COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No.: CR104Aug13

In the matter between:

THE COMPETITION COMMISSION	Applicant
And	
ARCELORMITTAL SOUTH AFRICA LIMITED	First Respondent
COLUMBUS STAINLESS (PTY) LTD	Second Respondent
CAPE GATE (PTY) LTD	Third Respondent
SCAW SOUTH AFRICA (PTY) LTD	Fourth Respondent

Panel:	E Daniels (Presiding Member) AW Wessels (Tribunal Member) M Mokuena (Tribunal Member)
Heard on:	16-19 July 2018; 11 June 2019; 26 June 2019; 28 June 2019
Order issued on:	18 August 2025
Reasons issued on:	18 August 2025

REASONS FOR DECISION AND ORDER

Introduction

[1] We note, right at the beginning that it is common cause that the alleged cartel conduct which formed the basis of this referral has ceased. It is a historic matter in that the conduct ended, according to the Competition Commission ("Commission"), already in 2008.[1] We now set out our reasons for the decision which we have reached.

[1] Founding Affidavit. Paras 25 and 27.

[2] This matter involves a complaint referred to this Tribunal by the Commission on 07 August 2013. In its complaint referral the Commission alleges that Cape Gate (Pty) Ltd ("Cape Gate") and the other Respondents, being ArcelorMittal South Africa Limited ("ArcelorMittal"), Columbus Stainless (Pty) Ltd ("Columbus") and Scaw South Africa (Pty) Ltd ("Scaw"), entered into an agreement or engaged in a concerted practice to fix the purchase price of scrap metal in contravention of section 4(1)(b)(i) of the Competition Act, 89 of 1998, as amended ("the Act").

[3] ArcelorMittal and Columbus have both admitted liability and have concluded settlement agreements with the Commission. These settlement agreements have been confirmed by the Tribunal.[2] Scaw was the leniency applicant for purposes of this complaint referral. Cape Gate denies that it contravened the Act. Therefore, the Commission seeks an order, declaring that Cape Gate has committed a prohibited practice in contravention of section 4(1)(b)(i) of the Act.

Background

The Relevant Products and Market Structure

[4] Before turning to the particulars of the Commission's investigation and findings regarding the complaint referral, we set out the relevant products and market in which the alleged conduct took place.

[5] The product forming the subject-matter of this complaint referral is scrap metal. Scrap metal is waste metal sourced from steel and aluminium cans, white goods such as fridges and stoves, small appliances and other metal items.

[6] Scrap metal is often collected for recycling and is used as an input in the production of steel products. The conversion process of scrap metal into steel is relatively energy efficient as compared to iron ore which is a substitute/supplement input into steel production.

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[2] *Competition Commission and ArcelorMittal South Africa Limited* (CR092Jan07/SA090Aug16) and *Competition Commission and Columbus Stainless (Pty) Ltd* (Case No: 020297).

[7] There are two types of scrap metal available in the market:

7.1. Ferrous scrap metal, a type of scrap metal containing iron which enables it to stick to a magnet. Examples of ferrous metal are heavy melt, structural steel and I-beams; and

7.2. Non-ferrous scrap metal, a type of scrap metal that does not contain iron and does not stick to a magnet. Examples of non-ferrous metal are copper, aluminium, non-magnetic stainless steel, brass and bronze. Non-ferrous scrap metal has more value in the market compared to ferrous scrap.

[8] There are various grades of scrap metal in the market, which are differentiated by size, cleanness, and chemistry. Scrap metal is also classified into processed and unprocessed scrap. Scrap metal is processed by manual torch cutting, bailing, shearing and shredding. Processed scrap metal is more expensive than unprocessed scrap metal.

[9] For purposes of the Commission's complaint referral, the Respondents are consumers of scrap metal and/or customers in the scrap metal market.

[10] The relevant market is, therefore, the market for the purchase of scrap metal in South Africa.

[11] The Respondents are all scrap consumers who purchase scrap metal from scrap merchants which they utilise as an input in the upstream market for the production of their steel products. In this regard, we note that:

11.1. ArcelorMittal is a primary producer of long and flat steel products in South Africa;

11.2. Columbus is a producer of stainless-steel products in South Africa;

11.3. Cape Gate is a primary producer of long steel products in South Africa; and

11.4. Scaw is a producer of long steel products in South Africa.

[12] Consequently, the Respondents are in a horizontal relationship as contemplated in section 4(1) of the Act by virtue of the fact that they are in the same line of business in the market for the purchase of scrap metal and in the upstream market for the production of steel products.

[13] For completeness, we note that the Commission has referred a separate complaint against the players in the market for the supply of scrap metal in South Africa – the scrap merchants.[3]

[14] The present complaint referral relates only to the conduct of the Respondents, more specifically, in this instance, Cape Gate, who are the largest consumers of scrap, as scrap consumers in the market for the purchase of scrap metal from scrap merchants.

[15] In other words, the Commission's case is that the Respondents, as the largest scrap consumers in South Africa, were in a buyers' cartel.

The operation of the alleged buyers' cartel

[16] On 21 December 2009, the Commissioner, acting in terms of section 49B (1) of the Act, initiated a complaint, against the Respondents, which was referred to the Tribunal.

[17] The Commission's complaint referral is based on the Commission's findings that in the period commencing in or about 1998 until at least 2008 the Respondents, being firms in a horizontal relationship, entered into an agreement, alternatively engaged in a concerted practice, as defined in the Act involving the restrictive practice of parties in a horizontal relationship directly or indirectly fixing the purchase price of scrap metal in contravention of section 4(1)(b)(i) of the Act.

[3] The conduct of scrap merchants (collusion) in the market for the supply of scrap metal is the subject-matter of a separate complaint referral to the Tribunal under case number CT 51/CR/Aug10.

[18] The Commission alleges that the cartel arrangements among the Respondents commenced in or about 1998 and continued until at least 2008. Essentially, the Respondents operated as a buyers' cartel in the market for the purchase of scrap metal.

[19] The principal objective of the buyer's cartel was to standardise and to coordinate the purchase of scrap metal by the Respondents based on a specific formula, a premium and the creation of a tier system which was agreed upon by the respondents These are discussed below.

[20] The buyers' cartel among the Respondents collaborated and acted in tandem with the upstream cartel of scrap merchants, alluded to in paragraph [13] above.

[21] The Commission found that the Respondents adopted a standard pricing formula and a standard premium which were the two main interrelated mechanisms used by the Respondents to coordinate the purchase of scrap metal from scrap merchants.

[22] The standard pricing formula was collectively negotiated and agreed upon by the Respondents and the scrap merchants and was used to determine the purchase price of scrap metal. The Respondents, on an annual basis, agreed among themselves on adjustments to the standard pricing formula and used the agreed adjustments to renegotiate the standard pricing formula with scrap merchants.

[23] The standard premiums (discounts) were agreed upon by the Respondents and the scrap merchants and were applied by different tiers of scrap merchants when selling scrap metal.

[24] The premiums were then structured as discounts off the formula price. The Respondents, on an annual basis, agreed among themselves the premiums to be applied by different tiers of scrap merchants and used their agreement as a basis for renegotiating the premiums with scrap merchants.

The Pricing Formula

[25] Between 1996 and 1998, discussions took place between the scrap consumers, on the one hand, and the scrap merchants, on the other, to develop a pricing formula for scrap metal. Following initial meetings and discussions, scrap merchants and the scrap consumers eventually agreed jointly that the standard pricing formula would be made up of the following components:

25.1. A three-week average of the international base price of Heavy Metal Scrap 1 (known as "HAMS"), which is published in the Metal Bulletin (ex-Rotterdam) on a weekly basis. In South Africa, HAMS is known as 205-grade scrap;

25.2. Multiplied by the average exchange rate over the corresponding period, to convert the Metal Bulletin price to South African Rand (yielding a “Rand Equivalent” price);

25.3. Less transport and FOB4 costs to reflect the cost of transporting scrap from the coastal ports to the inland region; and

25.4. Less a negotiated discount.

[26] The broad purpose of the formula was to take the international price of scrap metal and to adjust it back to an inland (or “Reef') export price. The Rand Equivalent price equates to a Rand price equivalent to the international (Metal Bulletin) price at the port.

[27] The FOB, transport costs and discount were intended to translate the Rand Equivalent price into a Reef price, to ensure that the scrap merchants would have no incentive to export scrap from the Reef.

[28] The standard pricing formula was renegotiated on an annual basis from around 1999. The annual renegotiation of the pricing formula had two phases:

28.1. Firstly, discussions took place, on the one hand, collectively among the scrap consumers only, and, on the other hand, collectively among the scrap merchants only, in each case to formulate and agree on their respective positions on the price components of the pricing formula; and

28.2. Secondly, the scrap merchants and the scrap consumers jointly met to negotiate and agree adjustments to the price components making up the formula.

[29] The Commission alleged that during the period of 1998 to 2008, the annual renegotiation of the pricing formula took place in the following way[5]:

29.1. The annual renegotiation of the standard pricing formula involved *inter alia* an exchange of correspondence, telephone calls, meetings and discussions. The meetings among the scrap consumers took place at various locations, for example at the Victoria Lake Club at Germiston, at Columbus' premises, at ArcelorMittal's premises in Vanderbijlpark, and at or after the meetings of the Ferrous Supply Committee of the South African Iron and Steel Institute ("SAISI").

29.2. Some of the representatives of the Respondents involved in the meetings and discussions included Mr Jake Olivier and Mr Rick Reato; Mr Dave Martin and Ms Ronel Bubb; Mr Coen Otto; and Mr John Bird and Mr Jackie Bucas who represented ArcelorMittal, Columbus, Cape Gate and Scaw respectively.

29.3. The pricing formula was initially administered by Ms Ronel Bubb of Columbus and later by Ms Freda Linsen of Mittal. Ms Freda Linsen resigned in 2006 and Ms Ronel Bubb again took over the administration of the formula.

29.4. After each annual renegotiation of the pricing formula, the schedule setting out the revised components of the scrap formula, which yielded a revised formula price for 205-grade scrap, was circulated to the large scrap merchants and the large scrap consumers by either Ms Ronel Bubb or Ms Freda Linsen.

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[4] FOB or "Free on Board" indicates the point at which a buyer assumes liability for the goods being transported.

[5] Founding affidavit. Paras 41 – 59.

29.5. Up to 2003, Ms Ronel Bubb circulated monthly updates of the formula calculation to reflect the change to the average Metal Bulletin price for that month and the resultant change to the formula price for 205-grade scrap.

29.6. The monthly updates were used by the large scrap merchants as the basis for their 205-grade scrap prices (and extrapolated to determine the price of other grades) when selling scrap metal to the Respondents.

29.7. In 2004, the monthly updates were no longer circulated, and the various scrap consumers and scrap merchants tracked the Metal Bulletin price and calculated the resulting changes to the scrap formula price themselves.

29.8. Between March and April 2005, a series of discussions took place between the scrap merchants collectively and the scrap consumers collectively aimed at agreeing on the 2005/6 adjustments to the standard pricing formula. Those discussions culminated in the scrap merchants and the scrap consumers collectively, on the 25 April 2005, reaching an agreement on the 2005/2006 price adjustment, a base price of R865 for the rest of the year and the adjustment of the transport costs to R167.47 for May.

29.9. The agreement of 25 April 2005 was preceded by discussions and agreement between the scrap consumers separately and the scrap merchants separately as to the adjustments to propose to each other.

29.10. Between 20 January 2006 and 06 April 2006, the scrap consumers held meetings to agree on the proposal to be made to the scrap merchants in respect of the price adjustments to the standard pricing formula for 2006/2007 which they communicated to the scrap merchants.

29.11. In or about May 2006 the scrap merchants and the scrap consumers agreed on the adjustments to the standard pricing formula for 2006/2007. The adjusted pricing formula applied for a year until 2007.

29.12. In or about January 2008, the scrap consumers held a meeting to discuss Reclam’s unilateral decision to stop using the Metal Bulletin list price, which had resulted in substantial input cost increases to scrap consumers. Mr Dave Martin (Columbus), Mr Nathan Friedman (Cape Gate), Mr Rick Reato (Mittal) and Mr Tony Harris (Scaw) attended this meeting. The discussions were aimed at getting Reclam to go back to the Metal Bulletin list price.

29.13. In or about late 2007 or early 2008, the differential between the local price of scrap and the export parity price had risen to approximately R700 per tonne. In order to try to close the gap, Reclam unilaterally announced that it would no longer be using the Metal Bulletin (ex-Rotterdam) list price as the base price for its scrap, but would be replacing it with the Tokyo Stock Exchange list price (“the TEX price”), which is the published price for scrap for Asia and the Far East. The TEX list price was at that stage approximately US$ 90 per tonne more than the Metal Bulletin list price. This resulted in Reclam’s prices rising significantly.

29.14. On 21 February 2008, Mr Nathan Friedman of Cape Gate held a meeting with Mr Tony Harris at Scaw’s offices to discuss the increase in the price of scrap that resulted from Reclam’s new pricing approach.

The premium (discount) arrangements

[30] The three largest scrap metal merchants - Reclam, Universal and Rand Scrap – also reached an agreement with the scrap consumers regarding the “premiums” that would be charged by the different “tiers” of scrap merchants for the sale of scrap metal, after the scrap consumers had collectively discussed and agreed upon a common approach to the discounts. The scrap consumers also agreed on a premium and a tier system in terms of which the scrap consumers paid prices based on the tiers in which the scrap merchants were located.

