COMPETITION TRIBUNAL OF SOUTH AFRICA

Case no.: CR107Mar11

In the matter between:

THE COMPETITION COMMISSION OF SOUTH AFRICA	Applicant
And	
ESOR LIMITED[1]	First Respondent
RODIO GEOTECHNICS (PTY) LTD	Second Respondent
DURA SOLTANCHE BACHY (PTY) LTD	Third Respondent
GEOMECHANICS CC	Fourth Respondent
DIABOR (PTY) LTD	Fifth Respondent
GRINAKER LTA, AN OPERATING GROUP OF AVENG (AFRICA) LTD	Sixth Respondent
ESOR AFRICA (PTY) LTD	Seventh Respondent
ESOR CONSTRUCTION (PTY) LTD	Eighth Respondent

Panel:	Yasmin Carrim (Presiding Member) Andreas Wessels (Tribunal Member) Medi Mokuena (Tribunal Member)
Heard on:	10-13, 16-17 April 2018 and 27 May 2021
Order issued on:	5 May 2022
Reasons issued on:	5 May 2022

[1] Previously cited as Esorfranki Limited and other times as Esor (Pty) Ltd.

REASONS FOR DECISION AND ORDER

INTRODUCTION & BACKGROUND

[1] On 2 March 2011, the Competition Commission (the '**Commission**') referred a complaint against the First to Sixth Respondents,[2] to the Competition Tribunal (the Complaint). The Complaint alleged that these firms engaged in price fixing, market allocation and collusive bidding, in contravention of section 4(1)(b)(i), (ii) and (iii) of the Competition Act No. 89 of 1998 (the '**Act**').

[2] The Complaint was initiated on 29 May 2009,[3] against six respondents. On 1 April 2009 and on 20 July 2009, Grinaker LTA ('**Grinaker**'), made formal applications for corporate leniency on behalf of the Ground Engineering Business Unit ('**GEL'**), the geotechnical division within its civil engineering business unit responsible for ground engineering services.[4] The leniency applications described the involvement of GEL and its competitors in collusive practices such as price fixing, market allocation and collusive tendering in the provision of piling, grouting, lateral support services as well as their related markets for the provision of geotechnical drilling investigation services.

[3] On 11 July 2017, Esor Africa (Pty) Ltd and Esor Construction (Pty) Ltd, formerly Franki Africa (Pty) Ltd, were joined as the Seventh and Eighth Respondents in the referral proceedings.[5]

---

[2] Esorfraki Ltd (formerly initiated against Esor Ltd); Rodio Geotechnics (Pty) Ltd ('**Rodio**'); Dura Soltanche Bachy (Pty) Ltd ('**Dura**'); Geomechanics CC; Diabor (Pty) Ltd; and Grinaker LTA (an operating group of Aveng (Africa) Ltd). Competition Commission 'Complaint Referral' (2 March 2011) hearing bundle p3-49.

[3] Initiation signed 29 May 2009 but stamped 2 June 2009.

[4] Such as piling, grouting, lateral support and geotechnical drilling investigation services. Complaint Referral p11 paras 12-13.

[5] Case No. CR107Mar11/JOI119Nov11. In this joinder application it was also clarified that what was once Esor Limited, after 2008 had changed its name to Esorfranki Limited; and after 2015 had reverted to Esor Limited (Competition Commission 'Supplementary Affidavit to Joinder Application' (undated) hearing bundle p1430 paras 14.3 and 14.4).

[4] In May 2013, the Commission applied for the joinder of Geomechanics CC, which was later converted into Geomech Africa (Pty) Ltd,[6] and sought an amendment to its referral[7] which were both granted by the Tribunal.

[5] On 19 October 2016, settlement was reached between the Commission, Geomechanics CC and Geomech Africa (Pty) Ltd.[8]

[6] The Commission also concluded settlement agreements with Rodio Geotechnics (Pty) Ltd ('**Rodio'**),[9] and, Dura Soltanche Bachy (Pty) Ltd.[10]

[7] By the time the matter was heard the only Respondents contesting the matter were Esor Ltd (formerly Esorfranki Ltd), Esor Africa (Pty) Ltd, Esor Construction (Pty) Ltd (formerly Franki Africa (Pty) Ltd), collectively referred to as '**Esorfranki**' and Diabor (Pty) Ltd ('**Diabor**'). Grinaker had been granted conditional immunity by the Commission accordingly no relief was sought against it.

[8] At this stage of the proceedings, the following witness statements had been filed:

8.1 Ken Jones, for the Commission. Jones had filed a supplementary witness statement as well.[11]

8.2 Bernard Krone, Michael Taitz and Roy McLintock, for Esorfranki; and

8.3 Sarel Aronldus Cilliers Strydom for Diabor.

[9] Diabor had indicated that they reserved the right to call Hermanus (Manie) Albertus Rossouw after an assessment of the evidence led by the Commission.

---

[6] Case No. CR107Mar11/JOI016May13 Geomechanics CC was converted into Geomech Africa (Pty) Ltd. Tribunal Order 'Settlement Agreement between the Competition Commission and Geomechanic CC and Geomech Africa (Pty) Ltd' (19 October 2016) hearing bundle p1230 footnote 2.

[7] Case No. CR107Mar11/AME028May13.

[8] Case No. CR107Mar11/SA108Sep16.

[9] On 13 April 2018. Case No. CR107Mar11/SA020Apr18.

[10] On 18 November 2015. Case No. CR107Mar11/SA164Oct15.

[11] Ken Jones 'Amended Witness Statement and Corrections to Ken Jones' Witness Statement' (undated) hearing bundle p1323-1350.

The witness statement of Rossouw for Diabor was filed close to the end of the Commission's case with the leave of the Tribunal.[12]

[10] Evidence was heard on 10 – 13, 16 and 17 April 2018. The Commission led with Jones, and Diabor followed with its witnesses.

[11] On 17 April 2018, at the request of Esorfranki, just prior to leading their evidence, the matter was postponed *sine die* on account of Esorfranki commencing business rescue proceedings and to pursue settlement talks with the Commission. At that point in time, both the Commission and Diabor had closed their cases.

[12] In 2020, the Commission approached the Tribunal to set the matter down for closing argument on the basis that settlement talks had failed.

[13] At a pre-hearing held on 3 December 2020, Mr Hans Klopper, the business rescue practitioner for Esorfranki, confirmed that the First Respondent was still under business rescue and Esorfranki was unable to afford legal fees to defend the matter on the merits. Many of the group's employees who were familiar with the events in the complaint referral were no longer employed at the companies. He confirmed that Esorfranki would not be leading any factual witnesses on the merits and its case was to be considered closed.

[14] The matter was set down for closing argument on the merits and remedies for 27 May 2021. Mr Klopper was directed to file an affidavit explaining the status of Esorfranki, including its financial position for purposes of arguing remedies. Diabor was directed to file a supplementary affidavit including financial information for purposes of arguing remedies.

[15] After considering the totality of the evidence before us, we have found Esofranki to be in contravention of section 4(1)(b)(i), (ii) and (iii) the Act. We have dismissed the case against Diabor. The reasons for our decision follow.

---

[12] This witness statement was filed later with the leave of the Tribunal.

Commission's case

[16] The Commission alleges that the Respondents were competitors in construction-related markets for geotechnical services, including piling, lateral support, grouting and geotechnical drilling investigation services. The Commission's case is that from the 1970s to at least 2015, the Respondents colluded on tenders for various construction projects. The Respondents are alleged to have done so by concluding agreements and/or arrangements in terms of which they divided tenders amongst themselves, fixed tender prices and allocated tenders / customers / projects amongst themselves in accordance with a scorecard that largely corresponded to their market shares. This part of the agreement / arrangement is described as the "formal arrangements" in the Commission's referral.

[17] The formal arrangements were said to persist until 2005, after which the Respondents engaged in *ad hoc* arrangements. The *ad hoc* ("**adhoc**") arrangements involved allocating tenders / projects between a subset of the Respondents on more specialised tenders that had fewer bidders, depending on the expertise required for the bid. In these arrangements the parties provided cover pricing and divided / allocated projects / tenders amongst themselves from time to time as and when projects came online.

[18] The Commission alleges that the conduct, whether in the form of formal arrangements or adhoc arrangements, constituted an overarching agreement amongst the Respondents to engage in collusion on tenders / projects in contravention of section 4(1)(b)(iii).

[19] The Commission alleges that Esorfranki was involved in both the formal and adhoc arrangements, while Diabor was involved only in the adhoc arrangements.

[20] The formal arrangements in which Esorfranki is alleged to be involved are:

20.1 Inner Circle;

20.2 Mercure Hotel;

20.3 Centurion Gate 1(c);

20.4 Centurion Gate 1(d); and

20.5 Lusip Dam.

[21] The adhoc arrangements in which both Esorfranki and Diabor are alleged to be involved in are:

21.1 Sappi/Saiccor piling project,

21.2 Moses Mabhida stadium piling project,

21.3 Braamhoek Dam Grouting project,

21.4 Coega Harbour diaphragm wall project,

21.5 Gautrain Rapid Rail Link project,

21.6 Olifantsfontein Treatment plant;[13] and

21.7 Lesotho Highlands Water Project.

[22] The Commission alleges further that the conduct lasted until at least 2015 when the last payment in respect of the Gautrain DP6 project was made.

Esofranki's defence

[23] In its pleadings Esorfranki admits that it participated in the formal arrangements but contends that its participation ceased on 24 September 2005, more than three years before the Commission's initiation of the complaint in 2009. It argued that the Commission was therefore precluded from initiating the complaint under section 67(1) and its referral was accordingly not competent for the period prior to 2005.

[13] This project was also listed as part of the formal arrangements by Jones but later clarified to have been an adhoc project.

[24] Although it admits its involvement in the formal arrangements, Esorfranki persisted in denying any involvement in the list of projects during that period put up by the Commission except for Lusip Dam. In relation to the Lusip Dam, Esorfranki admits that the project was allocated amongst members of the cartel but contends that the arrangement was prior to 24 September 2005 which it considers as the date on which all collusion in the formal arrangements stopped. Hence, it raises a section 67(1) special plea specifically in relation to this project.

[25] In relation to the adhoc arrangements, Esorfranki admits participation in collusive conduct only in the Sappi/Saiccor project but contends that the R500 000 (loser's fee) it had agreed to pay Grinaker was not honoured but rather set off against an amount owed between the companies. In its heads of argument, Mr Klopper added that Esorfranki group records indicate that *"the only case that it was willing to concede that may be the subject of liability was the Sappi/Saicor matter*".[14]

[26] The upshot of Esorfranki's defence was that it admitted to involvement in the formal arrangements but raised a section 67(1) plea to the effect that the conduct in all of them had ceased by 24 September 2005. In relation to the adhoc arrangements it admitted involvement in the Sappi/Saiccor project but contends that it is not in a financial position to pay any administrative penalty if found liable. It denies involvement in any other adhoc arrangements listed above.

Diabor's defence

[27] Diabor denies having participated in the collusive conduct and requests the dismissal of the Commission's complaint referral against it.

