of witnesses for the Commission and the tender document indicates that although there were individual lots the bids would also be examined holistically and that a firm whose package

was comprehensive across lots might be able to win.[79] This alone would make all the lots affected turnover.

[165] Third, collusion is harmful because it allows the other parties to the collusion to benefit from higher prices at the expense of the consumer. Each firm that is party to an act of collusion, aids and abets its co-conspirators to achieve that which they could not absent the collusion. Even if Videx did not profit from the collusive bidding, which we do not accept, it enabled the other three firms to do so. Its name appears frequently on the pages of Exhibit 3 as the party submitting an opening or closing bid.[80] With Videx as part of the collusive conspiracy the other respondents were free to raise their prices, confidently knowing it would not be bidding against them. For that it must be liable to a penalty and its turnover in respect of that tender serves as a legitimate and proportional base to impose a penalty.

[166] Finally, as we observed in *Aveng,* the concept of affected turnover is a discretionary one. There is no hard and fast rule to approaching its boundaries. As Bellamy and Child observe of the practice in European Community law " *It has been held that the Commission is not obliged to reach precise market definition for the purpose of setting a fine under the 1998 Guidelines."*[81]

[167] A similar approach is taken in the newly released United Kingdom Office of Fair Trading's (O.F.T.) *Guidance as to the appropriate amount of a penalty.*[82] Referring to UK case law on this point the Guidance document states:

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[79] In Exhibit 3, the tender document the following is stated: *"8) The ability to lower your own bid without necessarily entering the lowest bid in the online auction increases your chances of winning part of the business because a suppliers competitiveness across all lots will be taken into consideration in award evaluation."* Our emphasis.

[80] See for example Exhibit 3 pages 5 to 18.

[81] See Bellamy and Child, *European Community Law of Competition*, Sixth Edition, edited by P. Roth and V. Rose, page 1289 paragraph 13.149.

[82] OFT 423 dated September 2012. Available on www.oft.gov.uk

"The OFT notes that the Court of Appeal in its judgment in the Toys and Kits appeals stated that: '...neither at the stage of the OFT investigation nor on appeal to the Tribunal, is a formal analysis of the relevant product market necessary in order that regard can properly be had to step 1 of the Guidance, in determining an appropriate penalty' and that it was sufficient for the OFT to 'be satisfied, on a reasonable and properly reasoned basis, of what is the relevant product market affected by the infringement." [83]

[168] We find that Videx's entire turnover for Anglo Platinum should be included in the affected turnover. As we have been given figures over a two year period we will take the average of the two annual amounts as representing the turnover in the last year of the contravention. We used monthly sales figures Videx provided, per product, in respect of its sales to Anglo Platinum for the 2005-6 period.[84]

[169] This is the same approach we took with DSI.

[170] This amount would therefore be R24 068 196.00.[85]

Step 2

[171] The approach to setting the penalty at this stage, following *Aveng*, is to assess the infringement with respect to gravity and extent. Contraventions of section 4(1) constitute per se contraventions and are considered the most serious of the contraventions. Within the context of section 4(1)(b), serious enough, collusive tendering is seen as the most aggravating. Areeda and Hovenkamp in their treatise of United States law observe:

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[83] See footnote 18 of the Guidance, ibid.
[84] See Exhibit 12 page 5.
[85] Annualised figures were calculated as follows: 2005 (R 801 403 + R 538, 868 + R 546 659) x 12 = R 22 643 160.00 and 2006 (R 1 085 445 + R 656 139 + R 382 852) x 12 = R 25 493 232. 00. Add 2005 and 2006 (R22 643 160 + R 25 493 232) / 2 = **R 24 068 196.**

"Bid rigging schemes are commonly thought more harmful than ordinary price fixing because bid rigging is much easier for cartel members to enforce. The general cartel must always be concerned about surreptitious sales made at less than the cartel price, stealing sales from other cartel members and thus threatening cartel stability. In a bid rigging scheme, however, the winning bidder is selected by the cartel and any cheating will be detected immediately because the bid will be won by the cheater rather than the designated winner. For this reason bid rigging has been treated with somewhat greater hostility than price fixing generally."[86]

[172] This approach would suggest that the percentage on which to calculate the base amount should be closer to the 30% upper bound, than we have relied on in past decisions.[87] Had the collusive tender succeeded in its primary objective in achieving the bid prices we would have done so. However, in this case given that the tender was rejected by the customer, the gravity of the contravention is reduced slightly from what it might otherwise have been.

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[86] Areeda and Hovenkamp, *Antitrust Law*, paragraph 2005b.

[87] The upper bound of 30% is that adopted by the European Commission in its 2006 guideline. The OFT 2012 Guidance now also uses 30% as an upper bound having previously used 10%. According to the accompanying press release the change is justified because it: *"... gives the OFT the ability to set penalties which better reflect the gravity of different types of infringements, in particular for the most serious breaches of competition law, such as hardcore cartel activity and serious abuses of a dominant position. It brings the OFT in line with the approach of the European Commission and many European competition authorities."*(See press release from OFT dated 10 September 2012)

This approach to using the 30% as an upper bound to the base calculation was adopted first by the CAC in *SPC* and then applied by the Tribunal in two subsequent decisions, *Aveng* and *DPI*. In *Aveng* the base amount was set at 15% for both respondents, and likewise in *DPI*, for three respondents. In *SPC*, the CAC used 7% for one respondent and 20 % for another.