[31] The evidence relating to the standard premiums (discounts) are outlined fully in paragraphs 61 – 71 of the Commission's Founding Affidavit deposed to by Mr Tlabo Mabye, an analyst in the employ of the Commission, as follows:

"*61. In addition to arrangements pertaining to the standard pricing formula described above, the three largest scrap merchants - Reclam, Universal and Rand Scrap – reached an agreement with the scrap consumers regarding the "premiums" that would be charged by the different "tiers" of scrap merchants for the sale of scrap metal.*

62. The agreement was also reached on the basis that the scrap consumers collectively discussed and agreed a common approach to the standard premiums (discounts) and then met with the scrap merchants.

63. The scrap merchants were arranged into three (3) separate tiers:

63.1 Tier 1 comprised the largest scrap merchants, namely Rand Scrap, Reclam and Universal;

63.2 Tier 2 comprised Ben Jacobs Iron and Steel and Ton Scrap;

63.3 Tier 3 comprised the smaller scrap merchants.

64. The premiums were structured as discounts off the formula price described above. In terms of the agreed arrangement, scrap consumers paid:

64.1 the formula price to Tier 1 merchants;

64.2 the formula price less a set discount to Tier 2 merchants; and

64.3 paid the formula price less a larger discount to Tier 3 merchants.

*65. An example of the operation of the tier system appears from a document attached hereto and marked **TM4**. (not attached)*

66. The consequences of the structure of the premiums were, inter alia, that scrap consumers paid a relatively higher price for scrap purchased from Tier 1 merchants than that paid if scrap was purchased from Tier 2 merchants.

67. In turn, scrap consumers paid a relatively higher price for scrap metal purchased from Tier 2 merchants than that purchased from Tier 3 merchants.

68. The basis for relatively higher prices paid to Tier 1 merchants was that Tier 1 merchants had the capacity to guarantee security of supply in that they could meet all orders.

69. The merchant categories and the corresponding discount structure was negotiated and agreed by Reclam, Universal and Ton Scrap and scrap consumers in 1998. This structure was applied until January 2008.

*70. The size of the discounts payable to the different tiers of merchants, and the split between them, was varied from time to time and the revised tables setting out the calculation of the premiums / discounts were calculated from time to time until 2008. An example of the variation of the premiums appears in a note attached hereto and marked annexure **TM4**. (not attached)*

71. Similarly to the pricing formula, the scrap consumers met collectively, discussed and reached agreement or an understanding on adjustments to the size of the discounts and then negotiated with the scrap merchants."

[32] Mr Coenraad Christoffel Otto ("Mr Otto") who deposed to Cape Gate's Answering Affidavit was not called by Cape Gate to testify.

[33] However, in paragraph 23 of his Answering Affidavit, Mr Otto states with reference to paragraphs 61 to 67 of the Founding Affidavit that "*Save to admit that there were premiums, and paragraph 63, 64, 66 and 67, I deny these allegations*." It is necessary to deal with this aspect of Mr Otto's Answering Affidavit more fully.

[34] Mr Otto denies paragraphs 61, 62, 65 and also denies paragraphs 70-76 of the Founding Affidavit. In other words, Mr Otto denies that an agreement had been reached regarding the premiums and also denies that the Act has been breached.

[35] However, when one reads his admissions and his denials in the context of paragraphs 61 – 72 and 70 -76 of the Founding Affidavit, then his denials make no sense and must be rejected, especially as Cape Gate elected not to call him to give evidence.

[36] We must therefore accept and do accept the averments made in paragraphs 61 – 72 of the Founding Affidavit as being credible.

[37] Paragraphs 63, 64, 66 and 67 of the Founding Affidavit which Mr Otto denies, provide crucial details of the agreement reached between the parties in respect of the tier system and the premiums which were structured as discounts.

[38] Mr Otto acknowledges in paragraph 10 of his Answering Affidavit that "*The present complaint referral is only concerned with the conduct of scrap consumers in the market for the purchase of scrap metal from scrap merchants*" as stated by Mr Tlabo Mabye in paragraph 21 of the Founding Affidavit, but he denies that Cape Gate was a party to a prohibited horizontal practice even though he is aware that the complaint relates to an allegation by the Commission that Cape Gate together with the other scrap consumers contravened section 4(1)(b)(i) of the Act.

[39] Paragraphs 61 and 62 of the Founding Affidavit allege that an agreement was reached between the Respondents on the standard pricing formula and the premiums which were to be charged by the different tiers.

[40] It is inconceivable that Mr Otto would admit the existence of the tier system and that agreed premiums were applied but deny that an agreement had been reached on those matters when the essence of the complaint is that the Respondents had met to discuss the matters and had agreed on a common negotiating position. Cape Gate must have been a party to the discussions[6].

[41] We find, therefore, that an agreement as described by the Applicant existed between the Respondents and that Cape Gate was a party to the agreement and that section 4(1)(b)(i) of the Act was contravened by Cape Gate.

[42] If Cape Gate was not a party to the agreement, or had distanced itself from the agreement reached, then Cape Gate should have called Mr Otto to testify to give its version of the events which took place or used the cross-examination of the witnesses called by the Commission to dispute the existence of an agreement,[7] especially as Mr Otto admits the allegations made in paragraphs 44, 45, 46 and 47 of the Founding Affidavit and that he attended meetings and participated in the discussions, in paragraph 21 of Cape Gate's Answering Affidavit.

[43] The denial of the existence of an agreement between the Respondents presented Cape Gate with a dilemma.

[44] Had Cape Gate called Otto to testify he would probably have had difficulty in sustaining his view that no agreement had been entered into.

[45] To overcome this difficulty Cape Gate in its Heads of Argument state that "*Cape Gate (the third respondent) does not dispute, in general terms, the meetings, events, and*

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[6] *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 2 ALLSA 366 (A).

[7] *Omnico (Pty) Limited and Another v Competition Commission and Others* (142/CAC/JUNE 16; 143/CAC/JUNE 16: CR049 JULY 2012 at paras 55 – 58.

other communications pleaded by the Commission in which it is implicated (although there are certain communications which it does deny). It nevertheless denies that this conduct constitutes the alleged infringement of section 4(1)(b)(i) of the Act for the following reasons - …"[8] The reasons, amongst others, include averments that section 4(1)(b)(i) of the Act does not apply and that neither sections 4(1)(a) nor section 5(1) of the Act prohibit the conduct complained about, properly characterised, and are dealt with more fully later in these reasons.

[46] When Mr Martin who gave evidence on behalf of the Commission was cross-examined Mr Campbell on behalf of Cape Gate said to him that:

"*I am not going to ask you or challenge any evidence that you have given about meetings and emails and things like that; because in broad* terms *we agree with that. It's true that we do deny some dates and stuff like that. But at the end of the day, it really doesn't matter whether a meeting was on the 22nd of February or the 23rd of February, whether it was in Germiston or Vereeniging or anything like that. So we admit all of those contents (?) and you don't have to worry about defending any evidence on that score*."[9]

[47] Mr Martin stated in his witness statement that the "*large scrap* consumers *would meet to discuss those proposals (the proposals from the large scrap merchants) and reach consensus on the response which would be provided to the large scrap merchants*."[10] He also mentioned that on 6 April 2006, Columbus had hosted a meeting of the large scrap consumers to reach consensus on a collective view of the large scrap consumers regarding the adjustments to the pricing formula.[11] Mr Otto was present at that meeting.[12] Finally, he mentions with reference to a meeting between the consumers and the merchants where no specific conclusion could be reached, that the failure to conclude would usually entail scrap consumers meeting to reach consensus on a proposal to be put to the scrap merchants.[13]

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[8] Cape Gate's Heads of Argument. Para 2. Page 2.
[9] Transcript. Pages 49 and 50.
[10] Witness Statement: Mr David Philip Martin. Para 19. Pages 6-7.
[11] Ibid. Para 21. Page 7.
[12] Applicant's Supplementary Founding Affidavit. Para 13.4 and Mr Martin's witness statement page 7. Paragraph 21.
[13] Ibid. Para 22. Pages 7 – 8.

[48] Mr Martin's evidence and the failure of Mr Otto to testify reinforces our finding that the Respondents had reached an agreement in contravention of the Act, especially as Mr Martin was a credible witness.

[49] That is, however, not the end of the enquiry.

Exception Application, Supplementary Affidavit, and the Commission's case

[50] Cape Gate launched an exception application on 02 October 2013, to which the Commission filed a supplementary affidavit to its referral on 22 November 2013.

[51] Despite the filing of the supplementary affidavit, Cape Gate persisted with its exception on the grounds that:

51.1. The referral affidavits are vague and embarrassing; and

51.2. The affidavits lack averments necessary to sustain a referral.

[52] In respect of the first ground, Cape Gate submitted that the Commission's founding and supplementary affidavits were contradictory i.e. the allegation made by the Commission in paragraph 5 of its supplementary affidavit that "*at all material times the Respondents, in their capacity of consumers (therefore buyers of scrap metals, agreed to directly or indirectly fix the purchase price of scrap metal*" is contradicted by the allegations made in paragraphs 32, 34, 37, 40, 52, and 61 of the founding affidavit and paragraphs 7,8 and 9 of the supplementary affidavit.

[53] Essentially what the Commission sets out in these paragraphs is that the Respondents in some instances held meetings and discussions amongst themselves as competitors whilst in other instances the Respondents held meetings and discussions together with their suppliers (the scrap merchants) wherein they collectively negotiated and had an agreement on the standard pricing formula which was used to determine the purchase price of scrap metal.

[54] Cape Gate, therefore, alleged that it cannot determine from the Commission's papers what case it had to meet, specifically if the case is based on agreements allegedly concluded between scrap consumers or between scrap merchants or both.

[55] Cape Gate also argued that the allegations by the Commission that the Respondents and scrap merchants agreed jointly to the components of the pricing formula cannot be true because of the following reasons: the HAMS price is available from the metal bulletin and is not developed by anyone, the exchange rate is determined by banks, and for transport costs one would need somebody in the transport industry to find out the cost of transporting scrap metal from the coast to inland areas. Cape Gate further argues that even if there were discussions between the scrap merchants and the Respondents regarding the formula, it does not accept that the formula could be renegotiated and that those discussions could only have been irrelevant because there could never have been any impact on the price of scrap as alleged by the Commission. In respect of discounts, Cape Gate's submission was that although it accepts that negotiations of discounts can disclose an anticompetitive conduct, the Commission has failed to show a link between the negotiations and the price that was ultimately agreed.

[56] In relation to the second ground of exception, Cape Gate argued that in order for a complaint to be sustained under section 4(1)(b)(i) of the Act, it has to be alleged that an agreement or concerted practice was entered into by parties/firms in a horizontal relationship i.e. competitors and not by parties operating at different levels of the supply chain like the Respondents/scrap customers and scrap merchants/scrap suppliers as alleged by the Commission.

[57] The exceptions were dismissed by the Tribunal. We have dealt with the exception application because through the exception application, subsequent supplementary affidavit and papers filed in the course of this complaint referral it was clear that the essence of the Commission's case was that:

"*at all relevant times the Respondents, in their capacity as consumers (and therefore buyers) of scrap metal, agreed to directly or indirectly fix the purchase price of scrap metal."*

"This referral is related only to the consumers of scrap metal, the supply-side of the market being the subject of a separate referral, as stated in *paragraphs 20 and 21 of the referral affidavit*."[14]

[58] It is thus clear to us that the case that the Commission alleges is one of a buyer's cartel, which conduct is described in paragraphs 7-12 of the supplementary founding affidavit as follows:

"*7. As set out in the founding affidavit, the Commission contends that the Respondents adopted two main interrelated mechanisms in coordinating the purchase of scrap metal from scrap merchants and these mechanisms were framed under the following broad categories, namely:*

7.1 Discussions with scrap suppliers to negotiate a standard price formula and using that formula to determine the price of scrap metal; and
7.2 Discussions on premiums to be charged by different tiers of scrap merchants.

8. With regard to the standard pricing formula discussions, the Respondents *and scrap merchants collectively negotiated and agreed a standard pricing formula which was used to determine the purchase of scrap metal; and the Respondents on an annual basis agreed, amongst themselves as scrap [consumers], on an adjustment to the standard pricing formula and used the agreed adjustments to renegotiate the standard pricing formula with scrap merchants.*

9. With regard to the discussions on premiums the Respondents together with scrap merchants agreed on premiums that were applied by different tiers of scrap merchants for scrap metal. The premiums were then structured as a discount off the formula price

[14] Applicant's Supplementary Founding Affidavit, p2 at paras 5 and 6. Page 36 of the record.

and the Respondents on an annual basis agreed, among themselves, on the premiums that should be applied by different tiers of scrap merchants and used the agreements as a basis for renegotiating the premiums with scrap merchants.

10. It is the Respondents' conduct of discussing and agreeing or reaching an understanding amongst themselves, and then negotiating jointly as opposed to individually and independently with scrap merchants, on adjustments to the pricing formula and the premiums or discounts to be charged, which is the subject matter of the referral.

11. I refer inter alia to paragraphs 33, 48 and 71 of the referral affidavit that highlight the conduct on the part of the Respondents that is referred for adjudication.