[28] Further to this, Diabor also raises a special plea in terms of section 67(1). Ultimately Diabor's defence revolved around the fact that that Rossouw, alleged

[14] Esorfranki 'Heads of Argument' (20 May 2021) para 16.

to be the representative of Diabor in the collusive arrangements, had sold Diabor in 2005 to Strydom.

[29] We consider all of this later but set out first the relevant legal framework.

LEGAL FRAMEWORK

[30] Section 4(1) of the Act provides that –

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

[31] Section 67(1) of the Act, prior to the amendment in 2018 provided:

> *"A complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased."*[15]

[32] Prior to the decision of the Constitutional Court in *Competition Commission and Pickfords*,[16] section 67(1) was interpreted as an absolute substantive bar to the Commission initiating a complaint in respect of a practice that had ceased three

[15] Section 67(1) was subsequently amended by section 37 of Act No. 18 of 2018 which came into effect in 12 July 2019.

[16] *Competition Commission of South Africa v Pickfords Removals SA (Pty) Limited* (CCT123/19) [2020] ZACC 14 (***Pickfords***).

years prior.[17] However, a respondent who raised section 67(1) as a defence or a special plea bore the onus to allege the facts in support of that.[18]

[33] In *Pickfords* the Constitutional Court found that section 67(1) should be read purposefully and in accordance with the Constitution. The Court held that for these reasons the section could not be interpreted as an absolute substantive bar but rather a procedural time bar. If the Commission did indeed initiate a complaint three years after a practice had ceased it could seek condonation for non-compliance.[19]

[34] However, at the time that this matter was referred and evidence was heard, the prevailing interpretation of the law, as confirmed by the CAC, was that section 67(1) presented an absolute time bar and precluded the Commission from referring a matter that had been initiated more than three years after the conduct had ceased.

EVALUATION

Characterisation: overarching agreement

[35] In order to understand the Commission's allegation of the overarching agreement and to evaluate the defences raised by Esorfranki and Diabor, we highlight some features of the arrangements that were in place amongst the Respondents over a significant period of time.

[36] It would be appropriate at this stage to set out some history relevant to Esorfranki. Esor was established on 2 August 1985 and is a wholly owned subsidiary of Esorfranki Ltd (previously Esor Ltd and prior to that Esor (Pty) Ltd).[20] Esorfranki Ltd acquired Franki Africa (Pty) Ltd ("Franki") on 1 November

---

[17] See, for example, *Paramount Mills (Pty) Ltd v Competition Commission* (112/CAC/SEP11) [2012] ZACAC 4 (27 July 2012) (***Paramount Mills***).

[18] See, for example, *Power Construction (Western Cape) (Pty) Ltd and Another v The Competition Commission of South Africa* (145/CAC/Sep16) [2017] ZACAC 6 (2 May 2017) (***Power Construction***).

[19] *Pickfords* paras 41- 48.

[20] Esofranki 'Answering Affidavit' (15 July 2011) hearing bundle p56 para 5.

2006.[21] Franki is also a wholly owned subsidiary of Esorfranki Ltd. Sometime after 2015 Esorfranki Ltd went again by Esor Limited.[22] Prior to 1 November 2006, Esorfranki (known as Esor then) and Franki were independent competitors. Both Esor and Franki were participants in the collusive arrangements.

Details of the modus operandi

[37] The Commission's witness, Mr Kenneth Jones ('**Jones**'), commenced employment with Grinaker LTA in 1992 (which at the time was LTA but became Grinaker LTA in 2000) and was the general manager of GEL from about 2004/2005 until 2009/2010.[23]

[38] According to Jones, the collusive arrangements started in the early 1970s. These seem to have subsided for a while but were revived in the 1990s.[24]

[39] On or around 11 October 1994, Grinaker (GEL), Esor, Franki and Dura formalised what was then known as the Piling Group or the Book Club ("the Piling Club") which was an arrangement to fix prices and collusively tender on work in respect of geotechnical projects which included piling, lateral support, drilling and grouting.[25] Jones explained:

> *"Round about 1993 or 1994, I together with Mark [Laidlaw], we were asked by Pat Coleman of Franki, who … at that stage the Franki branch manager in Durban, and Jan Jeffreys who was the branch manager for Esor in Durban, to attend a meeting at one of the hotels in Durban, and I cannot remember which one it was, and at that meeting they brought up the suggestion of forming a "piling club", let's call it or a "cartel" is the terminology that is now used, with a view to rigging tenders in a way that*

[21] Esofranki 'Answering Affidavit' p60 para 23. Roy McKlintock 'Witness Statement' (3 April 2018) hearing bundle p1222 para 2.
[22] Competition Commission 'Supplementary Affidavit to Joinder Application' p1430 para 14.4.
[23] Ken Jones Amended Witness Statement p1330 para 2.
[24] Ken Jones Amended Witness Statement p1330 para 2.3.
[25] Ken Jones Amended Witness Statement p1334 para 7.

was fair to all, without making ridiculous amounts of money out of particular tenders, but specifically to try and cover some of the risks that are involved in geotechnical work, which are - geotechnical work I think generally is accepted that the risks involved, because you are working in unforeseen underground conditions that you cannot predict often, that it was felt that we should be pricing higher, in agreement with others, not only to make some additional money, but also to cover some of the risks…We had subsequent meetings to that, which also included others."[26]

[40] From 1994 to 2006 the groups in KwaZulu-Natal ("KZN") and Gauteng continued to allocate projects.[27] In Gauteng, Dura (Frans Visser) and Esor (Bernie Krone) and Franki (Rob Stocken and Mike Taitz) managed the lateral support and grouting scorecards. The piling scorecard was generally kept by either Franki or Dura.[28] In KZN, the arrangements involved Grinaker LTA, Franki, Esor, VNA Piling, Dura and Foundation Services and related to all activities but mainly piling and lateral support.[29]

[41] Jones explained that the *modus operandi* was to allocate projects according to "scorecards" or a "book" which corresponded with the Respondent's market shares.[30] This scorecard regulated how the tendering process should be conducted. Rules of allocation of work were prepared and agreed upon by participants. The rules regulated whose turn it was to get the work and various aspects of that tender / project such as the price for the bid, loser's fees, and cover bids. The tender allocated to each of the participants was recorded in a scorecard in accordance with an agreed percentage of the market share allocated to each participant in terms of running scorecard which parties called

[26] Tribunal Transcript of Proceedings CR107Mar11 (10 April 2018) p60.

[27] Later correction was made to add Gauteng Piling to the Piling Club. Ken Jones Amended Witness Statement p1335 para 12.

[28] Ken Jones Amended Witness Statement p1335.

[29] Ken Jones Amended Witness Statement p1336.

[30] An example is attached to the Complaint Referral at Annexure LM4 hearing bundle p35.

"The Book" or "scorecards". Scorecards were kept and managed for piling, grouting and lateral support services.

[42] Respondents would pay losers' fees, provide cover bids, and monitor compliance through constant meetings.

[43] In the hearing, Jones explained in detail to the Tribunal how the Piling Club / Scorecard worked:

> *"So, this book would be updated as we go along. So, if you look at the left hand side, the left hand column, it says the date. My recollection is that is the date of the – either the tender submission, or the tender issue. I think it was the tender submission, but I cannot be 100% sure about that. Then the name of the contract, and that could be the official name of the contract as on the tender documents, or it could have been the name that we used as a "book club", for whatever reason, and then the figures that you see under each of the various parties, are the figures that they told us at the meetings, must go on to the score card, because that was the tender amounts... and the way to top up would be to give them the opportunity for the next tender that came along".*[31]

[44] Jones explained how the arrangement was monitored to prevent cheating and competition breaking out[32] between the Respondents, going as far as forming a joint venture with Rodio to this effect:

> *"MR JONES: … So as I said, we noticed through the arrangement that Rodio were taking lateral support work outside of the arrangement of course, through tendering openly and competitively, and that was a concern to the parties within the arrangement. So because of my relationship and association with Paul Segato, I suggested in the meetings that what we should maybe do and also because we wanted to get more of the grouting work, was to bring in – or for me to discuss*

[31] Transcript (10 April 2018) p69 read with 'Annexure "KJ2": Copy of piling scorecard' hearing bundle p1098.

[32] Ken Jones 'Witness Statement' (undated) hearing bundle p1088 para 36.

with Paul Segato, bringing in him as part of the arrangement, as a joint venture partner to ourselves, for grouting work and for lateral support work.

MR PHALADI: So when you told the members of the book that you are now forming ROGEL, what did they think of that?

MR JONES: No, they were generally happy with that arrangement, because they were not – first of all they were not really interested in the grouting work. It was not really their core business The only grouting they did was in the lateral support for grouting in the rock support that was needed for rock anchors, or rock bolts, et cetera. So they were happy that we could get Rodio through this suggestion in under control, with regard to the lateral support work, number one. And number two, they were also happy that we did the grouting work, because they were not really interested in it. So, it was a way of us securing the grouting work, number one and number two, from that getting 50% of the lateral support work, but more importantly getting Rodio under control and getting the lateral support arrangement under control".[33]

[45] Regarding later years, Jones testified that there were consequences of a party not adhering to the arrangements:

"CHAIRPERSON: But was it that the threat was, that if you do not cut me in, I will go and compete outside of our arrangement and I will bid in at a lower price? Or, I will not give you a cover bid, or what was....

MR JONES: So it was exactly as you said, they would then – VNA would go to Johannesburg and disrupt that arrangement by pricing tenders at what they felt that was competitive prices and not discussing those prices with anybody else. So they may or may not be below who ever

[33] Transcript (10 April 2018) p92.

was in the arrangement, but they would price work it at what they felt was a competitive price, not an arranged price."[34]

[46] Jones also confirmed that cover pricing was applicable in the formal and adhoc arrangements.

"So, ja, there was always a cover price. So whether it was a formal agreement or ad hoc agreement, the parties would agree on the number and then the parties who were not going to, who were not allocated that particular tender, would cover that price. Add on, is a different thing".[35]

[47] Add-on amounts were amounts agreed between the firms as a loser's fee or "compensation". This amount was then added to the tender price and the winner would compensate the loser by that amount. This was usually in the region of 5% of the lowest tender.