The OFT Guidance, provides for an additional step in a methodology that is otherwise similar to that in the EU guidelines and suggested by the Tribunal in *Aveng*. This additional step is to provide for 'specific deterrence and proportionality'. Mentioned as an example where an undertaking's relevant turnover might be too low and might need to be adjusted upwards, are bid rigging cases. See Guidance, ibid, paragraph 2.18

[173] We will also take into account, in considering the extent of the contravention, that we can only make this finding based on a single tender for a single customer. Previous section 4(1)(b) penalties have involved collusion in national or regional markets for larger sets of customers.

[174] To sum up, we are discounting the base figure that might otherwise have been applied to a collusive bidding cartel for two reasons; the primary purpose was unsuccessful – the bid outcome was effectively defensive in that it retained the existing status quo in respect of pricing and quantity of supply and secondly, it is of a confined nature. However the discount is limited because the conduct was still in essence bid rigging, the most serious of the section 4(1)(b) contraventions, which themselves are the most serious of the contraventions contained in the Act, as we have held previously. For this reason we consider a figure of 18 % is appropriate as a base figure.[88]

Step 3

[175] Here we consider duration. Although the conduct might have subsisted for a longer period after the cut-off date we do not have evidence of how long that was. DSI, as we have seen, disclosed that the next time that Anglo Platinum invited tenders was in 2009. This would suggest that the duration may well have been three years. However we have insufficient evidence about the amount of later purchases post the 2006 figures we were given. We will limit the period to one year in both the respondents favour.

Step 4

[176] No rounding up is necessary so this step is not applicable.

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[88] The base amounts on these turnovers would be : DSI - turnover of R9 334 858 x 18% = R 1 680 274 .44 For Videx – turnover of R 24 068 196 x 18% =R 4 332 275 .28

Step 5

[177] Both respondents addressed similar arguments in mitigation. The market circumstances were such that the firms as suppliers of a product with some, but little innovation was largely at the time of the contravention a commodity. The respondents were placed between powerful suppliers for the purchase of their steel input and powerful buyers in the form of large mining houses. In the case of Anglo Platinum, the evidence was that the mine had refused to pass on cost increases or the full cost increase, thus cutting into the respondents' margins.

[178] Evidence of the margins earned on the products varied considerably, depending on product type, as with Videx or time period, as with DSI. [89] Further, we do not have an acceptable counterfactual, available to us at the time of hearing, as to what a proxy for margins or pricing would be in a competitive market. We know from the general evidence that the firms were concerned about being seen to excessively profiteer as that would jeopardise the long term viability of all the firms.

[179] Because we have found that the price in relation to the Anglo Platinum tender was a defensive one – i.e. that protected existing prices which may or may not have been set at a collusive level – we do not have evidence on this – we will assume in favour of the respondents that the prices concluded in the individual negotiations were lower than they might have otherwise been had the original plan A prices been accepted; and hence the corresponding benefit to them in the form of profits and associated harm to customers Plan B prices,

[89] See Exhibit 12, where the Videx margins vary between 4.8% and 18%, and the DSI statement, which attempts to make sense of price increases in 2005. (See page 216(9) paragraph 15). In a spreadsheet, DSI provided gross profit percentages for Anglo Platinum, for the period 2005 – 2006, which varied, from a low of 13.3 % to a high of 29.4%. (See Record page 216(22)).

as opposed to Plan A prices, contribute to mitigating the amount of the penalty.

[180] To summarise; the probabilities are given that this was a Plan B price and the fact that suppliers were positioned in between powerful suppliers and powerful buyers that levels of profit were not substantially more than they may have been in a competitive market environment.[90]

[181] However, even if Anglo Platinum was a powerful buyer it was only powerful if it had the ability to substitute suppliers with others. When suppliers collude so effectively as we have seen in the defeat of the two reverse tenders, the ability of the firm to assert a form of buying power is constrained. A further issue for the buyer is that these products were essential for the safety of the mining operations. There was much evidence to suggest that mines were reluctant on safety grounds to bring in new suppliers as its employees had faith in existing products they were familiar with. This constrained a mine's choice and the respondents were fully aware of this. This, level of profit earned factor, constitutes some, but a limited amount of mitigation.