12. The Commission does not allege that the act of concluding agreements between the Respondents and scrap merchants in itself constitutes a contravention of section 4(1)(b) of the Act, as such agreements would be vertical in nature".[15]

[59] In summary, the Commission contends that collective negotiations by the Respondents as competitors to directly or indirectly agree a purchase price for scrap, in contrast to individual and independent negotiations between each of them and each of the scrap merchants is prohibited by the Act.

Cape Gate's Defences

[60] As indicated above, Cape Gate does not dispute, in general terms, the meetings, events and other communications pleaded by the Commission in which it is implicated (although there are certain communications that it does deny). It nevertheless denies that this conduct constitutes the alleged infringement of section 4(1)(b)(i) of the Act for the following reasons:

[15] Applicant's Supplementary Founding Affidavit, pp 2-4. Pages 36-38 of the record.

60.1. The Act does not apply because the arrangements under scrutiny were pursuant to a non-commercial, socio-economic goal.

60.2. The conduct complained of is not conduct contemplated in section 4(1)(b) of the Act.

60.3. The Tribunal has already found that the scrap merchants fixed the prices in this period. They also dictated the price to the scrap consumers. This being the case, it is logically impossible for the scrap consumers to have done so.

60.4. The Commission and the Tribunal are precluded from visiting any adverse consequences upon the Respondents because the Department of Trade and Industry ("DTI") and the Commission, at all material times, were aware of the standard pricing formula, raised no objection to it, that this signified their approval of it, and the Minister of Trade and Industry then adopted it as a directive in terms of relevant enabling legislation, setting out a compulsory procedure. Cape Gate therefore acted entirely lawfully.

60.5. The conduct complained of, properly characterised, is not prohibited by either section 4(1)(a) or section 5(1) of the Act.

60.6. The price of scrap metal was, at all material times, determined by a formula, the largest components of which could only be objectively determined by reference to external data and therefore could not be determined, agreed or even influenced by the Respondents.

[61] These defences will be appropriately dealt with more fully below.

Legal Framework

[62] The Commission brought its case under section 4(1)(b)(i) of the Act. However, one of Cape Gate's defences is that the conduct referred to by the Commission in the complaint is more appropriately characterised either under section 4(1)(a) or section 5(1) of the

Act. We thus set out the legal framework for sections 4(1)(a), 4(1)(b)(i) and section 5(1) of the Act.

[63] Section 4 of the Act regulates the prohibition of restrictive horizontal practices by firms. Sections 4(1)(a) and 4(1)(b)(i) read as follows:

"*(1) An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if –*

(a) it has the effect of substantially preventing, or lessening, competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other procompetitive gain resulting from it outweighs that effect; or

(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;"

[64] To find a contravention under section 4(1), the following jurisdictional facts must first be satisfied:

64.1. There must be an agreement or concerted practice by firms; or

64.2. A decision must have been made by an association of firms; and

64.3. The firms involved must be in a horizontal relationship.

[65] Section 4(1)(a) pertains to a general agreement or concerted practice that has the effect of substantially preventing or lessening competition in the market unless pro-competitive gains outweigh that effect, while section 4(1)(b) pertains to specific types of conduct listed therein. Section 4(1)(b)(i) covers:

65.1. The indirect or direct fixing of a purchase or selling price; or

65.2. The indirect or direct fixing of any other trading condition;

65.3. Dividing markets;

65.4. Collusive tendering.

[66] Section 1 of the Act defines an 'agreement' as "*…a contract, arrangement* or *understanding, whether or not legally enforceable"* and defines a 'concerted practice' as a *"…co-operative or co-ordinated conduct between firms, achieved through direct contact, that replaces their independent action, but which does not amount to an agreement*".

[67] The Competition Appeal Court in *Netstar v Competition Commission*[16] distinguished an agreement from a concerted practice by stating that a concerted practice arises from the conduct of the parties which does not amount to an agreement while an agreement arises from the actions of and discussions among the parties to arrive at an arrangement which will bind them.[17]

[68] Specifically, according to the Supreme Court of Appeal ("SCA"), price fixing "*necessarily contemplates collusion in some form between competitors for* the *supply into the market of their respective goods with the design of eliminating competition in regard to price. That is achieved by the competitors collusively "fixing" their respective prices in some form. (By setting uniform prices, or by establishing formulae or ratios for the calculation of prices, or by other means designed to avoid the effect of market competition on their prices.)*"[18]

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[16] *Netstar (Pty) Ltd and Others v Competition Commission South Africa and Another* (99/CAC/MAY10).
[17] Ibid at para 25.
[18] *American Natural Soda Corporation & another v Competition Commission & others* 2005 (6) SA 158 (SCA) at para 48.

[69] The SCA also stated that *"There can be little doubt that an agreement by competitors that has as its specific design the elimination of price* competition *(the essential characteristic of a cartel)*[25] *constitutes direct price-fixing as contemplated by the statute. Where competitors have reached an agreement to set uniform prices, without more, all that might be required in order to establish a transgression of s 4(1)(b) is to produce their agreement, because its very terms may admit of no conclusion but that it was designed to eliminate price-competition.*[19]

[70] There is no South African precedent on direct or indirect fixing of purchase prices in terms of section 4(1)(b)(i) involving a buyers' cartel. The OECD Purchasing *Power and Buyers' Cartels, OECD Competition Policy Roundtable*[20] acknowledges that:

70.1. *"by* agreeing *to act in a coordinated* manner*, purchasers forming cartels reduce competition between them"*[21]*;*

70.2. many jurisdictions *treat buyers' and sellers' cartels symmetrically. As a conspiracy against the competitive process, many jurisdictions do not require analysis of the effect of a buyers' cartel to find an infringement, as the effects are presumed to be harmful by law."*[22]

70.3. *"*Generally*, the treatment of buyers' cartels as a per se or by object infringement appears to be* unrelated *to whether or not the buyers also competed as sellers, with the focus in most jurisdictions being on the <u>forming of an agreement for the purposes of fixing prices or other parameters of competition</u>."* (our emphasis).[23]

[71] In the European Union, Article 101 of the Treaty of Functioning of the European Union, akin to our section 4(1), prohibits arrangements that directly or indirectly fix purchase or selling prices. In other words, Article 101 extends to buyers' cartels.

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[19] Ibid, p178 at para 52.
[20] *OECD (2022), Purchasing Power and Buyers' Cartels, OECD Competition Policy Roundtable* 22 June 2022.
[21] Ibid, p16. Subsection 3.1.
[22] Ibid, p17. Subsection 3.1.1.
[23] Ibid.

[72] This position is affirmed in the book by Richard Whish[24], entitled Competition Law 8th Ed at page 563 as follows:

"*(vii) Buyers' cartels*

Buyers' cartels are also caught by Article 101(1). In Spanish raw tobacco (citation excluded) and Italian raw tobacco (citation excluded) the Commission found tobacco processors had colluded on the prices and other trading conditions that they would offer to tobacco growers and other intermediaries; on the allocation of suppliers and quantities; on the exchange of information in order to coordinate their purchasing behaviour; and on the coordination of bids for public auctions. The Commission considered that the buyers' cartels had an anti-competitive object (citation excluded), even though an agreement to pay lower prices than might have been paid in the absence of the agreement might have been expected to lead to lower prices for consumers. <u>*It is not necessary that consumers be deprived of price competition for there to be an infringement by object*</u> *(citation excluded). In the Commission's view an agreement on purchasing eliminates the autonomy of strategic decision-making and competitive conduct, preventing the undertakings concerned from competing on the merits and enhancing their position vis-à-vis less efficient firms (citation excluded)."* (our emphasis)

[73] The OECD referred to a more recent decision. In 2020, the European Commission issued an infringement decision against a buyers' cartel, against purchasers on the Ethylene merchant market. Ethylene is a chemical used in the production of materials, such as PVC.

[74] Three companies were fined, with a fourth being granted immunity as a leniency applicant.

[75] It was found that ethylene is often purchased under supply contracts that include pricing formulas based on an industry price reference called the "monthly contract price". Between 2011 and 2017, the purchasers coordinated strategies when dealing with

[24] Competition Law. 8th ed. Page 563. See 172, 173, 174, 175 and 176.

ethylene sellers to decrease the monthly contract price. This included exchanging pricing information during negotiations with sellers.[25]

[76] From the above, it is clear that buyers' cartels find application under section 4(1) of the Act.

[77] Section 5(1) of the Act states the following:

"*(1) An agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive, gain resulting from that agreement outweighs that effect.*"

[78] Section 1 of the Act defines a vertical relationship as one "*between a firm and its suppliers, its customers or both*". In other words, these firms would conduct their respective operations in different levels of the supply chain e.g. wholesaler and retailer, retailer and consumer.

[79] Section 5(1) prohibits agreements between firms in a vertical relationship if that agreement will have an adverse effect on competition. The onus to prove an adverse impact on competition rests on the complainant. However, section 5(1) like section 4(1)(a), also permits the respondent firm to raise a pro-competitive defence to rebut a complainant's prima facie case. It follows that once the complainant has established a prima facie case, the burden of proof shifts to the respondent to assert its efficiency or pro-competitive defence. Should it fail to do so, it may be concluded that the respondent has contravened section 5(1).

[25] OECD (2022) Purchasing Power and Buyers' Cartels. OECD Competition Policy Roundtable Background Note. Box 5. p20. Decision referred to: Summary of Commission Decision of 14 July 2020 relating to a proceeding under Article 101 of the Treaty on the functioning of the European Union (Case AT.40410 – Ethylene**).** See also: Clariant and Clariant International v. Commission ("Clariant v. Commission") (Case T-590/20) EU:T:2023:650.

Arguments & Evidence

[80] The Commission presented the factual evidence of Mr David Phillip Martin (Mr Martin) of Columbus and Mr Laurence Erasmus (Mr Erasmus) of Scaw.

[81] Cape Gate presented the expert economic evidence of Mr Richard Murgatroyd (Mr Murgatroyd) and the factual evidence of Mr George Frederick Herselman (Mr Herselman).

[82] Mr Martin was the first witness called by the Commission. He testified about the meetings which were held with the Department of Trade and Industry ("DTI"), the scrap merchants, the exchange of documents and scrap supply and related issues.

[83] Mr Martin was the CEO of Columbus and was also involved in the purchase of raw materials in the stainless-steel operation which includes scrap metals, ferrochromium and nickel which can be up to 70% of the cost of production. Generally, in the stainless-steel industry the CEO takes responsibility for high level procurement of raw materials.

[84] Columbus purchased scrap mainly from New Reclamation Group, which was the largest scrap merchant in the country and supplied between 50-80% of Columbus' scrap requirements and was the only scrap merchant capable of supplying the quality and volumes required by Columbus.

[85] It was cheaper to source scrap from within South Africa, but in times of shortages, Columbus would have to import scrap which entailed logistical and other problems. Generally, Columbus worked with the scrap merchants to ensure a constant supply of scrap but would at times have to look beyond their normal suppliers for scrap.

[86] The large scrap consumers, Mittal, Scaw, Cape Gate and Columbus, and the large scrap merchants, Reclaim Scrap, a division of Scaw, Universal Recyclers, Ben Jacobs Iron and Steel and Ton Scrap, held meetings and discussions and made arrangements to negotiate a price formula and to use that formula to determine the price of scrap. They

did the same in respect of the premiums charged by the large scrap merchants for scrap metal.

[87] According to Mr Martin, in the mid ‘90’s a joint body of consumers purchased scrap on behalf of the consumers. That stopped towards the end of that decade. About that time, the export business increased substantially and favoured scrap merchants who could export. The scrap consumers felt starved of scrap at times because of the exports and various discussions took place to address that issue.

[88] Columbus negotiated prices with Spoornet, based on what Spoornet could earn for the sale of scrap in the export market to retain Spoornet’s scrap in South Africa. In the early 2000’s Columbus was approached by the largest scrap merchants to enter into an arrangement to pay an export achievable price, less a discount to guarantee supply and volume of products to Columbus.

[89] All the other consumers had also been approached and a formula was finalised. The Metal Bulletin published weekly in Rotterdam, assuming a Grade ESRI 205 in South Africa, was multiplied by the rand / dollar exchange for a determined period. The FOB costs and the costs of transport from Durban to an inland site were subtracted from that figure to arrive at a reference price for a grade of scrap. A discount was also negotiated separately by each consumer which ensured that the consumers received a competitive international price, and the merchants were assured of buyers and did not, therefore, experience the logistical and cash flow problems associated with exporting a large amount of scrap.

[90] The discussions started in 2000, and the parties agreed on the formula to generate a reference price for the various grades of scrap. The discount structure seemed simple, but was in fact very complex, as merchants required a certain price to cover their overheads and only agreed on a discount above a certain fixed level. On an annual basis the scrap consumers would consider the extent to which they could allow the fixed price to increase, and the scrap merchants would indicate what they wanted. Discussions also took place on a sliding scale discount, depending on the price. The higher the price, the bigger the discount.

[91] Theoretically, according to Mr Martin, the negotiations should have taken place on an annual basis but there were lots of intermediate negotiations as issues arose. Technical issues also arose because some consumers wanted more stock and would accept a lower grade but pay a higher price and that resulted in prices all round which necessitated more meetings to regularise the prices.

[92] In most cases the material purchasing managers at Columbus, Cape Gate, Mittal and Scaw would meet to consider the mechanics and the numbers of the process. The merchants would present a joint proposal, and the consumers would present a counter proposal and then the parties would try to find a middle road. The consumers arrived at a counter proposal by holding meetings, sending emails and making telephone calls.