[48] The adhoc arrangements, occurred both in-between the allocations made under the formal arrangements, as well as after the formal arrangements had ceased. Jones testified that he believed that "*[i]n fact, there were some ad hoc agreements between the period 1994 plus minus to 19, to 2005/2006*".[36]

[49] The adhoc arrangements also included the allocation of projects, the taking and giving of cover prices, and the payment of compensation fees (also referred to as add-on amounts or loser's fees) for staying out of projects:

"Okay, so an add on would generally be and again I am generalising, but it would generally be in cases where certain of the – and it was often on more complex and bigger contracts where the client's professional team knew that there was only certain of the geotechnical companies [that] could carry out that work or had the capacity and equipment to do that work. So, they would send out invitee tenders, and those invitee tenderers then would sometimes talk to each other and come to what we

[34] Transcript (10 April 2018) p71-2.
[35] Transcript (10 April 2018) p75.
[36] Transcript (10 April 2018) p36.

term an ad hoc agreement. Again in some cases, very rarely, but in some cases if it was known that even if it was not an invitee tender, if it was known that only certain tenderers were tendering, in other words, if we somehow had found out that only certain contractors had drawn documents, so it was not necessarily an invitee tender, but we knew who had drawn documents, and we felt that there was a possibility that we could make an ad hoc agreement, then we would do that.… let's say there were three parties and two of the parties agreed that the one would take that particular tender on an ad hoc agreement, that party would then add on some money, for the other two losing tenderers, and it would be an amount agreed between the three, and that amount of money would be put into the tender."[37]

[50] Meetings between the participants were held in places such as guest houses in Auckland Park and Fourways, or the Franki or Esor offices. For example, a 1996 document reflects minutes of a meeting which took place at Esor's offices in Phoenix Durban between Jones, Brian McCartney from Dura, Frank van Niekerk from VNA Piling, Noel Band from Franki and Jan Jefferies from Esor.[38]

[51] In his witness statement Jones provided a non-exhaustive list of projects that were subject to the collusion, spanning many years. He also provided the Commission with several documents which included contemporaneous hand-written notes which recorded the agreements amongst the participants.

[52] We note here that the nomenclature used to describe the arrangements as "formal" and "adhoc" was adopted by Jones and the Commission.

[53] However, what was clear from Jones' evidence was that the essential understanding, arrangement or agreement ('agreement') amongst members of the cartel was that they would collude on projects involving geotechnical services from time to time. The conduct included colluding on the allocation of customers, cover bids, *quid pro quos* and losers' fees. The collusion was

[37] Transcript (10 April 2018) p75.
[38] Ken Jones Amended Witness Statement p1336.

implemented through *both* formal arrangements, amongst an inner circle of firms, and through adhoc arrangements which could include a wider array of smaller firms.

[54] Jones' evidence on this was not rebutted by the Respondents.

[55] A few challenges were posed to Jones under cross-examination and allegations of vagueness and hearsay were raised on specific projects. For example Mr Vetten challenged Jones' claims about the Mercure Hotel project on the basis that they had no records of the project.

[56] However, as discussed above, Esorfranki admits to its participation in the formal arrangements which admission supports Jones' evidence. It only seeks to limit its liability by distinguishing between the formal arrangements as collusion that ceased in 2005, and the adhoc arrangements post-2005 as once off conduct which was not part of the overarching agreement.

[57] Diabor denied involvement in any collusive conduct whatsoever. Because it claimed to have no knowledge of any collusion in the industry, it could not rebut any of Jones' evidence on this or Esorfranki's admission of the overarching cartel.

[58] We now turn to consider the evidence in relation to each of the Respondents. We deal with Esorfranki first.

Esorfranki

[59] Esorfranki has admitted to collusion in the formal arrangements prior to 2005. It admits involvement in the subsequent adhoc arrangement in the Sappi/Saiccor project after 2005 which it submits constituted a once off discrete instance of collusion.

[60] Hence the central enquiry in Esorfranki's case is not whether or not it contravened the Act but rather its *degree* of culpability.

[61] Esorfranki alleges that it withdrew from the formal arrangements on 24 September 2005. This is contained in an averment in its answering affidavit deposed to by Mr Bernard Krone ('**Krone**'), the chief executive officer of Esorfranki Ltd in July 2011.

[62] At para 14, Krone alleges that:

> "*On 24 September 2005 the directors of Esorfranki and Franki, Bernard Krone and Roy McLintok decided to withdraw from the consortium at Franki's offices in Johannesburg. McLintok was tasked with informing the other participants in the consortium. He instructed Mr Ian Oliver the company's business director to telephone each of the other participants which he immediately did by contacting-*
> *14.1 Mr Frans Visser of Dura Soltanche Bachy (Pty) Ltd;*
> *14.2 Mark Laidlaw of GEL; and*
> *14.3 Mr Nico Maas of Gauteng Piling*." (our emphasis)

[63] Later witness statements filed by Krone, Michael Taitz and Roy McLintock maintained this averment.[39]

[64] Krone in his witness statement provided further detail stating that–

> "*during the course of his employment he was aware that there were in existence formal arrangements for the securing of piling and lateral support tenders between Esor (Pty) Ltd, Dura Soltanche Bachy, Grinakr LTA, Gauteng Piling and Franki Africa …. Meetings between the participants in these arrangements in Gauteng would occur regularly, almost fortnightly. This was to ensure that the workstream was properly managed and handled and that responsive tenders could be submitted timeously*".[40]

---

[39] Bernard Krone 'Witness Statement' (undated) hearing bundle p1214-1215 paras 10-15, Michael Taitz 'Witness Statement' (3 April 2018) hearing bundle p1220 paras 7-11 and Roy McLintock 'Witness Statement' p1223 paras 8-11.

[40] Bernard Krone 'Witness Statement' p1214 paras 7-8.

[65] At para 8 of his witness statement McLintock confirms Krone's statement "*In result and after discussions with Bernard Krone a decision was taken to entirely withdraw from any participation in any collusive activities and this was formally confirmed by Bernard Krone and myself at a meeting that took place at Franki's offices in Johannesburg in September 2005"*.[41]

[66] While no witnesses were called by Esorfranki,[42] Jones confirmed that Esorfranki had initiated the end of the formal arrangements in September 2005.

[67] Does this mean that the *collusive* arrangements ended on 24 September 2005 the day on which Esorfranki decided to withdraw from the formal arrangements? We say not.

[68] In the context of collusive bid rigging and market / customer allocation, cartel conduct often persists beyond the date on which participants agreed to collude. In other words, such collusion was not a once off event where the conduct occurred and ceased on the same day. In *Power Construction*[43] the CAC confirmed that for the purposes of section 67(1) collusive conduct persists for the length of its effects; and, in bid rigging, effects continued until at least the last act relating thereto was performed which in that case was the last payment date of the tender.[44] In applying this principle, the CAC in *Power Construction* saw this point as settled, quoting dicta from *Videx*[45] and *Paramount Mills.*[46] Bid rigging effects would include the payment of the loser's fee in respect of a tender.

[69] We demonstrate below that in several of the projects that were subject of the formal arrangements in which Esorfranki was involved the effects, and thus the conduct, persisted beyond the date on which the collusive agreement was struck.

---

[41] Roy McLintock 'Witness Statement' p1223.

[42] Sadly, Bernard Krone passed away a few days before argument in May 2021.

[43] *Power Construction.*

[44] *Power Construction* at para 45.

[45] *Videx Wire Products (Pty) Ltd v Competition Commission of South Africa* (124/CACOct12) [2014] ZACAC 1 (14 March 2014) (***Videx***).

[46] *Paramount Mills*.

[70] In the Inner Circle Project, which was a tender for grouting and lateral support in Johannesburg, the firms involved were GEL, Esor, Franki and Dura. The contract was awarded to Franki. The closing date for the tender was **19 June 2006**.

[71] In the Mercure Hotel Project, Jones explained that this involved GEL, Esor, Franki, Rodio and Dura. The tender was for piling and support and the closing date was 14 December 2005. The tender completion date however was **June 2006**. The project was carried out by GEL and Rodio as Rogel, a consortium between the two which was formed in the 1980s.[47]

[72] The Lusip Dam project involved a grouting tender in Swaziland with a closing date of 26 July 2005 and a completion date of **June 2008**. The parties alleged to have colluded on this project included GEL, Esor, Franki, Rodio and Dura. As discussed below, Jones clarified that Franki was involved in this as part of the balancing out or equalising of the books.

[73] Two additional projects that Jones claims took place in the formal arrangements, were Centurion Gate 1(c) and 1(d).[48] Esorfranki denies participating in these.

[74] Centurion Gate 1(c) was a grouting tender in Pretoria with the closing date of **20 January 2006** and completion date of **April 2007**.

[75] Centurion Gate 1(d) was another scorecard arrangement tender regarding grouting in Pretoria with a closing date of **August 2007** and a completion date **November 2007**.[49] Final payment was made in respect of this tender in **January 2008**.[50]

---

[47] Ken Jones 'Amended Witness Statement' p1337 para 21. The JV was dissolved in 1992/3 but re-emerged in the late 1990s / early 2000s (Ken Jones 'Amended Witness Statement' p1337 para 22).

[48] Ken Jones 'Amended Witness Statement' p1347 para 39.

[49] November 2007 Centurion gate 1D tender completion date (Competition Commission 'Supplementary Affidavit to Joinder Application' p1433 para 24.2)

[50] Competition Commission 'Supplementary Affidavit to Joinder Application' p1433 para 24.3.

[76] Jones explained that he had included these two projects in the formal arrangements in his amended witness statement because they were negotiated on the back of the original Centurion Gate project which was part of the scorecard.[51] He testified to the scorecard of the original Centurion Gate project as:[52]

> "*The date as I said, as far as I can remember, refers to the submission date of the tender which was 4 July 2005, and it would be under one of the parties' names, and it does not give the party at the top, but if you go back, if you look at the start of this document, it is "F", which is Franki. So that 3.2 million was awarded for Franki for work that they did at Centurion Gate, and it went on the score card and we would have all covered that."*[53]

[77] He explained that Franki had gotten the tender for section of the work for the client and Rogel had gotten one for another section. The site was adjacent to the Total garage in Centurion.[54]

[78] However, Jones clarified that while Esorfranki was involved in the original Centurion Gate collusion it was not directly involved in Centurion Gate 1(c) and 1(d) because the client had contracted Rogel directly to do further work on the same site.

[79] Even if we disregard Jones' evidence on Centurion gate 1(c) and 1(d), and assume in favour of Esor for the Mercure Hotel Project, the evidence thus far confirms that:

79.1 The tender closing date for several projects in the formal arrangements was ***after*** 24 September 2005;

---

[51] Transcript (10 April 2018) p104, 108-9.
[52] Transcript (12 April 2018) p405.
[53] Transcript (10 April 2018) p103.
[54] Transcript (10 April 2018) p104-105.

79.2 There was a lag between the tender date and the completion date of the projects; and

79.3 Many of the projects were completed *after* 24 September 2005, the latest being June 2008 in relation to Lusip Dam.[55]

[80] We can see from the above that that Esorfranki was involved in the overall agreement to collude – in other words the cartel – from inception and that its conduct continued at least **until 2008,** when the last project in those arrangements was completed.