[182] We now consider the loss that might have been suffered by Anglo Platinum. DSI devoted considerable attention to leading evidence to suggest the lack of consequence of the prices of roof bolts in the price of the final commodity produced by the mine. On this argument, in respect of Anglo Platinum, the suggestion would be that the pricing of roof bolts is such a minor part of the total costs of production it should be treated as *de minimis*. Whilst there might be an argument to say that the pricing of roof bolts has no probable effect on the pricing of platinum, as individual producers may not be price makers in that market, it is a dangerous path to travel to afford it too much mitigation. Mines it is true face costs from multiple suppliers, but mines too have to be profitable or they will close, with great consequences to a much

[90] Input costs constituted up to 70-80% of the final price.

wider constituency than just their shareholders. For this reason mines have to be stringent about cost cutting. Anglo Platinum would not have engaged at some expense in payments to consultants and investment of their own management time in two failed reverse auctions, if the costs of roof bolts were considered trivial parts of their overall expenses.

[183] Thus whilst this aspect of the argument is worthy of some mitigation it is not as compelling as suggested by DSI.

[184] Both firms claim an entitlement to recognition of the fact that they co-operated with the Commission in respect of the investigation. Whilst they attended the section 49A hearings this is because they were legally obliged to. Nor did either assist the Commission in its case against the other or it appears provide it with much more than it had been provided already by RSC and Duraset. Most submissions were exculpatory. There was nothing exceptional in the level of co-operation offered, nor for that matter anything constituting aggravated conduct. This aspect cannot be considered as aggravating or mitigating conduct.

[185] There were also aggravating features of the respondents conduct. Senior management were involved. For DSI, Henson was actively involved and he is the company's chief executive. Similarly for Videx the active involvement of Le Roux, and both Josefs, the other directors, shows that the firm was involved in the collusion at the highest level.[91]

[186] The nature of the firms' behaviour also constitutes serious aggravation. The collusive bidding was fraudulent in nature in that it amounted to a covert misrepresentation to the customer that it was an open and fair bidding process when it was not. When Anglo Platinum tried to repeat the exercise, the firms again colluded to frustrate its purpose. Thus we are not dealing with a single incident in respect of

[91] Koszeswki at 48.

Anglo Platinum, but a repeated exercise by the respondents to defeat its attempt to lower prices through a reverse tender. We also know that Anglo Platinum did not go out on tender again until 2009.[92]

[187] The collusion was not an isolated act. But for the limitation provisions of the Act, the firms would have faced several other counts of collusion which they have not disputed. Had this been an isolated act of collusion this might have been a mitigating factor. But on facts that are common cause we know the respondents were party to several other collusive agreements and albeit unsuccessful attempts to divide the market and did so over a period of several years. The behaviour of the two firms against this context must be seen as an aggravating factor.

[188] Indeed Videx in its submission to the Commission admitted that there had been as many as 12 meetings between competitors in the period.

[189] In the case of Videx it was still attending meetings with competitors, albeit they did not succeed in their purpose, as late as February 2007, according to evidence that was not disputed.[93] It was Duraset that appears to have brought the attempts to further collude to an end; certainly it did not come about through the actions of either of these respondents, albeit they were the smaller two of the four firms implicated in this case.

[190] Overall the net aggravating factors are greater than the mitigating factors. For this reason we have increased the base amount by 10%. This increase would have been higher, but for the presence of some mitigating features that we earlier identified.

Step 6

[92] See footnote 67.
[93] See witness statement of Bornman paragraph 40-41.

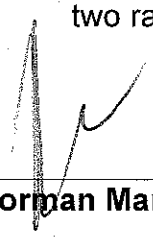
[191] It is not necessary to vary the amounts as they do not exceed 10 % of turnover in the preceding financial year.[94]

Conclusion

[192] DSI is liable for contravening section 4(1)(b)(iii) of the Act and we impose an administrative penalty on it of R 1 848 301 (One million eight hundred and forty eight thousand three hundred and one rand). Videx is liable for contravening section 4(1)(b)(iii) of the Act and we impose an administrative penalty on it of R4 765 502 (Four million seven hundred and sixty five thousand rand five hundred and two rand).

Order

1. DSI is found to have contravened section 4(1)(b)(iii) of the Act for a period of one year from 2005 to 2006.
2. DSI is ordered to pay an administrative penalty of R 1 848 301(One million eight hundred and forty eight thousand, three hundred and one rand) within three months of date of this order.
3. Videx is found to have contravened section 4(1)(b)(iii) of the Act for a period of one year from 2005 to 2006.
4. Videx is ordered to pay an administrative penalty of R4 765 502 (Four million seven hundred and sixty five thousand rand five hundred and two rand) within three months of date of this order.



Norman Manoim

19 September 2012
DATE

[94] In DSI's 2010 financial year, (year ending on 31 December), which was the last year audited statements were provided to us, the group turnover is R 231 601 332 and the company turnover is R 255 236 604. In Videx's 2010 financial year (year ending 28 February) the turnover was R 274 490 115.

Y Carrim and M Holden concurring.

Tribunal Researcher:	Thabo Ngilande
For the Applicant:	Adv T Motau SC and Adv N Mayet instructed by the State Attorney
For the Third Respondent:	Adv S.A Cilliers SC and Adv MJ Engelbrecht instructed by Cliffe Dekker Hofmeyr
For the Fourth Respondent:	Adv JC Butler SC instructed by Nortons Inc.