[93] The DTI only in 2003, five years after the agreement commenced, became involved on a formal basis in the discussions around the pricing formula, the discount and the elements of the formula. The aluminium producers were concerned about the amount of aluminium being exported because that created a shortage of material for beneficiation locally.

[94] The DTI called a meeting of all scrap users and the various scrap associations to find a mechanism to keep and beneficiate scrap in South Africa, in line with the DTI's metals policy to beneficiate and increase manufacturing locally.

[95] Mr Martin explained that to stop the export of scrap the exporters had to be offered a price which would discourage them from exporting scrap. In the sub-committee of the ferrous scrap consumers and merchants, a proposal was made on the export achievable price with a discount as a reference price to offer a person who wanted to export. The principles which underpinned the proposal were the same as those already in place.

[96] The DTI's level of involvement was limited to achieving the objectives of preventing most scrap from being exported from South Africa. According to Mr Martin, the DTI was not fully aware of the discussions which took place amongst the merchants and consumers to reach a price for scrap but confirmed that the DTI was told that an export achievable

price was in place to ensure that the local consumers had sufficient volume of quality scrap.

[97] A tier system was also discussed and agreed upon between the consumers and the merchants in the same way as they did on the pricing formula. The delegated representatives of the consumers would meet to discuss a uniform position to adopt in the negotiations with the merchants, either annually or on an ad hoc basis.

[98] When asked by Mr Maenetje, counsel for the Commission, how significant the three elements of the formula were in the negotiations, Mr Martin gave an enlightening reply. He said, "*Chair it's difficult to rate significance, in the tight margins in the steel industry any rand is significant so it was a case of fighting for every possible rand to get the lowest input price which gave us the right quality and the right supplier*."[26]

[99] He explained that for the period of the agreement, a reference price would be published and would be used for scrap purchases made the following month. Based on that price, consumers would then purchase whatever scrap they required.

[100] The pricing formula replaced one-on-one negotiations by each of the scrap consumers/buyers with each of the five scrap merchants. Any other negotiations with other merchants would be individually negotiated by the consumers. Two types of negotiations took place: negotiations on behalf of the consumers collectively using the pricing formula and one-on-one negotiations between individual consumers and scrap merchants whenever those individual consumers required extra scrap.

[101] It is also apparent from Mr Martin's evidence that the collective bargaining on the part of the consumers was designed to obtain the lowest input price from the merchants, which theoretically could be passed onto the public in the form of lower prices but there is no evidence to suggest that that actually happened.

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[26] Transcript, p23. Lines 8 -11.

[102] The merchants had the upper hand in the negotiations with the consumers, because they could export and achieve a higher price for their scrap, if the consumers were not prepared to pay the merchants a better price.

[103] When the DTI proposed an export permit system, to ensure that beneficiation took place locally and that local consumers had an adequate supply of scrap, it was generally agreed that the merchants should receive a price which would not prejudice them too much. In any event, if the merchants were simply prohibited from exporting, then the consumers would call the shots regarding the prices.

[104] After the introduction of the formula, the availability of scrap for the local market improved, although shortages did occur occasionally. Mr Martin confirmed that the parties achieved an export achievable price compared to (local) prices and that the arrangement ensured that local scrap consumers had sufficient domestic scrap for production purposes from 2000/2001 through to 2006.

[105] This had been negotiated jointly between the consumers and the merchants.

[106] According to Mr Martin, the DTI became aware of the pricing formula and set up a committee, the Scrap Metal Export Permits Policy Implementation Committee. The policy formulated by the DTI included references to pricing levels designed to keep scrap in the country to assist with the growth of scrap consuming value adding industries. The pricing formula had been negotiated as early as 2000, was still in operation in 2003 and was, in terms of the 2006 policy to be renegotiated, to avoid a ban on the export of scrap.

[107] The first meeting in about June 2003 was convened by and chaired by the DTI to consider the scrap supply issues and was also attended by two staff members of the Competition Commission ("Commission") who were introduced at the meeting as observers.

[108] At a meeting held on 24th July 2003, staff members of the Commission were again present. Although there was some uncertainty about the numbers, there were between two and five staff members present at the various meetings referred to.

[109] They attended as observers but it’s unclear what they actually wanted to observe although there was some, albeit minimal, participation by them, as the staff members of the Commission appear to have commented on at least two issues.

[110] Mr Martin also confirmed that the scrap merchants and the scrap consumers worked on a pricing formula from about 2000 through to 2003/4 and that the discussions were initiated by the merchants. Although the intention was to hold an annual review of the specific elements of the price formula, numerous day-to-day issues arose and had to be addressed. These included grading and supply issues as the merchants withheld scrap to obtain a higher price the following month.

[111] Although the DTI Proposed Policy on Scrap Metal Export Permits was supposed to be implemented on 1 August 2003, the deadline for the implementation was always postponed because of objections or because additional work had to be done in connection with the implementation. Minister Erwin, the then Minister for Trade and Industry had signed a policy document in 2003, which formed the basis for meetings with the DTI to discuss the export permit or scrap export permit implementation, but the policy was withdrawn because it was challenged. The DTI did indicate that it would consider a new policy relating to the export of scrap.

[112] Mr Martin confirmed that the pricing formula was consistently applied by the merchants and the consumers from about March 2001 through to mid-2006. During this time, they also held discussions with the DTI regarding the export of scrap. Although the details behind the calculations and the negotiations were not disclosed, from his perspective, the agreement on the export achievable price was disclosed to the DTI, as it formed the basis of their proposal to limit the amount of scrap that was exported.

[113] When asked pertinently by Mr Maenetje whether they had told the DTI that they had a solution which they had been implementing since 2001 through price coordination, he not only confirmed that they had, but also stated that the DTI picked up on that quickly and may have suggested that other scrap groups do the same. He also mentioned that the Commission would have had copies of the proposal from the sub-committees and

assumed they would have had sight of the slides put up by the DTI on the formula price at the meeting of December 2003.

[114] He also confirmed that the merchants approached the consumers who would first individually consider the matter and, thereafter, jointly consider the matter as a group of consumers. The presence of staff members of the Commission in the meetings gave him a measure of comfort because they were aware of a pricing formula, even if they did not say categorically that it was okay.

[115] Mr Erasmus, who was responsible for the procurement of raw materials which included scrap for Scaw also testified. Scaw, which also had a scrap processing operation, had a long steel manufacturing business which competed with Cape Gate and with Mittal.

[116] He was aware that Scaw had confessed to colluding with Mittal and Cape Gate. He had inherited the pricing formula used in the industry but was not a party or privy to the development of the pricing formula structure. He had been informed by the CEO of Scaw at the time, Mr Tony Harris and Mr John Bird, also of Scaw, that the large scrap consumers and merchants had approached the DTI for assistance to try to control the export of scrap.

[117] In 2005 and 2006 he did become involved in the discussions with consumers and merchants who were trying to formulate a proposal on the control of scrap to submit to the DTI which had requested the industry to come up with such a proposal. However, there was difficulty in obtaining consensus on the issue. He confirmed that prior to his involvement there had, over the years, been discussions between the consumers, merchants and the DTI to address the concerns which the consumers had about the export of scrap.

[118] According to him, the merchants were not too concerned about the final price of the scrap because they focused on securing volume and managing their margins. Mr Erasmus explained as long as the merchants could secure the volumes which the consumers required and as long as they could secure the profit margins they required;

they were not too concerned about the final selling price of scrap. On the other hand, the consumers were very concerned about the price at which they would buy scrap.[27]

[119] Mr Erasmus explained the tier system, which was comprised of three tiers, viz., 1, 2 and 3 in detail:

119.1. Tier 1 consisted of Reclamation Group, Universal Scrap and Rand Scrap which were the very large scrap merchants.

119.2. Tier 2 consisted of Ben Jacobs and Ton Scrap.

119.3. Tier 3 were all the other scrap merchants, in other words the smaller scrap merchants.

[120] Mr Erasmus described the relationship between the consumers and merchants as "important" and "symbiotic." The consumers needed the big discounts which they could only obtain from the merchants, if they bought the bulk of the scrap which the merchants had, because the merchants, in turn, could source scrap in the market at prices which were low enough for the merchants to secure their margins.[28] Specifically, with reference to Scaw, he explained that "*So it was a very important relationship which developed between the large consumers and the large suppliers. So for example in Scaw's case, more than 80% of Scaw's scrap came from the large suppliers, the Tier 1 suppliers that secured the volumes for Scaw and it also secured the large discount that Scaw required to make its business financially viable*."[29]

[121] The Tier system resulted in the Tier 2 suppliers being paid a lower price than the Tier 1 suppliers, while the Tier 3 suppliers received less than that paid to the Tier 2 suppliers for their scrap. It suited the consumers to buy cheaper scrap because that enabled them to focus on "*the weighted average input cost of scrap*."

[27] Transcript, p245. Lines 14 -23.
[28] Ibid.
[29] Ibid.

[122] The Tier 2 and 3 merchants compensated the Tier 1 merchants, if they "*poached scrap from a Tier 1 supply channel*." This was an arrangement between the merchants.[30]

[123] The pricing formula itself was based on various factors. These were the HMS price published by the Metal Bulletin, the rand/dollar exchange rate, the fobbing costs, FOB costs and inland transport costs and the negotiated discount. The fobbing costs (FOB costs and the inland transport costs) were deducted from the rand price to arrive at a FOB South African price of scrap.

[124] Mr Erasmus confirmed that the components of the pricing formula were not static but were changed through collective negotiations. According to him, scrap constituted between 50-60% of the total cost of manufacturing a long steel product so any small saving in price would have an enormous impact on the final cost of the product especially as Scaw purchased between 40 and 50 000 tons of scrap a month.[31]

[125] He also confirmed that the scrap consumers met to discuss and formulate a position which would be used in the discussions with the scrap merchants.[32]

[126] The consumers were used to "*keep the Tier 2 and 3 merchants in their places*", according to Mr Erasmus[33]. This indicates that the conduct of the scrap consumers affected the market structure at the merchant level.

[127] These tier merchants could only secure large volumes of scrap outside of their natural sourcing regions if they could buy scrap which would normally be bought by the Tier 1 merchants. To purchase such scrap, they would have to pay higher prices and could only pay higher prices if the consumers paid them (Tier 2 and 3 merchants) prices which were higher. This again illustrates how the conduct of the scrap consumers assisted in maintaining the market structure and market positions of the scrap merchants; it affected the ability of the smaller merchants growing relative to their larger competitors.

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[30] Ibid, p249. Lines 2-7.
[31] Ibid, p253. Lines 14-22.
[32] Ibid, p254. Lines 16-25.
[33] Ibid, p262. Lines 4-5.

[128] Two of the Tier 2 merchants, Ben Jacobs and Ton Metal may have been aware that the prices they received for their scrap were lower than those paid to Tier 1 merchants and threatened to export scrap. Mr Erasmus confirmed, though, that the Tier 1 merchants supplied up to 80% of the consumers' requirements.

[129] In 2006, Mittal announced that they were no longer going to participate in consumer meetings. Despite Mittal's withdrawal, the application of the formula continued and was administered by Ms Ronel Bub of Columbus who, each month, communicated the formula pricing to the consumers.

[130] Mr Erasmus's role in the scrap business at Scaw ended in March 2007, but he confirmed that the formula still applied at that stage, although discussions had not yet commenced on the arrangements for 2007.

[131] Reclam withdrew from the arrangement in about 2008 and adopted a new pricing approach which resulted in an increase in the cost of scrap.

[132] Mr Erasmus confirmed that he was familiar with the government's current scrap export permit policy. ITAC publishes the discounted scrap prices, for each grade of scrap, which the consumers have to pay. Although the industry complies, the policy, according to him, does not work.

[133] Mr Erasmus confirmed that the various components of the formula were based on information obtained locally and internationally and reflected the "*reality as closely as possible*" and that the final price was the outcome of the negotiations between the consumers collectively and the merchants.

[134] When asked by Mr Maenetje whether the consumers would have received a similar price to the one negotiated collectively by the consumers with the merchants, Mr Erasmus said that he did not think it would be possible, as the necessity for the arrangement that was in place was to secure a very large discount against the export achievable price. The arrangement was premised on the basis that with the consumers' support the merchants would be able to maintain their margins.

[135] Mr Murgatroyd, an economist, testified on behalf of Cape Gate and said that the Commission's case is about an object infringement or a per se prohibition. Mr Murgatroyd explained that economists acknowledge that such an infringement will give rise to anti-competitive effects, so it is unnecessary to prove anti-competitive effects. He submitted that one would have to look at the factual, legal and economic context to try and understand whether the conduct in question is actually an object infringement.

[136] He focused on the economic context surrounding the alleged conduct to ascertain how the two relate to each other to determine whether the conduct amounts to an object infringement. To do that he had to understand the market for the supply of scrap, the dynamics in that market and the merchants.

[137] The merchants could either supply the domestic market with scrap or export the scrap, a point made by the Commission's factual witnesses as well. The import of scrap is limited because of the high costs involved. However, South Africa is structurally long on scrap as more scrap is being produced than could be consumed.