[81] Furthermore, it appears that projects were still allocated amongst the cartel members after 24 September 2005. Jones in his explanation of how the formal arrangements came to end, testified that after September 2005 when Franki decided to end the formal arrangements there was another meeting held to close off the books and to equalise things between them –

> *"If you further look at the page 35 at the bottom line, you will notice that – where he says, "ahead or behind", you will notice that Franki is behind by 1.36 million and the GEL is behind by 2.89 million, call it 2.9 million, it was minus figures. So we were the furthest behind on the book at that stage. So … when we decided we were going to end the book and that would have been around this time and there would have been a meeting, as I stated in the witness statement to conclude things. And as I said also it was amicable separation. We agreed… that we would try and even the book out at least to make it as close as possible to make sure that everybody was more or less where they should be at that time, in accordance with the arrangement. So as a result of that, this could be, I am not saying it is, as I said yesterday, this may be the final book that was done and filled in and issued. But I believe in the meeting that took place sometime in November we agreed on the contracts that are in my witness statement on page 1347. And as counsel for Franki has*

[55] While Lusip Dam was a project in Eswatini it formed part of the market/tender allocations in the Piling Club.

mentioned this morning I made a mistake with The Circle, that was actually a Franki job and I do remember that now. The reason is, is that Franki were behind and the other projects that is on there were, apart from Olifantsfontein Treatment Plant which is a typing error, that should be on the ad hoc sizes (side) we have also mentioned previously. So the other projects were an attempt through the arrangement to get us to more or less where we should have been, or would have been to be equal with all the other parties to the arrangement, when the arrangement seized (sic).

CHAIRPERSON: Just to confirm, you are saying the Inner Circle, Mercure Hotel, Centurion Gate and Lusip Dam are part of the balancing out equalising of the book?

MR JONES: That is correct."[56]

[82] Thus, according to Jones, in the separation process, several projects were allocated amongst the book club members ***after*** 24 September 2005 in order to equalise them namely putting them in a more or less equal position vis-à-vis the cartel arrangement between them.

[83] Mr Vetten on behalf of Esorfranki challenged Jones under cross examination, the sum total of which was to say that Esorfranki had no record of these projects.[57]

[84] Jones on the other hand had kept detailed records in a scorecard. He came across as honest in his recollections, even correcting the typo's that the attorneys had made on the list of projects. He was forthcoming, non-defensive and took the Tribunal into his confidence when he explained that while he had included Centurion Gate 1(c) and (d) in the formal arrangements because in

[56] Transcript (12 April 2018) p403-5.

[57] Regarding the Braamhoek Dam Grouting project (Transcript (10 April 2018) p19) and the Olifantsfontein treatment plant project (Transcript (11 April 2018) p255).

his view these had followed on the back of the original Centurion Gate collusion but that Esorfranki was not directly involved in these.[58]

[85] In any event, whether or not additional projects were allocated amongst the cartel members during the separation process, after September 2005 as claimed by Jones, we have shown above that the conduct pertaining to the projects allocated prior to 24 September 2005 continued at least until after June 2008. On this basis, the claim by Esorfranki that the Commission's 2009 initiation was not valid under section 67(1) because the conduct had ceased in 2005 (three years before the initiation) falls to be dismissed.

[86] We turn now to consider Esorfranki's conduct after 2005 under the adhoc arrangements.

Adhoc arrangements

[87] The Sappi/Saiccor project was a tender for piling services where agreement was arrived at in **July 2006** that GEL would bid higher and lose the bid. The companies allegedly part of the collusion relating to this tender are GEL, Franki, Esor and Dura. Jones produced handwritten notes of a meeting that took place at Franki's offices in KZN. In attendance were Ken Jones (GEL), Mark Laidlaw (GEL), Mike Barber (Esor), Pat Coleman (Franki), Rob Marsden (Dura) and Steven Crous (Dura).

[88] To achieve this objective, Franki provided GEL with a price to submit as its tender price. GEL and Franki also agreed that Franki would add an amount of R500 000 to be paid to GEL for not bidding competitively. This was referred to by Jones as an "add-on" to the price submitted to the tender but was to be paid to GEL by Esorfranki as a "loser's fee". The tender closing date was 7 July 2006. GEL issued a fictitious invoice dated 30 November 2007 to Franki for crane hire.

[58] Transcript (10 April 2018) p103.

[89] Esorfranki admits, in para 43.3 of its answering affidavit, to this arrangement and that it received the invoice but avers that it did not pay the loser's fee. The amount was apparently set off against an amount owed between the companies in respect of a contract in which they were joint venture partners.

[90] However, no confirmatory affidavit of this set-off was filed by anyone on behalf of GEL nor was any witness called to confirm this alleged set-off. Significantly no date is provided for the alleged set-off.

[91] But even if were to accept that the loser's fee was paid as a set-off, this would have logically taken place only on or *after* 30 November 2007 and this conduct would not be affected by the proscription in section 67(1).

[92] We turn now to consider the evidence of the projects Esorfranki denies involvement in. We stress that this is not to assess whether Esorfranki is culpable but rather to assess its *degree of culpability*.

[93] The projects that Esorfranki denies being involved in are:

93.1 Moses Mabhida Stadium: a piling project. Tender closing date: 6 September 2006.

93.2 Braamhoek Dam Grouting: a lateral support and grouting. Tender closing date: 15 June 2007. Awarded to Rogel.

93.3 Gautrain Rapid Rail Link DP6: a geotechnical project. Tender closing date: 9 June 2006.

93.4 Lesotho Highlands Water Project: a geotechnical drilling investigation. Tender closing date: 7 March 2007.

93.5 Olifantsfontein treatment plant: a grouting project. Tender closing date: 31 March 2006.

[94] Suffice to say at this stage, Jones' evidence in relation to these projects was that Esorfranki was involved in all these projects.[59]

[95] Mr Vetten on behalf of Esorfranki challenged Jones on this evidence, arguing that they had no records of Esorfanki being involved in any of these projects. We do note here that Mr Vetten on behalf of Esorfranki vigorously disputed that Esorfranki could be involved in the Braamhoek Dam project or the Gautrain DP6 project. Notably the completion date for the Braamhoek Dam project was March 2010 and the Gautrain DP6 was July 2015.[60]

[96] Jones however kept internal records of the adhoc arrangements. He explained that –

> *"CHAIRPERSON: So you did do a kind of a quid pro quo during that period as well?*
>
> *MR JONES: Ja we did. We did not do it officially, in other words we did not have a scorecard but we kept our own internal records of – and some of these notes that you see here are specifically for that reason and Mr Wessels has just asked me to explain. These are notes that I would keep so that I would not forget what add-ons had been given to whom and the compensation payments that were made. So that if there was a particular job that we were interested in I could refer back to these and say well we played the game on these particular ones it is now, I think, our turn. It did not always work like that. Often there was arguments and disagreements on who should get what and maybe even sometimes we agreed to disagree and price competitively but generally if possible we tried to make an agreement on those ad hoc opportunities."*[61]

---

[59] **Moses Mabhida Stadium** (Transcript (11 April 2018) p138 para 7 and Transcript (11 April 2018) p137); **Braamhoek Dam Grouting** (Transcript (10 April 2018) p19 para 18) **Gautrain Rapid Rail Link DP6** (Transcript (11 April 2018) p140, 144-145, 153-154); **Lesotho Highlands Water Project** (Transcript (12 April 2018) p363) and **Olifantsfontein treatment plant** (Transcript (11 April 2018) p255).

[60] When the last payment was alleged to have occurred.

[61] Transcript (13 April 2018) p550-1.

[97] In our view, in light of Esorfranki's admission of collusion in the Sappi/Saiccor project, there is no need for us to consider this evidence in greater detail because the case against Esorfranki now revolves on the *degree* of its culpability and not whether it was culpable at all.

[98] Esorfranki has admitted to being party to collusive conduct and as we have shown above this conduct continued at least until June 2008 (under the formal arrangements) or until 2015 under the adhoc Sappi/Saiccor project.

Were the adhoc arrangements a continuation of the overall agreement?

[99] There is of course another way to characterise the adhoc arrangements namely that these constituted a *continuation* of the cartel albeit in a different form.

[100] This would not be unusual in cartels of long duration, in which different *modus operandi* are used.[62] For example there might be a core inner circle of cartel members which would meet regularly and other members who would be brought in on an adhoc basis for projects or bilateral engagements with the members of the inner circle as is the case in point. Often such cartels go through periods of instability when price wars might break out and cheating occurs but are revived, as and when needed, to maintain their levels of profitability. At times, specific members may use price wars as a punishment mechanism in a particular sub-market or to keep new players out.[63]

[101] Jones confirmed that this cartel went through phases of inactivity and revival. Furthermore, collusion on adhoc projects (which were not part of the Piling Club or Scorecard) took place even <u>*during the period*</u> of the formal arrangements. Price wars were utilised from time to time as a form of enforcement and punishment.

---

[62] See, for example, *Videx* para 67; and *Competition Commission v Pioneer Foods (Pty) Ltd* (50/CR/May08) [2010] ZACT 9 (3 February 2010) (***Pioneer Foods***) at para 34.

[63] See, for example, *MacNeil Agencies (Pty) Ltd v Competition Commission* (12/CAC/Jul12) [2013] ZACAC 3 (18 November 2013) (***MacNeil***).

[102] Thus the adhoc collusion on identified projects from time to time was *part and parcel* of the overall agreement and not something new that commenced only after 2005.

[103] In other words, while the formal arrangements came to an end, the members of the cartel *continued* to engage in adhoc collusive conduct, which they had engaged in even during the period of the formal arrangements. The change in 2005 was not a cessation of their collusion but only a change in their *modus operandi*.

[104] Jones, in his explanation for how the formal arrangements came to end, confirms that the adhoc arrangements were a continuation of the relationship amongst the members of the formal arrangements –

> "*Now just to try and explain how this thing dissolved and to use an analogy. It was a happy divorce, it was not an acrimonious divorce of the parties. In fact that has played out by the fact that we continued talking, even after the arrangement had seized with each other on certain ad hoc arrangements. So the divorce was cordial*".[64]

[105] He testified further that the adhoc arrangements usually occurred when they saw an opportunity for colluding:

> "*CHAIRPERSON: Just explain that. When you say you were aware was it an understanding between you that you will still continue?*
>
> *MR JONES: No it was not discussed I do not think, at that time. I think it was at that time we discussed that we would stop the arrangement and I think we all walked away saying that you know that would be it, and then certain opportunities came along where the bigger parties were invited to tenders and then discussions started around us.*
>
> *CHAIRPERSON: And how did those discussions start?*

[64] Transcript (12 April 2018) p 403.

MR JONES: It would normally start via one of the parties phoning the other parties and discussing it. That could have, following that there could have been a meeting to discuss it and then an agreement reached between the parties that this was – there was a possibility in terms of this ... [intervenes]

CHAIRPERSON: Opportunity.

MR JONES: Opportunity to price it as an ad hoc arrangement, not competitive in other words.

CHAIRPERSON: And you did not feel uncomfortable with approaching each other?

MR JONES: No not at all. Like I say there was no animosity in this divorce. We separated I think on good terms. It was a culmination of things that brought about the reason for the separation or for the ceasing of the formal arrangement but I do not recall that there was any animosity between the parties particularly. I mean there is always cases where the one party does not get on with the other, etcetera, etcetera we parted, I believe on good terms and hence we carried on talking to each other afterwards when there was an opportunity to talk to each other in terms of the ad hoc agreements.[65]

…

MS MOKUENA: Can you tell us was this conversation after the amicable divorce period or was it prior to the amicable divorce period?