[138] According to Mr Murgatroyd, the suppliers of scrap have significant alternative options for selling their scrap and possess a materially stronger bargaining position than the buyers of scrap, because the strength of the bargaining power is determined by the outside options which they have. The suppliers have the option to export and face an opportunity cost when supplying domestically, but local buyers have poor outside options.

[139] The opportunity cost is the money a supplier could make if the supplier exported the scrap – the money the supplier could make if the supplier sold it to someone else internationally. Therefore, in economics terms, the supplier is going to be unwilling to supply a domestic customer unless that customer pays a price which is equal to or greater than the opportunity cost. A firm behaving rationally, to maximise profit, would export the scrap. He explained that what the suppliers wanted was the export parity price, which is the price which would be realised in the export market, less the costs of exporting. A discount would also be applied to the final price.

[140] While Mr Murgatroyd was giving his evidence regarding the discounts and the manner in which the export price is calculated, Mr Maenetje objected strongly to his evidence, arguing that Mr Murgatroyd is an expert witness, but was giving factual evidence which he cannot do. Mr Maenetje suggested that Cape Gate was trying to introduce factual evidence through the back door, as it had elected not to call a factual witness itself (that could be cross-examined). The only factual evidence led on the price and the discounts was that of Mr Erasmus. Mr Maenetje, though, stated that the Commission was not acquiescing to Mr Murgatroyd purporting to be a factual witness, but did not object to the line of questioning. On that basis, we allowed Mr Murgatroyd to continue with his evidence regarding the price and the discounts applicable.

[141] We do not deem it necessary to deal in any detail with the export parity price, the actual prices negotiated between the consumers and the merchants and the discounts because those were common cause during the hearing and the export parity price was based on information which was readily available.

[142] When asked whether the fact that Cape Gate was a buyer of scrap and not a seller of scrap made any difference, he replied that when sellers co-ordinate their actions they do that to obtain higher prices, but when buyers co-ordinate their actions they do so to get lower prices. When sellers co-ordinate it’s bad for the consumers because prices increase, but when buyers do so, the input costs are lower and output increases which results in lower prices which is good for consumer welfare.

[143] According to him, there is a legitimate economic debate about whether buyer conduct could constitute an object infringement. If buyers got together to restrict purchasing and produce less, that would be bad for consumer welfare, as the prices of the goods would be higher. That would be monopsonist behaviour which he did not think the consumers, including Cape Gate had engaged in.

[144] There was a shortage of scrap, and the consumers wanted more scrap. They wanted to buy more which is at odds with monopsonist behaviour. The conduct of the consumers in this instance is closely aligned with that of a buyers’ group which comes together to

negotiate better prices. However, he conceded that whilst that could be good for consumers, it could also harm competition and the effects would have to be assessed.

[145] The pro-competitive benefits are the reduced costs and increased inputs, in this case, the increased availability of scrap which leads to more production of steel and lower prices for the steel products. General economic theory indicates that in general, according to Mr Murgatroyd, that reductions in variable input costs will reduce prices.

[146] An object infringement is assumed to give rise to competitive harm. If the conduct is an object infringement, then there has to be a clear mechanism through which that conduct is likely to give rise to harm. Having looked at the conduct of the parties, it was unclear to him how the conduct could have resulted in either higher prices for scrap or reduced output and whether there was a clear mechanism for consumer harm in the conduct.

[147] He considered the prices paid by the consumers through the pricing formula and concluded that they were paying more or less the export parity price ("EPP") so the outcome is close to perfect competition because in perfect competition the cost to the consumer should equal the opportunity cost which is the export price less what he called the hassle factors involved in exporting.

[148] When questioned about joint purchasing agreements, Mr Murgatroyd said that it could raise competition concerns, because a purchaser with buying power could foreclose competing purchasers by limiting their access to efficient suppliers. In a joint purchasing arrangement, there would have to be a passing on of a fair share of the benefits to consumers. Although the agreement may be an object infringement, if it resulted in lower prices to consumers through pass-on it's an exemption criterion.

[149] Mr Martin had said that while they did not increase prices, they (Columbus) may have kept prices at the same level. Mr Murgatroyd, however, regarded that as a "*price cut*." He however conceded that he had also not seen any evidence that Cape Gate had passed on any price reductions to the consumers.

[150] Mr Murgatroyd was the expert witness for Cape Gate, yet he neither sought nor was given any information by Cape Gate which would have enabled him to calculate

economically and scientifically whether any benefits in the form of price cuts or increased outputs had been passed onto the buyers of Cape Gate's products. We cannot, to use Mr Maenetje's words, "*lap up*"[34] what Mr Murgatroyd says about an expected pass-on, especially as the calculation of a precise estimate pass-on is an extremely complex exercise.[35] There isn't a shred of evidence to suggest that there had been a pass-on which Mr Murgatroyd confirmed in reply to a question from Mr Maenetje.[36]

[151] Mr Murgatroyd was questioned extensively on the differences between a buyers' group and a monopsony. Mr Maenetje referred him to an article by the writer Carstensen who argues that the fundamental distinction between a legitimate buyer group and a cartel is that the group acts to gain the efficiencies of a joint enterprise. One way to distinguish the buying group is to focus on its functional goals. If it exists to consolidate, coordinate and administer the buying activities of the participants then it is prima facie a buying group. When the group exists only to agree on how the parties will conduct their own purchases it is *prima facie* a cartel.[37]

[152] In response Mr Murgatroyd quoted other lines from Carstenson in which he says that '*The hallmark of a cartel is that the buyers have only coordinated their buying to exercise power over the sellers*' and '*The clearest cases involve a situation where each buyer undertakes all the actual buying activity that is necessary to obtain supplies, thus buyers having no way integrated their buying activity*.'[38]

[153] He explained that the point being made by Carstenson is that "*the hallmark of these cartels is where they are only buying or they are only engaging in* this *conduct to exercise that power. They are not doing it to integrate their buying activity. They are just doing it because they want to exert this kind of significant bargaining power over the cartel in order to give rise to either monopsony outcomes in extreme or more kind of broadly negative strategic outcomes and he is saying here that well, you know, one indicator of*

[34] Transcript, p427. Line 3.
[35] Ibid. Lines 1-2.
[36] Transcript, p426. Lines 3-7.
[37] Transcript, p445-446. From lines 23 – line 8, p447.
[38] Transcript, p447-448. Lines 20 – 4, p448.

that is going to be well, if they haven't integrated their buying activity at all then that is pointing in that particular direction."[39]

[154] He agreed with the proposition that where there is only an agreement, each participant will behave as a buyer, with nothing else, the resulting entity is a pure cartel, but one would also have to understand what the actual options are for buyers and sellers.

[155] He explained this as follows:

".. *the relevant test is whether the buyers are likely to have significant bargaining power and by that we mean is significant enough bargaining power to be able to engage in these bad things, to be engaged in these it resembles monopsony or at a softer version, strategic behaviour that actually harms competition and harms consumer outcomes, and that is really the relevant question so certainly did they get some bargaining power?*"[40]

[156] In our view, the scrap consumers did have some bargaining power. The logistics involved in exporting scrap are onerous and time consuming and the scrap merchants would have to wait for payment, whereas if they sold locally, they would be paid sooner than if they exported.

[157] Cape Gate called Mr Herselman as a witness who simply confirmed the witness statement that he had prepared, his curriculum vitae and copies of five regulatory instruments contained in "Bundle G" which were regulations published in the Government Gazette by the International Trade Administration Commission, regarding the export of scrap metal.

[158] Mr Herselman could not add anything to the evidence already presented to the Tribunal, but did confirm that there were concerns about the export of scrap and the supply of scrap to the local market; that the DTI was involved in those discussions and had set up a number of working groups to discuss the issue; that the Commission had attended some of the meetings, although he was unable to shed any light on the extent of the

[39] Transcript, p449. Lines 1-9.
[40] Transcript, p456-457. Lines 21 – 2 on page 457.

Commission's participation in the discussions; that some of the participants had raised competition concerns, while others did not want the price of scrap to be regulated in any manner.

[159] We now turn the specific defences put up by Cape Gate to the Commission's complaint referral.

Cape Gate's First Defence – The Act Does Not Apply

[160] Cape Gate argued that any collusive action that may be found was pursuant to the DTI and the industry initiative to retain scrap metal in South Africa to promote growth and jobs in the downstream industries operated by the scrap consumers.

[161] Mr Herselman testified that over 100 foundries have closed and people had lost their jobs and Mr Erasmus testified that Scaw had retrenched 1,200 employees.[41] Any collusive action, thus, falls within one of the exceptions to the application of the Act, and articulated in section 3(1)(e) of the Act as: "*concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose*."

[162] It makes no difference whether Cape Gate is held to have acted in terms of the industry's standard pricing formula or some or other standard pricing formula. Mr Herselman's evidence was that both were designed to do the same thing – to make good quality scrap metal available to local consumers so as to develop those industries and create jobs.[42]

[163] In their view the conduct of the buyers/consumers of scrap clearly had a commercial objective. We referred above to the evidence of Mr Erasmus that the consumers, being the largest consumers of scrap in South Africa, were very concerned about the price at which they would buy scrap.[43] As firms in a horizontal relationship, they were also concerned about obtaining sufficient volumes of scrap. Both price and volume clearly are commercial objectives of firms and fall within the ambit of the Act.

[41] Transcript, p330. Lines 1-25.
[42] Ibid. line 27.
[43] Transcript, p245. Lines 14 -23.

Cape Gate's Second Defence – the Conduct Complained of is not Conduct Contemplated by Section 4(1)(b) of the Act

[164] Prior to its argument on the interpretation of section 4(1)(b)(i) of the Act, Cape Gate argued that there can obviously be no market for merely the purchase of scrap metal because there is no market at all if sellers are not part of it. And the same with the price. The purchase price, it submits, is in every transaction, exactly the same as the selling price, otherwise no transaction has taken place.

[165] "*The respondents and scrap merchants collectively negotiated and agreed a standard pricing formula which was used to determine the purchase price of scrap metal*."[44]

[166] Cape Gate argued that this paragraph in the Commission's referral is incorrect. The standard pricing formula did not determine the "*purchase price*" only, but the transaction price. What is correct in this paragraph is that on the Commission's own version, it was the purchasers and merchants, negotiating collectively, who set the "*purchase price of scrap metal*".

[167] Moving on to Cape Gate's interpretation of section 4(1)(b), they state that section 4(1)(b)(i) proscribes "*fixing a purchase or selling price*." The interpretation of this phrase is important. Any sensible interpretation must proceed from the starting point that in any contract of sale, such as that of scrap metal, the transaction is only sealed when the seller and the purchaser agree on a price.

[168] Cape Gate argued that the words "*purchase*" and "*selling*" in section 4(1)(b)(i) are used to ensure the capture of horizontal anti-competitive conduct on both sides of the transaction – neither sellers nor purchasers are permitted to collude in order to fix a price. But that does not mean that the section contemplates that a price can be fixed more than once. It can, obviously, only be fixed once. Therefore, if the transaction price is the result of collusion between the sellers, then, in terms of section 4(1)(b)(i), the

[44] Pleadings (founding affidavit), p16 at para 32.

"selling price" has been fixed; and if the transaction price is a result of collusion between the purchasers, then the "*purchase ... price*" has been fixed. In each of these cases, the terms "*selling price*" and "*purchase ... price*" refers to the transaction price as contaminated by collusion, in the one instance, by the sellers and, in the other, by the purchasers.

[169] It is the Commission's case that at all relevant times the Respondents, in their capacity as consumers (and therefore buyers) of scrap metal agreed to directly or indirectly fix the purchase price of scrap metal.[45] It is the Respondents' conduct of discussing or agreeing or reaching an understanding amongst themselves, and then negotiating jointly as opposed to individually and independently with each of the scrap merchants, on adjustments to the pricing formula and the premiums or discounts to be charged, which is the subject matter of this referral. The Commission does not allege that the act of concluding agreements between the Respondents and scrap merchants in itself constitutes a contravention of section 4(1)(b) of the Act, as such agreements would be vertical in nature.

[170] Cape Gate submits that there is no allegation or evidence that the conduct complained of resulted in the actual prices ultimately paid and received; the actual transaction prices were arrived at in consequence of negotiations between buyers and sellers and were not "fixed" by the scrap consumers. The joint negotiations referred to above cannot involve any of the restrictive practices articulated in section 4(1)(b) because plain vanilla negotiations are the logical antithesis of price-fixing.

[171] Agreeing adjustments to the pricing formula prior to negotiations with the scrap merchants is an agreement only on a negotiating position, not an agreement to fix a price. It was impossible for the scrap consumers to fix a price because they knew that the price could only be fixed after negotiations with the scrap merchants.

[172] The Commission's argument that a commercial transaction that has two prices, both of which can be fixed postulates the proposition that in the same time period, and in respect

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[45] Bundle A (supplementary founding affidavit), p36 at paras 4 and 5.

of the same transactions, as here, both sellers and buyers can be held to have fixed the eventual transaction price:

172.1. It results in the imposition of administrative penalties on both sellers and buyers as well as the situation where if buyers (or purchasers) come together to resist collusion or monopoly pricing by a combination of sellers, their legitimate resistance to anti-competitive conduct becomes, itself, punishable as anti-competitive conduct (and of course, vice versa).

172.2. It results in the impossibility of fairly determining the amount of the administrative penalty because of the impossibility of determining who had suffered loss or damages in terms of section 59(3)(b) and who had derived a profit for the purpose of section 59(3)(e).

172.3. It results in inevitable unfairness that follows from the widely differing turnover of merchants, on the one hand, and purchasers, on the other, as required for the purpose of section 59(2).

172.4. It results in the consequence that sellers would have a civil action against the purchasers in terms of section 65(6)(b) of the Act; and purchasers would have the identical action against the sellers.

Cape Gate's Third Defence – The Scrap Merchants Fixed the Prices and Dictated the Formula to the Scrap Consumers

[173] Cape Gate argued that it is common cause that *the scrap merchants or sellers fixed the selling price of scrap* in the period 1998 to 2008. This, they argue, is evidenced by the Consent Agreements concluded between the scrap merchants and the Commission and made Orders of the Tribunal.

[174] Cape Gate argued that in terms of the concluded Consent Agreements between certain merchants and the Commission, there was only one transaction price for the purchase

and sale of scrap metal in the aforesaid period, and that transaction price was found to have been fixed by the scrap merchants. Thus, the price of scrap could not have been fixed by the scrap purchasers.

[175] In the Supreme Court of Appeal ("SCA") it was held that "*price-fixing inevitably involves collusive or consensual price determination by competitors*."[46] Cape Gate emphasised that the word "determination" is important. If competitors lack the power to "determine" a price, i.e., to make it the transaction price, then they have not fixed the price.

[176] They further argued that this Tribunal has already found that where an order by consent contains an admission of liability, "*it has the same consequences as a finding that there has been a prohibited practice in a full complaint hearing*."[47] Accordingly, our orders in respect of the scrap merchants having fixed the price of scrap metals exclude our jurisdiction and competence to make orders holding the scrap purchasers, such as Cape Gate, responsible for fixing the price of scrap metal.

[177] In support of its argument, Cape Gate turned to the testimony of Mr Martin, who intimated that it was the merchants, before the DTI initiative, who came together (i.e. Reclamation Group, Universal Recycling, Rand Scrap, Ton Scrap and Ben Jacobs) and first approached Columbus (before the other consumers) in early 2000 saying they wanted an agreement for the purchase of scrap based on the international reference price, with the quid pro quo being that the volumes of scrap required by the consumers would then stay in South Africa.[48]

[178] Further, and according to Mr Martin, the scrap merchants threatened to starve the local scrap consumption market if the consumers did not submit to the export parity prices.

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[46] *American Natural Soda Ash Corporation and Another v Competition Commission and Others* 2005 (6) SA 158 (SCA) at para 4.

[47] *The Competition Commission v South African Airways (Pty) Ltd and Others* (83/CR/Oct04).

[48] Bundle D: p213, para 3; Transcript: p56, line 6 – p57, line 3; Transcript: p61, lines 10 – 12; Transcript: p63, lines 13 – 17; Transcript: p65, lines 7 – 15; Transcript: p65, line 20 – p66, line 6; Transcript; p66, lines 14 – 18; Transcript: p67, lines 6 – 22; Bundle B (Martin statement): p3 __ para 8; Transcript: p68, lines 6 – 8; Transcript: p70, lines 4 – 7; Bundle B (Martin's statement): p4, para 11; Transcript: p70, lines 13 – p71, line 6; Transcript: p71, lines 16 – 23; p71 line 24 – p72, line 17; Transcript: p73, lines 14 – 18; Transcript: p172, line 12 – p174, line 5; Transcript: p181, lines 3 – 6; Transcript: p185, line 20 – p186 line 3.

This dovetails with Mr Murgatroyd's evidence that the scrap merchants had a credible alternative option to domestic customers in exports, while the consumers did not have the same option to import. This, as Mr Martin agreed, meant that the bargaining power of the scrap consumers was comparatively weak.[49]

[179] Mr Erasmus also testified that the scrap merchants proposed the formula.[50] The scrap consumers' acquiescence came about in consequence of each of them, individually, having been approached by the merchant collective.

[180] Therefore, this defence – that the scrap merchants fixed the price – rests on two bases:

180.1. The orders already made by the Tribunal to this effect that preclude any other finding; and

180.2. The evidence in this case that this was, in fact, what happened.

[181] The Commission rebuts this defence. It argued that this defence ignores the collusive process that the Respondents followed in negotiating the price of scrap with the merchants. The evidence makes it clear that the merchants did not simply impose the price of scrap on the consumers. The consumers operated as a buyers' cartel in collectively negotiating the purchase price of scrap with the merchants.

[182] We have already mentioned that we are of the view that the scrap consumers acted as a buyers' cartel. In this regard we agree with the Commission.

Cape Gate's Fourth Defence – Cape Gate acted in terms of a Regulation having the effect of law

[183] Cape Gate argued that the DTI policy was authorised by the Minister and the Director-General and made in terms of the Import and Export Act, 45 of 1965. It had the effect of a regulation regulating the approval of export permits for scrap metal and required the

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[49] Bundle B (Murgatroyd), p129 at para 12; Transcript, p57, lines 4 – 11.
[50] Bundle C, p93; Transcript, p295, lines 15 – 25; p296, line 21 – p297, line 3.

local steel manufacturing industry that consumed scrap metal as input to have first refusal.

[184] In order that this policy operate fairly and not discriminate in favour of scrap consumers and against scrap merchants, it required, and authorised, both groups to agree on a price equal to an export parity price minus certain discounts, at which scrap metal would be sold by the merchants to the consumers locally. Export permits would then be approved only for scrap metal volumes over and above what had been taken by the consumers under this arrangement. The aim was to strengthen down-stream industries and increase employment opportunities in South Africa.

[185] That regulation was made by the Minister who is an organ of state as contemplated in sections 239(a) and (b) of the Constitution; and it was therefore administrative action as contemplated in the definition of that term in section 1 of the Promotion of Administrative Justice Act, 3 of 2000 in that it was a decision by an organ of state when performing a public function in terms of legislation.

[186] It was also administrative action on which participants in the industry acted, took decisions and concluded transactions. Whether or not it was in conflict with the Act, it existed until set aside by the High Court (which it has never been) and could not be ignored or contravened by any person or body. As such, no person acting within its boundaries and doing what it authorised, can be held to have acted unlawfully.

[187] The Commission argued that the defence that it and the Tribunal are precluded from imposing any kind of adverse consequence upon the Respondents because the DTI who, at all material times, were aware of the standard pricing formula, raised no objection to it and, furthermore, signified its approval of it, by suggesting its adoption in respect of another market, is bad in law and fact.

[188] First, and as a matter of fact, Mr Herselman confirmed that the DTI never worked with a pricing formula that was agreed between the consumers and merchants and which they had implemented from 2001.

[189] Secondly, and as a matter of fact, Mr Herselman confirmed that he (and the DTI) did not know of the industry pricing formula.

[190] Thirdly, and as a matter of fact, Mr Herselman confirmed that the DTI never approved the pricing formula that the Respondents had been implementing from 2001. It would not even have been able to approve such a pricing formula.

[191] Fourthly, the Commission's factual witnesses and Mr Herselman confirmed that the DTI was not aware of the detailed engagements amongst the consumers collectively and the merchants collectively regarding the annual adjustments of elements of the pricing formula.

[192] This defence is a red herring. Firstly, the policy was never gazetted and so had no regulatory effect and could be and was ignored by all the parties. Secondly the Act binds the state which means that the DTI was bound by the Act. According to the evidence, the then Minister of Trade and Industry had signed the policy, but it was never gazetted. Departments routinely publish their regulations, laws policies and notices in the gazette. The fact that the policy was never gazetted suggests strongly that it was not gazetted because there must have been some concern about the validity of the policy especially in relation to the Act.

[193] Fifthly, and as a matter of law, in the absence of an exemption granted under the Act from the application of the provisions of section 4(1)(b), nothing precludes the Commission and the Tribunal from finding Cape Gate in contravention of the Act and imposing a penalty against it. Not even estoppel operates in such circumstances to preclude adverse consequences against Cape Gate. In any event, for estoppel to operate it would be necessary to prove a representation either by the Commission or the Tribunal that it approved of the conduct of the Respondents. Mr Herselman confirmed that he is not aware of any conduct on the part of the Commission that could constitute such a representation.

[194] Sixthly, and as a matter of law, the Respondents had discretion or autonomy whether or not to engage in the conduct complained of and were not obliged by any law to act in

the manner in which they did. The pricing formula was not even gazetted so as to acquire the force of law obliging them to act as they did. There is also no law that obliged them to meet annually to negotiate adjustments to the pricing formula. The only thing that obliged them in this way was their understanding or agreement that they needed to do so. That understanding or agreement is in contravention of the Act.

[195] The components of the formula were based on information which was freely available. Cape Gate did not have to meet with the other scrap consumers to decide on the formula. It could have done so by simply accessing freely available information, but chose not to do so.

[196] The scrap consumers were at all times concerned about the competition issues, yet forged ahead with an agreement in a cavalier way.

[197] We concur with the Commission's above submissions that Cape Gate's fourth defence is bad in law and fact.

Cape Gate's Fifth Defence – the conduct complained of is more correctly characterised as conduct contemplated in either section 4(1)(a) or section 5(1) of the Act

[198] In relation to the proper characterisation of this conduct from an economic perspective, Cape Gate relied on the evidence of Mr Murgatroyd. His evidence addressed whether, on a proper characterisation of the conduct in issue, it should fall to be prohibited under section 4(1)(b)(i) of the Act. Mr Murgatroyd testified that in seeking to characterise the alleged conduct there are a number of key aspects of it, and the economic context surrounding it, that differentiate it from, and mean that it is not congruent with, an object infringement. In summary, these key aspects are as follows:

198.1. First, the alleged conduct concerns a horizontal relationship between buyers rather than sellers. This is significant because the incentives of the coordinating firms as buyers are materially different from those of colluding firms acting as suppliers. Specifically, while the motivation for sellers to collude arises from the fact that they can increase profits by raising prices and restricting output, the motivation for buyers to coordinate in relation to their purchasing activities is to reduce input costs and expand output. If such motivation or purpose is observed, as it is in this case, the outcome is more than likely to be procompetitive, not anticompetitive. In this case, Mr Murgatroyd testified, the economic structure to which the alleged conduct most closely aligns is that of a buyer group. Unlike most horizontal arrangements on price between suppliers, which can typically be expected to harm consumers, the competitive effects of buyer group-type arrangements are a priori ambiguous, and such arrangements can often give rise to procompetitive benefits.

198.2. Second, in this case the conduct that the Commission seeks to impugn as a contravention of section 4(1)(b), and which must therefore be characterised, flows directly from a vertical arrangement, in that it relates to discussions amongst the Respondents regarding adjustments to the pricing formula and the discount schedule that were agreed in collective vertical negotiations that were taking place between the Respondents and scrap metal suppliers during the relevant period. This is plainly conduct which is incidental or ancillary to the core vertical agreement and relationship between the scrap merchants on the one hand, and the Respondents on the other. Moreover, it was the evidence of Mr Martin that the scrap merchants dictated the formula to the scrap consumers.[51] This evidence is uncontroverted and must be respected. In the words of the CAC in the SAB case, that evidence confirms that the core vertical relationship which gave rise to the conduct that the Commission seeks to impugn, was “initiated by” the scrap merchants (not the other way round) with the “manifest objective” of selling their scrap products to their best advantage.[52]

198.3. Third, in light of the fact that an object infringement involves conduct that is very likely to give rise to competitive harm, there should be a plausible basis to

[51] Transcript: p56, line 6 – p57, line 3; Transcript: p61, lines 10 – 12; Transcript: p63, lines 13 – 17; Transcript: p65, lines 7 – 15; Transcript: p65, line 20 – p66, line 6; Transcript; p66, lines 14 – 18; Transcript: p67, lines 6 – 22; Bundle B (Martin statement): p4, para 9; Transcript: p68, lines 6 – 8; Transcript: p70, lines 4 – 7; Bundle B (Martin’s statement): p4, para 11; Transcript: p70, lines 13 – p71, line 6; Transcript: p71, lines 16 – 23; p71 line 24 – p72, line 17; Transcript: p73, lines 14 – 18; Transcript: p172, line 12 – p174, line 5; Transcript: p181, lines 3 – 6; Transcript: p185, line 20 – p186 line 3.
[52] *Competition Commission v South African Breweries* [2014] 2 CPLR 339 (CAC), at para 45.

conclude that the alleged conduct on the part of the respondents resulted in higher domestic prices for scrap metal and/or higher prices for, and reduced output of, steel products produced using that scrap metal. There was no such basis established in this case. Mr Murgatroyd testified that while it is not necessary to prove anticompetitive effects in order for conduct to be found to constitute an object infringement, market outcomes can nevertheless be insightful in examining potential object infringements. In this case, RBB found (as should the Tribunal) that the market outcomes that were realised under the arrangements relating to the pricing formula and discount schedule are consistent with those that one would expect under competitive market conditions. Specifically, in a competitive market, one would expect the price for scrap to domestic buyers to be no lower, and potentially higher (to the extent that domestic competition is imperfect), than the opportunity cost to suppliers of supplying such customers, which in this case is export parity price. One would also expect customers to be prepared to pay a premium in order to obtain security of supply. These aspects are reflected in the pricing formula and discount schedule, respectively.