MR JONES: I am so glad that you have asked that question because I am not particularly comfortable about calling anybody a liar and I think it needed further clarification. …

MR JONES: This particular phone call is something that I think – let me put it this way, is something from this whole many years of

[65] Transcript (13 April 2018) p 544-5.

arrangements and ad hoc arrangements that is more crystal clear in my mind in terms of memory than anything else. Anything that is in those two files, and let me give you a reason for that, and I say that because I know that exactly when it – I know when it happened, I know where it happened, where I was when I received that call, I even know where I was standing at that part time where I was and I even know who was standing next to me at that time when I received that call. And I can tell you that I was at Berg River Dam and we were doing a joint venture with Rodio and we had gone down there for a monthly site meeting together with the main contractor. It was 10 May 2006 because the tender for DP6 I think closed in June 2006, and the reason I say it is May is because it was the monthly site meeting that we went down, which would normally be the end of the month, somewhere around 25 May. So we were at Berg River Dam, which is in Franschhoek in the Cape. We were doing a joint venture together as I say with Rodio. I had gone down there with Paul Segatto. I was standing on the concrete pathway leading to the main contractor's office. So I was just outside the office of the main contractor, either prior to the meeting or after the meeting, and standing next to me was Paul Segatto. And the reason that I remember it so vividly is that – and I will never forget it, probably remember it for the rest of my life unless I Alzheimer's which certain people think I may have started already, but – and the reason I remember it so vividly is that first of all it was from Ian Oliver who was not the one who was allocated the project of DP6, it was Dura. But you will remember that I said that the communication between Rob Marsden of Dura at that stage had broken down so I could not understand really why Ian Oliver would be phoning me when he was in a project that was allocated to Franki, because he normally was from Franki. That was the first thing. The second thing and reason that I remember it so vividly is that it was so ferocious, it was very aggressive as I have said in my testimony, and I have known Ian and knew Ian at that stage for quite a long time and I had a lot of respect for him and I hope that was mutual. And during that time I had never ever seen him or heard him talk to me or anybody else in that way. So it is firm in my memory because I felt it

was out of character. I had never seen that side of Ian Oliver. And then the third reason or fourth reason, I cannot remember how many now, was that it was strange for me to hear him mention that if I do not cooperate with Dura he would go to the top, to the very top at Aveng, meaning the CEO. He did not mention his name, I did mention the name but he did not mention the name but that is who he meant, Carl Grim. So he was not going directly to my boss, he was not even going to my boss's boss who would have been the MD of Grinaker LTA, he was going to in some way, either himself or somebody else, but they were going in some way to the very top of Aveng, which is the holding company obviously and the company that is registered on the JSE. So does that answer your question?"[66]

[106] There is no evidence that the members of the erstwhile Piling Club distanced themselves from this adhoc form of collusion. On this construction the cartel could be said to have persisted until 2015.

[107] Whether the adhoc arrangements are seen as a continuation of the overarching agreement or as a discrete once off instances of collusion, on Esorfranki's own version, it did collude on at least one adhoc project after September 2005 namely Sappi/Saiccor.

Conclusion on Esorfranki

[108] As we have shown above Esorfranki's defence, namely that its withdrawal from the formal arrangements on 24 September 2005 constituted a cessation of the collusive conduct falls to be dismissed. It might have withdrawn from the formal arrangements, but its collusive conduct that was the subject of the overall agreement under the formal arrangements continued at least until **June 2008**.

[109] Its conduct after 2005 could be characterised as a *continuation* of the overall agreement albeit in a different form. But even if the adhoc arrangements are

[66] Transcript (13 April 2018) p 558-60.

not characterised as such, we find that Esorfranki's collusive conduct in the Sappi/Saiccor project had not ceased three years prior to the Commission's initiation in April 2009.

[110] Thus, we find that Esorfranki has contravened section 4(1)(b)(i)-(iii) in that it colluded with its competitors to fix prices, allocate customers and engaged in bid rigging through cover pricing from at least 1999[67] to 2008.

[111] We turn now to consider the case against Diabor.

Diabor

[112] The Commission alleges that Diabor was involved in at least the following adhoc arrangements namely:

112.1 the Middelburg and the Cradock projects;

112.2 the Gautrain Rapid Rail Link project;

112.3 the Lesotho Highlands Water project.

[113] The Commission's case against Diabor is that it was only involved in the adhoc arrangements.

[114] During the Commission's case, Diabor's legal representatives sought to introduce the witness statement of Manie Rossouw. The Tribunal permitted Diabor to file the witness statement and to call Rossouw to the stand, affording the Commission the right to lead evidence in rebuttal should it elect to do so.[68] We turn to consider the allegations in respect of the different projects.

[67] Esorfranki's conduct preceded the commencement of the Competition Act and while we can have regard to such conduct for purposes of context, it can only be held liable for conduct from the date on which the Act came into effect.

[68] Transcript (13 April 2018) p471, 480-2.

Middelburg and Cradock projects

[115] Jones testified that Diabor participated in collusive adhoc agreements with GEL in respect of certain projects in **2003/2005**. One of Jones' old notes dated 20 May 2003 indicates that Diabor colluded with GEL on the Middleburg drilling project and the Cradock project. Jones explained:

> *"MR JONES: The 20th of the 5th 2003.*
>
> *…*
>
> *MR PHALADI: Can you please explain what that note is about?*
>
> *MR JONES: Ja, that was an adhoc agreement that I had come to with Manie Rossouw, who at that stage was the owner of Diabor, that we would cover his price for the Middleburg drilling tender, which looks like it closed on the 3rd of the 4th 2005, and his price was, as it is stated there, 312 575 and then I made a not[e] there that he is putting in R1,000 for us. I actually think that that is a mistake, because I doubt very much that it – we would ask for an add on of R1,000, because you cannot buy much with R1,000, even in 2005. I think – I suspect that that number was R10,000, and not R1,000, but that is what I wrote at that time, so.*
>
> *MR PHALADI: We are aware that you subsequently left KwaZulu-Natal and went to Gauteng. Sorry, just to go back, back to that document. If you could just go to bullet point, can you please just explain to us what that is about?*
>
> *MR JONES: Ja, this is a similar agreement that I had come to with Manie Rossouw of Diabor, for a project that he wanted us to cover him in Cradock, and his price was approximately R800,000, and we agreed that he would put in R10,000 not only for us, but for us and Rodio. So, he was asking me to broker a deal together with Rodio, in other words speak to Rodio and agree that we would cover, that we would both cover Manie Rossouw on the Cradock project, and for that he would add on R10,000.*

MR PHALADI: And at the time which company did Manie Rossouw represent?

MR JONES: He was the owner of Diabor."[69]

[116] Although under cross-examination Jones could not establish the exact date of the document implicating Diabor to the Middleburg and Cradock projects, Jones remained firm in his testimony that:

"*MR JONES: I can confirm that these conversations took place and that this amount of monies were paid*."[70]

[117] On the issue of the Middelburg and Cradock projects, Rossouw denied any form of illegality and couldn't recall details about the projects Jones was referring to.

[118] While Jones could refer to some contemporaneous notes, we note that these projects occurred around 2003, some eight years prior to the Commission's initiation. No evidence was led whether the conduct in relation to the Middelburg and Cradock projects continued beyond 2006 (three years prior to the Commission's initiation).

[119] The Commission, in closing argument, did not press further with these two projects and accepted that its case against Diabor rested on whether the alleged collusion on the Gautrain project, continued beyond 2006, into at least 2008 and would thus not be affected by section 67(1). We turn to consider the evidence in relation to this project.

Gautrain Rapid Rail Link

[120] The Commission alleged that two sections of the Gautrain Rapid Link project were the subject of collusion, namely DP6, of 9 June 2006, and OR

[69] Transcript (10 April 2018) p81-82.
[70] Transcript (13 April 2018) p449.

Tambo/Marlboro ('**ORT**'), of 7 June 2006.[71] Regarding Diabor, the Commission alleged that:

120.1 Diabor was part of the Diabor, Geomechanic[72] and Solitech[73] ('**DGS**') joint venture that bid and won the tender for the geotechnical services work in relation to the Gautrain project;

120.2 during the award of the project, which happened in various stages because of the change of main contractors or consultants, the DGS joint venture engaged in collusive conduct with some of its competitors, including Rodio and Dura;

120.3 the collusive conduct in respect of the Gautrain project that started around 2004 continued with the negotiation of the OR Tambo / Marlboro section of the Gautrain project; and

120.4 the other Respondents in this case, namely Grinaker, Dura, Geomechanics and Rodio have confirmed that Diabor formed part of the DGS joint venture that colluded on the Gautrain project. [74]

[121] Jones alleged that in 2006 GEL (including Rodio which were represented by GEL), Franki (and Esor, which was represented by Franki) and Dura attempted to form a consortium intended to bid for all the geotechnical work for the Gautrain. They failed in this because the Bombela Consortium was not interested in their proposal of forming a consortium with it. After this unsuccessful attempt, certain adhoc agreements relating to the Gautrain project were concluded:

121.1 It was agreed that Rogel, Franki and Esor give a cover price of R50 million on the DP 6 section of the Gautrain in order to ensure that the Dura-Geomechanic joint venture wins the contract;

---

[71] Ken Jones 'Amended Witness Statement' p1349-1350 para 42.
[72] As discussed earlier, this company was related to Geomech Africa Proprietary Limited.
[73] Soiltech was Esorfranki's geotechnical drilling division (Complaint Referral p24 para 33.9.2).
[74] Complaint Referral p23-24 para 33.9.

121.2 Rogel and Dura would provide a cover price to DGS in relation to the O.R. Tambo / Malboro Drilling investigation project for Gautrain in order to ensure that the DGS joint venture won the contract; and

121.3 In return for covering these projects, Rogel would be given other geotechnical work required in the Gautrain or any other project which may have provided an opportunity to collude, which Franki, Esor, Geomechanics, Diabor and Dura would stay out of.[75]

[122] During cross examination Jones clarified that the ORT section of the Gautrain commenced first and the DP 6 later.[76]

ORT

[123] On the ORT section Jones testified that this project was an adhoc arrangement and was done by DGS. He confirmed that as Rogel they had looked at it because it involved quite considerable geotechnical work. He stated that they "*would have rigged it with Rodio, as Rogel, but it was awarded to the DGS joint venture, and we would have covered them based on the adhoc agreement*."[77]

[124] When asked what the amount of the cover was, Jones conceded that he could not recall. He stated that Mark Laidlaw had dealt with the other parties and that he had little involvement in in the discussions around this contract. He was more familiar with the DP6 project.[78]

[125] Under cross examination Jones confirmed that he had no personal knowledge of Diabor's involvement in the ORT section.[79]

[126] Neither Mark Laidlaw nor any of the other alleged partners to this collusion were called to testify.

---

[75] Kenneth Jones 'Affidavit' (9 December 2009) hearing bundle p1358-9 para 8-9 read with Complaint Referral p23-24 para 33.9.
[76] Transcript (12 April 2018) p355-6.
[77] Transcript (11 April 2018) p145.
[78] Transcript (13 April 2018) p463.
[79] Transcript (13 April 2018) p462-3.