[199] The Commission rebutted this defence by arguing that the Respondents' conduct preceded the involvement of the DTI and survived the withdrawal by the DTI of the policy (allegedly incorporating a DTI determined pricing formula) that was never formally implemented by way of gazetting. The fact that the policy was never gazetted means that none of the parties was bound by the policy. Cape Gate's defence based on the policy must fail.

[200] The evidence of Mr Murgatroyd confirms that the present arrangement is not a buyers' group but a buyers' cartel, much in line with the discussion of these concepts in Exhibit 5 (TRM p 439 line 12).[53] Following cross-examination, counsel for Cape Gate in re-examination invited Mr Murgatroyd to tease out (or perhaps counsel teased out) the distinction between a buyers' cartel and a buyers' group. This is what Mr Murgatroyd said (TRM p 519 line 21 – p 520 line 6):

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[53] "TRM" for Transcript of 19 July 2018 where Mr Murgatroyd's evidence is recorded from p 335-520.

"*MR MURGATROYD: No I think, I mean this is kind of what I also alluded to before the joint purchasing or not that's a legal thing, from an economic perspective I don't see the difference. I mean in a weird sort of way if you're engaged in a tight buy group where you say each month okay how much do you need, I need 10, I need 10, I need 20 you're actually sharing more information than if you're engaged in a loose arrangement where you're negotiating together and you're going off and doing your own buying. So you know to the extent that one's concerned about kind of sharing of information actually the kind of tight buy group where you're joint purchasing actually shares more information than one that doesn't.*

MR GOTZ: Thank you Chair."

[201] The present is not a case where the consumers shared information regarding actual volumes that each required monthly and jointly purchased such volumes of scrap metal. As Mr Erasmus testified without any challenge, the exchange in relation to volumes was done informally and only in relation to annual volumes. As a fact, once price was fixed, each of the consumers would go off and negotiate with the merchants to secure volumes.

[202] In the circumstances, Mr Murgatroyd in re-examination made it clear that the present arrangement could not be regarded as a buyers' group, which might be subject to assessment under section 4(1)(a) of the Act. It is a buyers' cartel to which section 4(1)(b)(i) applies. For this reason, his references to EU Guidelines 2011 regarding horizontal cooperation agreements are irrelevant. He was even reluctant initially to engage on them on the basis that he had not read the guidelines recently (at the time of cross-examination) and that they were a peculiar framework not provided for in South Africa. (TRM p 401 line 22 – 405 line 12). Mr Murgatroyd's reluctance to engage on the EU Guidelines because he hadn't read them recently is disingenuous. Mr Murgatroyd has given evidence before the Tribunal on many occasions and his answers to the questions relating to those guidelines posed to him by Mr Maenetje suggest that despite the fact that he may not had read those guidelines "recently" he knew and understood the guidelines. Mr Murgatroyd also mentioned that he is familiar with the book "Competition Law (8th ed) by Richard Whish and David Bailey which also deals extensively with the EU Guidelines.

[203] Mr Murgatroyd fairly accepted that there is no requirement for purposes of characterisation under section 4(1)(b)(i) that the consumers be a monopsony or be like a monopsony; that the Respondents in this case in no way integrated part of their buying activities (except for imports from the coast that are irrelevant as they were not the subject matter of the cartel); and there was no joint investment of any form. (TRM pp 448 line 14 – p 452 line 21, p 406 line 21 – 407 line 10). He went on to make his contentions but could not fairly run away from these facts.

[204] He did confirm that as part of characterisation the Tribunal must ask itself whether the arrangement was truly concerned with joint purchasing. (TRM p 408 line 22 – p 409 line 2).

[205] Foreign jurisprudence shows that collective price agreements in contrast to commercial negotiations conducted bilaterally between two independent firms are in principle prohibited – per se or by object. Foreign jurisprudence is relevant under section 1(3) of the Act. Mr Murgatroyd did not point to any foreign case law to the contrary.

[206] The involvement of the DTI is irrelevant to characterisation. In any event, the facts show that the Respondents kept their engagements away from the DTI and engaged the DTI in parallel to their own collusive engagements.

[207] There is nothing in Mr Murgatroyd's evidence that compels the Tribunal to characterise the conduct otherwise than as one that falls within the ambit of section 4(1)(b)(i), as contemplated in *inter alia* SAB. The horizontal component here was not incidental but the main one. The factual evidence is clear that the consumers collectively negotiated for the purchase of scrap. To achieve this, they coordinated by meeting and agreeing a negotiating position and then collectively negotiating with the merchants. It is precisely the type of conduct that other jurisdictions find to be per se prohibited or a by object restriction.

Cape Gate's Sixth Defence – the price of scrap metal was determined by a formula

[208] The evidence – particularly of Mr Erasmus – was uncompromising in this regard. Each year, inputs were made into the formula from objective sources. Thus, no agreements alleged by the Commission were either made or, indeed, required to be made.

[209] The Commission rebuts this defence by arguing that the price was at all material times fixed by a standard pricing formula. The largest components of the standard pricing formula could only be objectively determined by reference to external data and could not therefore be determined or even influenced by the Respondents.

[210] The Commission submitted that this defence is bad both in law and fact:

210.1. First, the consumers negotiated the standard pricing formula collusively with the merchants;

210.2. Secondly, collusion on the discount structures, and the actual discounts annually, as well as the other elements of the standard pricing formula that required annual adjustments contravenes section 4(1)(b)(i) of the Act. This is sufficient to find a contravention and is not even affected by the alleged involvement of the DTI.

210.3. Thirdly, as a matter of fact, the Commission's factual witnesses disputed that the discount structures and the other elements of the standard pricing formula that were negotiated annually and adjusted were economically negligible or minor. The witnesses were not challenged on their evidence in this regard; and no contrary factual evidence was presented on behalf of Cape Gate.

Our Analysis

[211] As alluded to earlier, the Commission's complaint was captured in its Founding Affidavit and its supplementary affidavit.

[212] In essence the Commission contends that collective negotiations by competitors to directly or indirectly agree on a purchase price for scrap, in contrast to individual and independent negotiations between each of them and each of the scrap merchants is prohibited by the Act.

[213] That sums up adequately, in our view, the Commission's case and crystallises the issue we must adjudicate: Given Cape Gate's six defences, was Cape Gate's conduct vis-à-vis the agreement of the pricing formula an infringement of section 4(1)(b)(i)?

[214] In addressing whether or not there was a contravention of section 4(1)(b)(i), we deal first with Cape Gate's fifth defence – characterisation. We find it appropriate to address this defence first because if the Commission mischaracterised the conduct, then its complaint referral stands to be dismissed, rendering the other defences put up by Cape Gate moot.

[215] It is well known that agreements between competitors to fix prices, allocate markets and collude on tenders are the most egregious of contraventions of the Act, this is why agreements or understandings between competitors which provide for price fixing, allocating of markets and/or colluding on tenders are, in most instances, per se prohibited.

[216] Therefore, insofar as any such agreement or understanding is established, the impugned firms will be found to have contravened competition law and no effects analysis will be available to the firms to defend or justify their conduct.

[217] In other words, the conduct is presumed to have an anticompetitive effect on competition. It could then be said that these agreements or understandings are restricted by object rather than by effect, and this corresponds broadly with the conduct prohibited in section 4(1)(b) of the Act.

[218] There are however instances where a firm's conduct will, on the face of it, fall within the ambit of section 4(1)(b), but the firm's conduct will not be found to fall within the object of the section 4(1)(b) and no contravention will be established. This is the

characterisation defence invoked by Cape Gate through its expert witness, Mr Murgatroyd.

[219] The SCA has stated that "*characterisation is to establish whether the character of the conduct complained of coincides with the character of the prohibited conduct and this process necessarily embodies two elements. One is the scope of the prohibition, a matter of statutory construction. The other is the nature of the conduct complained of this is a factual enquiry*."[54]

[220] From this, it is clear that not every agreement between competitors would fall within the object of section 4(1)(b), and that it would be easy to envisage an instance where, for example, competitors could enter into a bona fide joint venture for a legitimate purpose, through the vehicle of a separate entity, in which prices for goods that it supplies would be set (which prices would emanate from the competitors) merely in pursuance of the joint venture.

[221] The CAC noted that the 'characterisation' that is required under our legislation is to determine (i) whether the parties are in a horizontal relationship, and if so (ii) whether the case involves direct or indirect fixing of a purchase or selling price, the division of markets or collusive tendering within the meaning of s 4(1)(b).[55]

[222] Moving to the analysis of the facts, the CAC stated that the ultimate question was whether, in the circumstances of the case, SAB's and its appointed distributors' conduct was to be characterised as dividing markets within the meaning of section 4(1)(b).[56]

[223] The CAC further stated that the idea of the characterisation principle is to ensure that only those economic activities to which no defence should be tolerated are held within the scope of the prohibition in section 4(1)(b). This, the CAC held, is informed both by common sense and competition economics.[57]

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[54] *American Natural Soda Corporation & another v Competition Commission & others* 2005 (6) SA 158 (SCA) at para 47.
[55] *Competition Commission v South African Breweries Limited and Others* (129/CAC/Apr14) at para 38.
[56] Ibid at para 38
[57] Ibid at para 44.

[224] With reference to the facts in this case Mr Murgatroyd argued that the collective negotiations between the scrap suppliers on price was incidental to a vertical agreement and it was not an object infringement as this involves conduct that is very likely to give rise to competitive harm – in other words there should be a plausible basis to conclude that the alleged conduct on the part of the Respondents resulted in higher domestic prices for scrap metal and/or higher prices for, and reduced output of, steel products produced using that scrap metal.

[225] Mr Murgatroyd had testified that one would expect the costs benefits of a buyer group to be passed onto the consumers. However, he had not been provided with any empirical evidence by Cape Gate to show that any cost benefit obtained from the agreement reached had been passed onto the consumers.

[226] We may assume that had Cape Gate passed any benefits onto the consumer, they would have provided Mr Murgatroyd with the necessary evidence. As pointed out by both the SCA and CAC, we have to consider the alleged contravention with reference to the evidence as a whole.

[227] The Respondents, when they met to discuss a pricing formula, were not acting as a buyers' group trying to purchase goods at a lower cost through purchasing more quantities of those goods. Ultimately, the parties, pursuant to their discussions, agreed on a formula which took into account the following:

227.1. the Metal Bulletin published weekly in Rotterdam, assuming a Grade ESRI 205 in South Africa;

227.2. the rand / dollar exchange for a determined period;

227.3. the FOB costs and the costs of transport from Durban to an inland site; and

227.4. a discount.

[228] The Metal Bulletin price was multiplied by the rand / dollar exchange rate for a determined period. The FOB costs and the costs of inland transport were subtracted from the “exchange rate” price. The consumers received a discount which resulted in the consumers paying a competitive international price.

[229] Facially, the negotiation of the formula seems uncomplicated and should have taken place on an annual basis. However, the consumers needed a secure supply of scrap and, at times, required more than their usual quantities of scrap. This meant that more regular meetings had to take place between the individual consumers and the various scrap merchants. In this scenario, consumers would agree to pay more for their scrap which affected all the consumers because the other merchants would then also expect higher prices.

[230] This is the most likely reason why the scrap consumers entered into an agreement regarding the price of the scrap they wanted to purchase. They agreed to the formula to ensure that all of them paid the same price for scrap.

[231] Keeping track of the exchange rate, the FOB costs and transport costs also presented the consumers with challenges and necessitated regular discussions between the consumers, according to the scrap consumers.

[232] We do know, though, that the information on which the formula was based was and still is freely available.

[233] Discussions with the merchants were important to ensure quality. Columbus is a stainless-steel producer. According to Mr Martin, Columbus needs ferrous scrap and needs a high level of specification from a chemical composition point of view and without any trace elements. In their search for scrap Columbus looks for black bales from the automotive industry, heavy sections for the rail industry and generally purchases high end scrap.

[234] The agreed formula was based on readily and freely available information relating to the metal price, the rand / dollar exchange rate, the FOB costs and the inland transport costs.

[235] Our observation in this regard does not, however, absolve us from considering what exactly the character of the arrangement was.

[236] The discussions on the formula, seemed superficially to serve a necessary and legitimate purpose which was to secure a reliable supply of scrap at prices which were fair and reasonable under circumstances where the merchants could achieve better prices if they exported their scrap.

[237] The merchants wanted an export parity price and had originally approached the consumers with that proposal.

[238] However, as stated by us already, the consumers did not have to meet collectively to discuss the formula to be used because the information which they needed to negotiate a price was publicly available information which was easily accessible.

[239] Cape Gate could have but did not call any factual witnesses to explain why it was necessary to meet collectively and to collectively agree on the formula, especially as the information was publicly available and easily accessible.

[240] The consumers and the merchants were also free to approach the state to intervene and did so. The state has the power to prohibit the export of scrap, if necessary and has done so.

[241] The facts of this matter show that the buyers of scrap collectively agreed on a position with which they would approach the merchants. This was confirmed by the evidence of Mr Martin and Mr Erasmus.

[242] There is no reason why the scrap consumers could not have approached the merchants individually.

[243] It is evident from this that the material purchasing managers at Columbus, Cape Gate, Mittal and Scaw met not only to consider the mechanics and the numbers of the process, but also to arrive at an agreement on a counter-offer.

[244] No coherent evidence was led as to why the consumers had to meet to discuss a price, as the consumers had all been approached individually (and not collectively) by the largest scrap metal merchants about the payment of an export achievable price to secure the supply and volume of scrap.