[127] Rossouw testified that he had personal knowledge of the work on the Gautrain. He explained that work on the Gautrain had in fact started in 2004 and there were many projects related to it. Initially the work was done for several consultants, Bruinette Kruger Stoffberg ("BKS") being the first. Later the consultant was Murray & Roberts and then later Bombela:[80]

> *"MR ROSSOUW: Madam Chair, the OR Thambo Marlboro Section part as is stated, of the Gautrain Rapid Link. We have conducted with DGS, who had then at that particular point in time consisted out of Diabor, Geomechanics and Soiltech, the site investigations for Murray & Roberts. On the announcement that Bombela was the preferred bidder, we went to Bombela and we offered our services to Bombela for the rest of the site investigations, or the final stages of the site investigations, under the same prices that we did for Murray & Roberts, with certain imminent savings in the situation, and the fact that we had a very intimate knowledge of the project. So, yes, Marlboro or Thambo was never a tender, a separate tender, it was basically part of a negotiated agreement with Bombela. … Madam Chair, the first instance we were working directly for the – what was then the Old Transvaal Provincial Administration. The consultants were BKS. Subsequent to that, Murray & Roberts were appointed with consultants being Ninhan Shand for whom, we had done that second portion and then, as I say, the last portion we did directly for Bombela, who was the construction organisation.*
>
> *MR VETTEN: So, if I understand correctly, the initial work was done with an entity that was not Bombela …*
>
> *MR VETTEN: Can you give us an indication of the time when this happened? So, let start in the first phase, and then the Murray & Roberts phase, and then we will come to what you have referred to as the negotiated phase with Bombela.*

[80] Transcript (16 April 2018) p618-9, 661, 741.

MR ROSSOUW: I am afraid I will have to bypass that one. I just cannot remember. All I know it was the whole Gautrain Project. From – we started, actually it took something like 10 years. So, I am not sure when we did the work for BKS, the Transvaal Administration. I think, if I remember correctly, that the section we did for Murray & Roberts, was most probably done in the latter portions of 2005, because this is more or less in that period that I left Diabor and we kept on as DGS and we did the work for Bombela, and that was round about 2006."[81]

[128] As to the alleged collusion on ORT, Rossouw testified that work on ORT for Bombela came about pursuant to the work DGS was already doing for Murray & Roberts and the contract was negotiated with Bombela:

"MR VETTEN: Can you just please explain what you meant when you said, when Bombela became the – I think you said "the preferred" – I have it down as "bidder", but I think I have got it incorrectly, I think – but tell us what you meant when Bombela became the preferred whatever?

…

MR ROSSOUW: Madam Chair, it was basically an idea that came up to us, because we had such an intimate knowledge of the whole project. We – when I say "we", I am talking about DGS, we had the ability to basically cover all aspects, technical aspects, being required. I just thought last night, when I was thinking about Friday and today, we had something like about maybe 10 or 12 specialist subcontractors, of which I can name but a few … they would not necessarily have the knowledge and/or the background to know all these specialised organisations. So, we had that added advantage that we could fast track the whole operation, and there was a substantial saving included in this whole operation, because they did not have to go through a lengthy tender process, and it was certainly their prerogative to decide whether they would like to negotiate with us, and/or put up a tender.

[81] Transcript (16 April 2018) p617-9.

MR VETTEN: And you said then that they negotiated with you, and you agreed terms and started the work, under Bombela?

MR ROSSOUW: That is correct."[82]

[129] Rossouw denied being party to any collusion on ORT in 2004 or any other time. In his view, if his partners in DGS were party to any collusion, he was not aware of it and they would have been acting without any authority from him.

[130] Under cross examination Mr. Phaladi, for the Commission, put to Rossouw, for his comment, statements made by Paul Segatto ('**Segatto**') in a settlement proposal put up by Rodio and which had been included in the trial bundle.[83] In that document, Segatto, on behalf of Rodio, sought to inform the Commission that he believed Rodio was party to the collusive conduct on a Gautrain DP2 project.[84]

[131] We find it unnecessary to repeat verbatim the contents thereof suffice to say that Segatto alleged that Rodio, Aveng, Dura and Geomech Africa (Geomechanics) were involved in what he considered to be conduct in contravention of section 4(1)(b).

[132] In paragraph 6.1 of that document, it is stated that: "*Geomechanics agreed to submit a non-competitive bid for the project as they had been given an opportunity to submit a winning bid as part of a consortium for the Gautrain DP2 contract in 2004. I understand the consortium in this bid consisted of Geomechanics, Diabor and Soiltech"*.[85]

[133] Rossouw confirmed that he was aware of this project and that it was the work DGS had done for Murray & Roberts discussed above.[86] Rossouw maintained

---

[82] Transcript (16 April 2018) p619-21.

[83] Rogel Joint Venture ("Rogel") and Rodio Geotechnic (Pty) Ltd 'Settlement offer to the Competition Commission titled: "FORM TO BE COMPLETED BY APPLICANTS REGARDING AN INVITATION TO THE CONSTRUCTION INDUSTRY TO ENGAGE IN SETTLEMENT OF CONTRAVENTIONS OF THE COMPETITION ACT" dated 2 March 2011 and stamped as received on 3 March 2011' hearing bundle p1056-1060.

[84] Rodio Settlement offer p1057.

[85] Rodio Settlement offer p1058.

[86] Transcript (16 April 2018) p764-769.

that he was unaware of any collusion as alleged by Segatto in his statement. As far as he was concerned DGS submitted a bid to Murray & Roberts and that was it. He was not aware who else might have submitted a bid to Murray & Roberts.

[134] At this juncture we find it necessary to point out that Segatto's statement was made in the context of Rodio seeking to settle the matter with the Commission and Segatto was not called to explain it. Thus, the evidence remains untested.

[135] Nevertheless, it is instructive to note that while at para 6.1 Diabor is mentioned, Segatto puts this as his 'understanding', not knowledge. Then at para 6.3 Segatto doesn't implicate Diabor as one of the parties to the collusion between Rodio, Aveng, Dura and Geomech Africa. Furthermore, in paras 7.1. and 7.2 of that same document Segatto provides details of all the individuals involved in the alleged collusion but does not mention Rossouw, who was the owner and face of Diabor at the time is not mentioned. [87]

DP 6

[136] On the DP6 project Jones testified that as ROGEL they had priced the project at R50million, but they were then informed by Dura that the "*joint venture price with Geomechanics was R60m*".[88] He and Segatto were of the view that this was excessive. He had several engagements with Rob Marsden from Dura who wanted them to cover them on R60million which they refused. He was called by Ian Oliver who pressured him to put in a tender of R60million which he refused to do. Although he was upset by the manner in which Ian Oliver spoke to him, he stood his ground and advised him that "*they (ROGEL) were putting in a price of R50m*".[89] Ultimately the project was awarded to Dura and Geomechanics.

[87] Rodio Settlement offer p1059
[88] Transcript (11April 2018) p146
[89] Transcript (11April 2018) p148.

[137] On the issue of Diabor's involvement in DP6, Jones testified that discussions took place between him and Segatto but that he spoke to the people he knew better such as the senior people at Dura and Franki. Segatto would speak directly to Dave Rossiter, the owner of Geomechanics and "*I am not sure if he spoke to Diabor, you would need to ask him that but he either spoke to Diabor directly or he spoke to Diabor through Geomechanics*".[90]

[138] Under cross examination Jones again confirmed that he had no personal knowledge of Diabor's involvement in DP6 as he relied on what Segatto conveyed to him. Furthermore it seems that Segatto did not attend all the meetings:

> *"MR JONES: Well on the DP6 project he was the one, as has been mentioned, who spoke to Geomechanics and Diabor and Sol Tech or he spoke through Geomechanics to those, and Geomechanics may have spoken to those other parties because of the DGS JV. In terms of the formal agreement Mr Segatto did not attend any of the meetings. I am not sure if he mentioned that, except one and it is noted somewhere that he attended one meeting that was an ad hoc meeting that in fact we had with – we were invited to a meeting by Stefanutti and Basson or Stefanutti Stocks as it became, and they asked us if we would be happy to show some compaction grouting work out on the grouting work out on the Gautrain project. So he attended that meeting but all the other meetings – and nothing materialised by the way from that. We agreed to disagree on that."*[91]

[139] The facts around Diabor's involvement in DP6 were further complicated because it was sold to Strydom in 2004. Strydom's evidence was that he, through a company called Amaris Drilling (Pty) Ltd ('**Amaris'**), bought Diabor during 2005.[92] Negotiations between Strydom and Rossouw for the sale of

---

[90] Transcript (11April 2018) p150.
[91] Transcript (13 April 2018) p551-2.
[92] Transcript (17 April 2018) p808-809.

Diabor had commenced in the course of 2004.[93] In support of Strydom's evidence a copy of the Sale of Shares Agreement was put up. The Sale of Shares Agreement between Amaris and Rossouw, in terms of which Rossouw sold his shares in Diabor to Amaris, was signed by Amaris on 23 August 2004 (but Rossouw had not yet counter -signed).[94]

[140] In terms of the Sale of Shares Agreement Rossouw was restrained from competing with Diabor for a period of 2 years.

[141] The sale of the business was concluded on 12 April 2005.[95] However Rossouw remained involved in the business as Managing Director. Rossouw resigned as Managing Director on 14 October 2005 and allegedly withdrew from Diabor operations.[96] However, Rossouw's resignation as an ordinary director of Diabor was only effective from 6 February 2006.[97]

[142] Strydom testified further that it was only in March 2005 that Rossouw disclosed to him that Diabor was involved in a consortium, namely DGS, in relation to the Gautrain project. In Strydom's assessment the project was not really going to be profitable for Diabor because the profits would be split amongst the consortium members.[98]

[143] After taking legal advice, the new owners of Diabor agreed that Rossouw could continue with this particular contract in his own name, notwithstanding the restraint of trade. A copy of the directors' resolution to this effect was put up.[99]

---

[93] Diabor (Pty) Ltd 'Answering Affidavit' (30 March 2011) hearing bundle p206 para 12.

[94] Diabor (Pty) Ltd 'Answering Affidavit' p207 para 13-14 and 'Annexure AA5' Sales of Shares Agreement between Amaris Holdings (Pty) Ltd and Hermanus Albertus Rossouw in respect of Diabor (Pty) Ltd (signed 2004) p 225-257.

[95] Diabor (Pty) Ltd 'Answering Affidavit' p211 para 33.

[96] Diabor (Pty) Ltd 'Answering Affidavit' p210, 212 paras 29 and 38.

[97] Diabor (Pty) Ltd 'Answering Affidavit' p210 para 29.

[98] Diabor (Pty) Ltd 'Answering Affidavit' p59 para 19, see also Transcript (17 April 2018) p811-12.

[99] 'Minutes of a Board Meeting of Diabor (Pty) Ltd dated 24 August 2005' hearing bundle p1062-1064.

[144] That resolution was included in minutes of a board meeting reflecting a discussion on 24 August 2005 that Diabor was excluded from DGS[100] and that Rossouw would bring this to the attention of the members of the DGS consortium.[101]

[145] Strydom testified that Diabor did indeed receive some sub-contracting work from DGS, the invoice date being October 2005. This was pursuant to the arrangement he had struck with Rossouw that Diabor might do some subcontracting work on the Gautrain at its discretion.[102]

[146] Rossouw, in his evidence largely confirmed the events set out by Strydom above.

[147] Although he was at times uncertain about dates, he confirmed under cross examination that he had resigned as a director of Diabor on 6 February 2006.[103]

[148] As to Rossouw's continued involvement in the Gautrain project, he submitted that he had decided to continue it in the name of Duma Investments (EDMS) BPK ('**Duma**'), another company owned by him and his wife.

[149] He claimed that he had advised the partners in DGS and the client of this new arrangement and that the D in DGS now stood for Duma and that they had no objection to it.[104]

[150] None of the consortium partners were called to testify. The document that was put up in support of his contention that Duma became the partner in DGS, was found to have been signed only in 2008 and by him alone.[105] At the same time however the Commission, other than relying on this 2008 document, did not

---

[100] Diabor (Pty) Ltd 'Answering Affidavit' p61-62 paras 26 and 37. Minutes of a Board Meeting of Diabor (Pty) Ltd dated 24 August 2005 p1062-1064.
[101] Minutes of a Board Meeting of Diabor (Pty) Ltd dated 24 August 2005 p1064.
[102] Transcript (17 April 2018) p884 and 892.
[103] Transcript (13 April 2018) p613.
[104] Transcript (14 April 2018) p676.
[105] Transcript (16 April 2018) p678.

lead a witness, although being afforded such opportunity, who could rebut Rossouw's claims.

[151] Under cross examination, Jones, the Commission's own witness, confirmed two significant aspects regarding Diabor. In the first instance Jones confirmed that he understood Diabor to be involved only at the *sub-contracting* level. This understanding accords with the evidence of Strydom and Rossouw that Diabor had decided to withdraw from the DGS consortium and take on sub-contracting work in its discretion. Second, Jones confirmed again that he had no personal knowledge of the discussions because he had relied on Segatto from Rodio for his information on Diabor and that he had ***inferred*** that they were party to a collusive discussion:

> "*MR JONES: Okay, let me try and answer based on what I think, I understand the question is. The mere fact that a JV has been formed to me, would not indicate that there is anything wrong with that, in any way. But, in this case, we are referring to the specific JV for Gautrain, where the JV was formed and collusive activity took place with that JV, or the JV members. I am not sure if that answers your question.*[106]
>
> *…*
>
> *MR KOTZE: I understand it, Madam Chair, but my question was, how was Diabor involved in DP 6?*
>
> *MR JONES: Okay. Diabor, according to the discussions that I had with Paul Segatto at that time, he was talking to the – to Geomechanics and Diabor as far as I know, as far as I can remember. Diabor were to be brought in on DP 6, not as a JV partner, but as a subcontractor, that is what I was told. A subcontractor to the JV of Dura-Geomechanics.*
>
> *MR KOTZE: On DP 6?*
>
> *MR JONES: On DP 6.*

[106] Transcript (13 April 2018) p462.

MR KOTZE: And you say that is the collusive conduct?

MR JONES: That is what I was told. So, from that I infer that they were involved with discussions with those two parties, and part of the collusive conduct.

…

MR KOTZE: Okay. Thank, you. So, I am purposefully not going to deal further with OR Thambo-Marlboro, but on DP 6, I think I have asked it and you have answered it, you now say that the involvement of Diabor was that, it would get subcontractor work out of DP 6?

MR JONES: That is what I was informed, yes. That is my recollection of what I was informed."[107]

Lesotho Highlands

[152] We turn now to consider the evidence on the Lesotho Highlands Water Project: a geotechnical drilling investigation, the closing date of the tender being 7 March 2007.

[153] Jones' evidence on this was that Diabor had drawn the tender documents for this project but had not submitted a bid for the work. This he suggested was a continuation of the agreement struck in 2006 where it was agreed that DGS would get the Gautrain work and Franki, Esor, Geomechanics, Diabor and Dura would stay out of future projects.[108]

[154] Jones' evidence was based on discussions he had with Segatto and from an email sent to him by Segatto that Diabor had been mentioned at the tender opening. Segatto in turn had gotten a report back from Joe Tavares who had

[107] Transcript (13 April 2018) p465 and 467.
[108] Complaint Referral p23-24 para 33.9.

attended the tender opening ceremony who had reported to Segatto that Diabor had not submitted a bid although it had drawn the tender documents.[109]

[155] Strydom's evidence on this was that they had wanted to bid, and even called a colleague to see the extent they could subcontract on the project. However, Strydom and his sons decided not to put in a bid because they evaluated the project as being too big and saw that there was some work to be done that they were unfamiliar with.[110]

[156] In support of this was an email sent by Strydom to the Commission Secretary of the Lesotho Highlands Water Commission on 6 February 2007 saying *thank you but no thank you*, for the opportunity to bid. This letter was put to Jones, who was asked to comment – he had no comment to give.[111]

Conclusion on Diabor

[157] Where does this leave matters then?

[158] As far as Diabor's conduct, as a whole, is concerned; recall that the Commission alleges that Diabor was only involved in adhoc arrangements. Hence its conduct could not be construed as a continuation of the formal arrangements prior to 2005.

[159] Could its conduct be characterised as an overarching or overall agreement? The Commission did not put up such a case. Instead, it relies on the 2008 date as the cut- off date for Diabor to avoid the application of section 67(1) in relation to the Gautrain project.

[160] As to the Middelburg and Cradock projects the Commission in argument did not press with these. We assume that this was because these occurred some eight years prior to the initiation of the Commission's complaint. In any event,

[109] Transcript (12 April 2018) p373.
[110] Transcript (17 April 2018) p817-9.
[111] Transcript (13 April 2018) p483-485.

Rossouw had denied any collusion on these and no other witness was called to break the impasse between Jones and Rossouw.

[161] Let us then consider the evidence in reverse order starting with the Lesotho Highlands project. The primary difficulty for the Commission here is that Jones' evidence that Diabor stayed out of this project as a *quid pro quo* for DP6 was based on an *assumption* by Jones that Diabor had agreed to the alleged collusive arrangement struck in 2006 on DP6.

[162] However, Jones' evidence, in the form of his assumption, of Diabor's collusive involvement on DP6 is based completely on what he was told by Segatto. Moreover, Jones did not know *as a fact* whether Segatto had obtained Diabor's agreement to collude on DP6 directly, or indirectly through Dave Rossiter. Instead, he simply assumed that Segatto *would have* spoken to someone to bring Diabor on board.

[163] Segatto was not called to explain how or whether indeed he had obtained Diabor's agreement. Dave Rossiter was also not called to explain his role in this.

[164] The Commission challenged Rossouw's claim that he had informed his partners in DGS of Diabor's withdrawal from the consortium and its replacement with Duma. But this version was challenged only on the basis of an unsigned document of Duma, despite the Commission being aware of Strydom's version since 2011 and being afforded an opportunity to rebut Rossouw's evidence. The Commission's own witness, Jones, was aware (albeit indirectly) that Diabor was only involved at a sub-contracting level thereby suggesting that this fact had been conveyed to DGS and others.

[165] The involvement of Diabor in the ORT collusion as alleged by Jones was put in dispute by Rossouw who had personal knowledge of the project.

[166] Jones conceded that he relied on Segatto for this information. In his evidence in chief, he went as far as saying "*you should ask him*" thus distancing himself from the alleged collusion on ORT as much as possible. But again, neither

Segatto nor Mark Laidlaw (assuming he was involved in these discussions), were called.

[167] The reliance placed by the Commission on Rodio's settlement proposal does not assist it. While Segatto mentions Diabor as part of the DGS consortium, he does not finger Diabor as a party involved in the collusive conduct on DP2. Rossouw confirms this was the ORT work done for Murray & Roberts, but disputes Segatto's claim that Diabor was involved in any collusive arrangements.

[168] The evidence relied upon by the Commission such as the Rodio, Dura and Geomechanics settlement agreements and included in the trial bundle which mention Diabor remains untested.

[169] While we do not wish to place too much reliance on this, it was rather surprising to hear counsel for Rodio during the hearings of the settlement agreement submit that Segatto persisted with his stance that he had no personal knowledge of the collusion.[112]

[170] Allegations of collusive conduct in contravention of section 4(1)(b) are of a serious nature. Firms charged with such accusations not only face the prospect of serious reputational damage but also dire consequences on the form of heavy penalties and possible criminal prosecution for directors.[113] The Tribunal is required to adhere to the Constitutional principle of legality and fairness, more so in cases when the evidence relied upon by the Commission is indirect or hearsay evidence.

[171] In this case we are dealing with hearsay upon hearsay evidence, with the Commission's chief and only witness conceding that all of his evidence regarding Diabor's involvement in the collusion was based either on what he was told by others or what he had assumed.

---

[112] Transcript (13 April 2018) p552.

[113] As contained in section 73A(1), (2) and (3) of the Act. However, we note that subsections (5) and (6) have yet to come into effect.

[172] While the Tribunal is not precluded from considering hearsay evidence,[114] the probative value that we accord to it is decided in the totality of the evidence before us.

[173] The Competition Appeal Court in *Gralio*[115] has cautioned that despite the Tribunal's discretion to accept hearsay evidence in its proceedings, it must ensure that the evidence so accepted constitutes sufficient proof of the allegations, especially so in the context of direct evidence to the contrary-

> *"While the Tribunal is not a Court of law, and is entitled to afford itself significant flexibility in its hearings, particularly with regard to the ordinary rules of evidence, it remains bound by the requirements of fairness. Crisply expressed, Tribunal hearings need to adhere to the principles of legality and its decisions must be founded on credible evidence. The flexibility allowed in its proceedings is not intended to permit abuse of the process…*
>
> *The Tribunal in this case, in line with the flexibility afforded in its proceedings, admitted hearsay evidence by Myburgh and Greeff. But whether such evidence constituted sufficient proof of the allegations made is a different issue, particularly in the context of Singh's evidence disputing participation in the cartel."*[116]

[174] All of the evidence put up by the Commission in relation to Diabor was not only of a hearsay nature but was based on hearsay upon hearsay and remained untested. Thus, we would exercise caution in relying upon such evidence. More so in the context of the direct evidence presented to us by Rossouw and Strydom.

---

[114] Section 55(3)(a) of the Act reads:

"*The Tribunal may accept as evidence any relevant oral testimony, document or other thing, whether or not—*

(i) it is given or proven under oath or affirmation; or

(ii) *would be admissible as evidence in cour*t"

[115] *Competition Commission of South Africa v Gralio (Pty) Ltd* (107/CAC/Dec10) [2011] ZACAC 7 (20 October 2011)

[116] *Gralio* at paras 47 and 48.