[245] The evidence, too, is clear about how an export price could be calculated on the basis of readily available information. It would appear to us that each consumer would have been able to negotiate separately with the merchants who had approached them.

[246] We further note that the conduct involved all the major buyers of scrap in South Africa acting as a collective in the purchasing of scrap. This is not a case where some small players in an industry came together to jointly purchase as a buyers' group. Broadly, the aim of joint purchasing agreements is for members to benefit from lower purchasing costs. Two of the main distinctions between them and buyers' cartels are that they are usually transparent and involve a genuine joining of purchasing activity (Carstensen, 2010[58]). They also typically involve smaller firms in the market with lower combined market shares. In contrast, in this case the conduct on the buyers' side involved all the major scrap buyers in South Africa.

[247] Therefore, we find that the characterisation defence fails. We now move onto the remaining five defences of Cape Gate.

[248] The arguments of pro-competitive benefits due to the buyers' conduct as advanced by Mr Murgatroyd, such as the increased availability of scrap in South Africa, should in our view be assessed under remedies. As we have found, there is no evidence that the

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[58] Carstensen, P. (2010), *Buyer Cartels Versus Buying Groups: Legal Distinctions, Buyer Cartels Versus Buying Groups: Legal Distinctions, Competitve Realities, and Antitrust Policy Competitve Realities, and Antitrust Policy*, https://scholarship.law.wm.edu/wmblr.

largest buyers of scrap passed on any price benefits to their customers. The parties have not yet made submissions regarding appropriate remedies should a contravention be found.

[249] According to the undisputed evidence, the scrap merchants approached the consumers to negotiate an export parity price. This happened in the 2000's already when Columbus and all the other large scrap consumers were approached.

[250] We know from the evidence that scrap is a very important input in the steel manufacturing process and is expensive, so the consumers tried to secure quality scrap at the lowest possible prices from the right supplier.

[251] The merchants were clearly in a stronger bargaining position because they could export the scrap, if the local consumers were not prepared to pay higher prices.

[252] The DTI, too, had concerns around the export of scrap. It wanted beneficiation to take place within South Africa to boost South Africa's manufacturing capacity and also wanted to ensure that the consumers had adequate supplies of scarp for their operations.

[253] The above in our view may be considered when assessing mitigating factors under remedies.

[254] It's important to note that in terms of section 81 of the Act, the State is bound by the Act. This means that the State itself or its entities cannot participate in activities which may contravene the Act but must promote the purpose of the Act as set out in section 2. When the DTI became involved in the discussions around the pricing formula, it would have been mindful of its obligations in terms of the Act, a point we have already made.

[255] Perhaps, mindful of the opportunity cost to the scrap merchants of exporting scrap, the DTI had proposed an export system. However, the DTI appeared to be in a typical catch-22 situation. If the merchants were simply prohibited from exporting their scrap, the local consumers would dictate the prices at which they would buy the scrap from the merchants. It was then accepted by the DTI and the industry players that the merchants should receive a price which would not prejudice them. That was the export achievable

price and ensured that local consumers had sufficient domestic scrap for production purposes from 2000 – 2006. The DTI policy in this regard was gazetted at a later stage and then became effective.

[256] This achievement resulted in the DTI meeting an objective to ensure that the local scrap consumers had adequate supplies of scrap for their production processes, at prices which were reasonable, based on a formula agreed upon by everyone in the industry and that not all scrap produced in South Africa was exported.

[257] We do not understand Mr Martin to be suggesting in any way that the DTI had during the initial meetings encouraged the consumers to reach an agreement amongst themselves on a pricing formula in contravention of the Act.

[258] Nothing presented in evidence suggests that the Commission's independence had been compromised in any way or that it had provided advice on competition law issues or guidance as to how the pricing formula should be calculated.

[259] We conclude, therefore, that the Commission's staff attended the meeting at the invitation of the organisers of the meetings as observers only.

[260] It is highly unlikely, in any event, that the Commission which has important investigative and prosecutorial functions in terms of the Act would compromise itself by participating in the discussions of the various sub-committees.

[261] The evidence suggests that the Commission participated in in a limited way in some of the meetings arranged by the DTI.

[262] We have already commented on the Commission's participation and have said that on the evidence before us it is clear that the Commission's independence was not compromised in any way and neither had it provided advice on competition issues nor had it provided guidance on how the pricing structure should be formulated.

[263] Even assuming for a moment that the Commission had participated in some way in the discussions, that would not mean that the scrap consumers could simply ignore the provisions of the Act. Neither for that matter could the Commission. There were avenues available to the scrap consumers to apply for an exemption but they failed to do so even though they were mindful of the Act and had access to lawyers.

[264] Cape Gate argues that the Commission suggests that a commercial transaction can have a selling price and a purchase price which can be fixed and fall foul of section 4(1)(b). They then argue that that would not be a contravention of section 4 of the Act by the purchasers at all, as the parties to a contract must agree on a single price. In support of this they cite Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd 1986 (3) SA 555(AD) at p 574 B-C (Westinghouse)

[265] Westinghouse does not help the Respondent. The issue in this case was the calculation of a price based on a base price and an escalation clause. In this regard, the court stated:

"*It is a general rule of our law that there can be no valid contract of sale unless the parties have agreed, expressly or by implication, upon a purchase price. They may do so by fixing the amount of the price in their contract or they may agree upon some external standard by the application whereof it will be possible to determine the price without reference to them. There can be no valid sale if the parties have agreed that the price is to be fixed in the future by one of them. This is part of the wider general principle that contractual obligations must be defined or ascertainable, not vague and uncertain*."

[266] Westinghouse preceded the commencement of the Act and did not deal with competition related issues. It dealt with a contractual dispute between the parties.

[267] In this matter, it was not the formula which gave rise to the complaint. It was the fact that the consumers fixed a price collectively with the scrap merchants and not individually. Cape Gate's argument that the price was set by the scrap merchants and not by the Respondents ignores the collusive process that the Respondents followed in negotiating the price of scrap with the merchants. That evidence makes it clear that the merchants

did not simply impose the price of scrap on the consumers. The consumers operated as a buyers' cartel in negotiating the purchase price of scrap with the merchants.

[268] Finally in regard to price fixing, Cape Gate states that the SCA has characterised "price fixing" as the "determination "of a price by competitors". This statement must be considered in relation to what the SCA actually said:

"*[48] Price-fixing necessarily contemplates collusion in some form between competitors for the supply into the market of their respective goods with the design of eliminating competition in regard to price. That is achieved by the competitors collusively "fixing" their respective prices in some form. (By setting uniform prices, or by establishing formulae or ratios for the calculation of prices, or by other means designed to avoid the effect of market competition on their prices.)*

[49] But while price-fixing inevitably involves collusive or consensual price determination by competitors, it does not follow that price-fixing has necessarily occurred whenever there is an arrangement between competitors that results in their goods reaching the market at a uniform price. The concept of "price-fixing", both in lay language and in the language that the Act uses, may, for example, be limited to collusive conduct by competitors that is designed to avoid competition, as opposed to conduct that merely has that incidental effect."

[269] The scrap consumers, that are in a horizontal relationship to each other, used a formula to negotiate and to fix a purchase price for scrap with the scrap merchants collectively and not individually. In calculating the formula, they acted collusively, in contravention of the Act.

[270] For the reasons mentioned above, we are inclined to agree with the Commission which has succeeded in proving that the conduct of the respondent constituted price-fixing.

[271] In SAB, the CAC noted that the US Supreme Court had observed that the legality of an agreement could not be determined by a simple test as to whether the agreement restrains competition. The statutory prohibitions against unreasonable restraints and

monopolisation were to be construed as proscribing only unreasonable conduct. In other words, the legality of such conduct was to be determined on a rule of reason basis. The CAC noted what the US Supreme Court said in Standard Oil of New Jersey vs United States 221 US 1 and United States vs Trenton Potteries Company 273 US 392 (1927) that price-fixing eliminates competition and involves the power to control the market and fix arbitrary and unreasonable prices and that agreements which create such potential may well be held to be unreasonable or unlawful restraints without having to enquire into the price's reasonableness or otherwise.[59]

[272] The CAC went further. It also noted that the Court of Appeals in the BMI case had said that "*More generally in characterising the conduct under the per se rule our enquiry must focus on whether the effect and the purpose of the practice are to threaten the proper operation of our free-market economy*."[60]

[273] The latter is not a question which has been satisfactorily answered by Cape Gate. Cape Gate has not provided us with any evidence that it passed any benefits which it derived from the pricing formula agreement onto the public. We have already indicated that had it actually done so it would have provided its expert witness, Mr Murgatroyd with the necessary information.

[274] Cape Gate was in a position to negotiate on an individual basis with the merchants. Although no evidence on the matter was led, Cape Gate was aware of the Act and should have sought guidance on the discussions on the pricing formula but elected not to do so.

[275] Importantly, the fact that a tier system was devised caused prejudice to the tier 2 and 3 supplies who were paid lower prices for their scrap which would probably have impacted on those merchants in a detrimental way. The implications of the tier system that was agreed on was that the market structure and market positions of the merchants were maintained, which would adversely affect (future) competition at the merchant level.

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[59] *Competition Commission v South African Breweries Limited and Others* (129/CAC/Apr14) at para 30.
[60] Ibid at para 35.

[276] Had the pricing formula been devised simply to negotiate a price for scrap which could be exported then it would not have been necessary to introduce a 3-tier system involving all the scrap merchants.

[277] The consumers benefitted from the arrangements.

[278] The consumers secured a lower price from the tier 1 merchants and even lower prices from the tier 2 and 3 merchants. They managed to secure scrap supplies, and the consumers knew what their competitors would pay for scrap.

[279] The tier 2 and 3 merchants were not involved in the discussions regarding the prices to be paid by the consumers for their scrap and neither, for that matter, were the thousands of informal scrap collectors.[61] During the hearing, those who testified acted as if the informal scrap collectors don't exist and have no voices. The failure to mention them is typical of how poor people are treated in our country.

[280] The Act does not envisage that consumers and merchants would meet to discuss and agree on prices to the detriment of other scrap merchants and scrap consumers including the informal collectors who play an important role in the scrap metal supply chain.

[281] We can and must accept that if the Tier 2 and Tier 3 merchants were going to be paid less than the Tier 1 merchants, that those merchants would pay the informal scrap collectors less than that what they would have received absent the pricing formula with catastrophic consequences for already poor people.

[282] In effect, the Tier 2 and Tier 3 merchants and the informal scrap collectors subsidised both the Tier 1 merchants and the scrap consumers because the lower prices which the Tier 2 and 3 merchants received from the scrap consumers and the corresponding lower prices which the informal scrap collectors received, offset the higher prices which the scrap consumers had agreed amongst themselves to pay to the Tier 1 scrap merchants.

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[61] See paras 284, 285 and 286 below.

[283] Murgatroyd was the author of the *Economic Assessment of the Commission's* Complaint *Referral*[62] which he referred to often while giving evidence on behalf of Cape Gate.

[284] *The South African metal recycling industry in focus,* an article prepared by the Tutwa Consulting Group and dated 12 May 2017, is referenced a number of times in the RBB Economics' assessment.[63]

[285] In a footnote the article mentions that scrap metal collectors include 400 000 informal labourers, bakkie collectors and bucket shops who provide collection services with the aim of selling their scrap to metal recyclers.[64] This is a very large number of people who rely on the sale of the scrap they collect to sustain themselves.

[286] The impact of the price setting arrangements agreed upon by the scrap consumers must have impacted in a serious way on the scrap metal collectors.

[287] For all the above reasons we find that none of Cape Gate's defences can be upheld.

Reasons for delay in issuing the decision

[288] Following pre-trial proceedings, including pre-hearings and the hearing of interlocutory applications, the matter was set down for hearing and was duly heard and completed.

[289] The Chairperson of the panel Mr Enver Daniels and Tribunal Member Dr Medi Mokuena left the Competition Tribunal ("Tribunal") in 2022 and 2019 respectively due to the expiry of their terms of office. Draft reasons had been prepared at that stage and were being deliberated upon by the panel. During this time the panel was informed by the parties that they were in settlement discussions, and the finalisation of reasons was put on hold. For some time, the panel laboured under the belief that the parties were engaged in

[62] RBB Economics. 11 April 2018. The assessment is privileged and confidential.
[63] Footnotes 1, 4, 9 on pp6 and 7 of the RBB Economics report.
[64] Footnote 3 on p4 of the Tutwa report.

settlement discussions and may have settled the matter. The parties however were unsuccessful in their post hearing settlement negotiations and recently requested reasons.

[290] We regret the inconvenience caused by the delay.

ORDER

1. Cape Gate is found to have contravened section 4(1)(b)(i) of the Act by entering into an agreement to fix the purchase price of scrap metal.

2. In relation to remedies, as agreed during the hearing, a further Pre-Hearing will be conducted to discuss the matter.

3. There is no order as to costs.

Signed by:Enver Daniels
Signed at:2025-08-18 18:11:01 +02:00
Reason:Witnessing Enver Daniels

Enver Daniels

18 August 2025

Mr Enver Daniels | **Date**

Dr Medi Mokuena and Mr AW Wessels concurring.

Case Manager	:	Kameel Pancham
For the Commission	:	Adv. NH Maenetje SC
For Cape Gate	:	Adv. J Campbell SC and Adv. A Gotz SC *instructed by* Bowmans