[175] No other direct evidence was put up by the Commission in rebuttal of Rossouw's and Strydom's direct evidence that Diabor was not involved in the alleged collusion although it had every opportunity to do so.

[176] In our view the Commission has not, on a balance of probabilities, discharged its onus to show that Diabor was involved in any collusive arrangements on the ORT, DP6 or the Lesotho Highlands projects.

[177] Hence, we find on a balance of probabilities that the Commission has not discharged its onus in respect of Diabor's involvement in the alleged collusion.

[178] Accordingly, the complaint referral against Diabor is dismissed.

REMEDIES

[179] We turn now to the issue of remedies in relation to Esorfranki.

[180] In its pleadings the Commission has asked that we impose an administrative penalty up to 10% of Esorfranki's turnover as contemplated in section 58(1)(a)(iii) having regard to the factors in section 59(3).

[181] However, by the time the matter was finally heard and argued, Esorfranki had been placed in business rescue.

[182] Mr Klopper confirmed that he was the business rescue practitioner for the Respondents, Esor Limited (First Respondent) Esor Africa (Pty) Ltd (Seventh Respondent) and the former[117] business rescue practitioner for Esor Construction (Pty) Ltd (Eighth Respondent). He is the appointed Receiver of Creditors for the Eighth Respondent.

[117] Business rescue proceedings in relation to the Eighth Respondent ended on 8 March 2019. (Johannes Klopper 'Affidavit' (20 May 2021) supplementary hearing bundle p3 para 13).

[183] The parties were permitted to make submissions on the imposition of an administrative penalty after closing argument.

[184] Klopper persisted with the position that none of the Respondents were able to pay a penalty.[118] Furthermore, Esorfranki had sold its geotechnical business which had been housed under Esor Construction (Pty) Ltd in 2013.[119]

[185] The Commission reached back to the last financial year in which Esor Construction (Pty) Ltd reported revenue from geotechnical being 2014.

[186] Based on the 2014 financial statements the Commission proposed a penalty as set out below.

[187] The affected turnover was identified as R724 052 000. (Step1)

[188] It proposed a basic amount of 15% being R108 607 800. (Step2)

[189] It then multiplied that by the duration of the cartel from 1999 to 2015, being 15 years[120] (Step 3) giving a figure of R1 629 117 000.

[190] In determining the cap, the Commission had regard to 10% of the turnover of Esor Group as at 28 February 2014 being 10%(R1 576 371 000) = R157 637 100.

[191] The amount of R1 629 117 000 clearly exceeds the cap provided in section 59(2). Hence it submits the permissible amount for a penalty would be R157 637 100.

[192] Thereafter the Commission considered mitigating and aggravating factors and applied a discount due to the Respondents' dire financial position to arrive at a proposed amount of R62 800 000.[121]

---

[118] Post the commencement of business rescue proceedings in August 2018 the Esor Group entities were and are all insolvent (Johannes Klopper 'Affidavit' p3 para 14.)

[119] Esorfranki 'Heads of Argument' para 19.

[120] Where 1999 and 2015 are not included, this is correct however, we notice that if the duration of the cartel was inclusive of 1999 and 2015 it would be 17 years (not 15). Given the outcome of the test we do not see reason to correct this step.

[121] This is a 39.838% discount.

[193] In our view while the six-step process set out above provides a useful guideline, it remains a guideline.

[194] The power to impose an administrative penalty, is a discretion bestowed upon the Tribunal. In *MacNeil*, the CAC held that–

> "*the imposition of administrative penalties is a matter entrusted by s 59(1) to the discretion of the Tribunal. The Tribunal is entitled, for the guidance of interested parties, to indicate the process of reasoning it will ordinarily follow in determining a penalty, provided the guidance is not inherently flawed and provided the Tribunal appreciates that it always retains a discretion which it cannot fetter, thus allowing itself to depart from its own guidelines in appropriate circumstances*."[122]

[195] Turning now to arrive at an appropriate penalty, we first have regard to the fact that this is a serious contravention. Cartel conduct is the most egregious offence in competition law, where harm to customers and consumers is assumed. This is why our Act treats such conduct as *per se* or strict offences under section 4(1)(b)(i)-(iii) where a respondent is not permitted to mount a defence once the conduct has been proved.[123]

[196] This was a cartel of long duration spanning 15 years. Esorfranki was a main participant if not a leader of the cartel. It formulated the rules of the formal arrangements and kept a scorecard.[124] The market had been cartelised for a long period of time with adverse consequences for customers. Add-on amounts paid by customers (loser's fees) were in some instances as high as R800 000.[125]

---

[122] *MacNeil* at para 78.

[123] See for example*, Pioneer Foods* at para 148.

[124] Transcript (13 April 2018) p540, 541, 548.

[125] Examples of add-ons 'Handwritten notes of a meeting dated 5 October 2000 entitled "Natal Story 1999/2000"' hearing bundle p.1274; Transcript (13 April 2018) p533-534.

[197] Esorfranki has previously been found to have contravened the Act in 2007 where it applied for leniency and paid a penalty in relation to the Lanxess Groundwater Remediation Project.[126]

[198] On the other hand, Esorfranki initiated a cessation of the formal arrangements as far back as 24 September 2005. During the course of these proceedings, it made several efforts to settle the matter with the Commission, having requested the matter stand down for such purposes in April 2018.

[199] The business implicated in the conduct no longer forms part of the group. The First Respondent is a shareholding company and although it was previously known as Esor, this entity, in which business activities took place, was active in the construction business only and as long ago as the early part of the 2000's and has since ceased such business activities.[127] The First Respondent was under a restraint of trade and was legally not permitted to tender or perform any work that would be in conflict with the terms of the sale agreement.[128] The Seventh Respondent is a property owning company with its own set of creditors.[129] None of the parties presently engaged in the Esor Group's management or business activities were involved in or have any knowledge of the activities forming the subject matter of this hearing.[130]

[200] The geotechnical turnover of the individual group companies for the financial year ended February 2016, R Nil.[131] Any claim that will be asserted by virtue of a penalty imposed on the Esor Group or any of the First, Seventh or Eighth Respondents individually will fall to be dealt as a concurrent/unsecured claim against the Esor Group in terms of the adopted business rescue plans in

---

[126] *CC v Esorfranki CO* (case number 016956) dated 22 July 2013.
[127] Esorfranki 'Heads of Argument' para 6.
[128] Esorfranki 'Heads of Argument' para 22.
[129] Esorfranki 'Heads of Argument' para 7.
[130] Esorfranki 'Heads of Argument' para 23.
[131] Esorfranki 'Heads of Argument' para 22.

relation to the Seventh and Eighth Respondents and the cause of action which arose before the commencement of business rescue provisions.[132]

[201] Mr Klopper, argued that if the Tribunal wishes to impose a penalty on the Esor Group or any of the either the First, Seventh or Eight Respondent individually will only serve to punish creditors and its few remaining employees, who are innocent bystanders, for alleged actions by parties who acted as such, some 15 years ago or more.[133] While we accept that a penalty imposed by this Tribunal might further dilute estimated amounts owing to creditors, this is not a factor that the Tribunal would ordinarily have regard to in its evaluation under section 59(3), and with good reason, so as to not create incentives for firms to simply drive themselves into business rescue in order to avoid paying a penalty.

[202] Nevertheless, while we appreciate the need for penalties to serve both deterrence and prevention,[134] this determination remains discretionary. Having regard to the protracted nature of these proceedings and weighing up all the factors listed above, we are of the view that an appropriate penalty in the circumstances would be **R15 700 000** million (fifteen million seven hundred thousand rands). This amount is arrived at by relying on the affected turnover in the 2014 financials of Esor Construction (Pty) Ltd, and amounts to 25% of the Commission's proposed penalty of R62 800 000.

[203] However as discussed earlier Esorfranki has undergone many changes. Before Esor Limited, there was Esor (Pty) Ltd.[135] By November 2006 Esor Limited, as it was at the time, had six wholly owned subsidiaries including Esor Geotechnical Engineering (Pty) Ltd which was subsequently renamed Esor Africa (Pty) Ltd. In November 2006 Esor Limited acquired the Franki Africa group, whereby Franki Africa (Pty) Ltd became a wholly-owned subsidiary of

---

[132] Esorfranki 'Heads of Argument' at para 20. The aggregate amount owing to creditors at present is circa R323,6 million. Based on a recent estimated outcome calculation the Receiver for Creditors of the Eighth Respondent projected that creditors may expect to receive some 1,5 (one comma five) cents in the rand.

[133] Esorfranki 'Heads of Argument' para 21.

[134] *Pickfords* at para 53.

[135] Esofranki 'Answering Affidavit' p56 para 5 and Bernard Krone 'Witness Statement' p1214 para 3.

Esor Limited. Sometime after this, Franki Africa (Pty) Ltd became Esor Construction (Pty) Ltd and Esor Limited changed its name to Esorfranki Limited. By November 2006 Esor Africa (Pty) Ltd and Esor Construction (Pty) Ltd were wholly owned subsidiaries of Esorfranki Limited. Later, by June 2015, Esor Africa (Pty) Ltd and Esor Construction (Pty) Ltd were wholly owned subsidiaries of Esor Limited, the name that Esorfranki Limited had reverted to again.[136]

[204] This was the reason why the Commission had sought to join the Seventh and Eighth Respondents. The Commission seeks relief against First, Seventh and Eighth Respondents with good reason given the myriad of changes the Esorfranki Group of companies has undergone. Accordingly, we find it prudent, in the context of this history of the Esorfranki Group, to impose the administrative penalty jointly and severally on the First, Seventh and Eighth Respondents.

[205] We thus make the order below.

[136] Competition Commission 'Supplementary Affidavit to Joinder Application' p1430 paras 14.1 to 14.4.

ORDER

The following order is made:

[1] Esor Limited, Esor Africa (Pty) Ltd and Esor Construction (Pty) Ltd contravened section 4(1)(b)(i), (ii) and (iii) of the Act.

[2] Esor Limited, Esor Africa (Pty) Ltd and Esor Construction (Pty) Ltd are ordered to pay, jointly and severally, an administrative penalty amounting R15 700 000 million (fifteen million seven hundred thousand rands) within 60 days of the date of this order.

[3] The Commission's complaint against Diabor (Pty) Ltd is dismissed.

Signed by:Yasmin Tayob Carrim
Signed at:2022-05-05 16:50:10 +02:00
Reason:I approve this document

Yasmin Tayob Carrim

Ms Yasmin Carrim **5 May 2022**
Date

Mr Andreas Wessels and Ms Medi Mokuena concurring.

Tribunal case managers:	Mpumelelo Tshabalala, Peter Kumbirai and Aneesa Ravat
For the Commission:	Nelly Sakata, Lebo Phaladi and Kriska-Leila Goolabjith
For Esorfranki:	Hans Klopper of BDO Business Restructuring (Pty) Ltd and Dirk Vetten, instructed by Mr Steven Thomson of Thomson Wilks Attorneys
For Diabor:	Adv Brook Stevens instructed by Chris Kotzé and Vidette-Sigrid Roux of Kotzé and Roux Attorneys Incorporated