IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CASE NUMBER: 107/CAC/Dec10

DATE: 20 October 2011

In the matter between:

THE COMPETITION COMMISSION OF SOUTH AFRICA

Appellant

and

GRALIO (PTY) LTD

Respondent

J U D G M E N T

DAMBUZA, JA:

1. The appellant referred a complaint to the Competition Tribunal (the Tribunal) against the respondent, alleging that the respondent, together with various other companies, participated in a cartel which engaged in price fixing, division of markets and collusive tendering, in contravention of section 4(1)(b)(i), (ii) and (iii) of the Competition Act (Act No 89 of 1998, as amended, ("the Act")). The complaint wasdismissed by the Tribunal; hence this appeal against the judgment and order of the Tribunal.

2. The original complaint referral by the appellant was against ten companies (including the

respondent)[1]which operated in the manufacture and supply of concrete products. By the time of the hearings before the Tribunal the ninth and tenth companies had since been absorbed, through corporate mergers, into two of the other companies. All exceptthe respondent in this appeal admittedto having participated in anti-competitive activities in contravention of the Act as alleged.All except two of those whoadmitted having participated in the acts which triggered the complaint, concluded settlement agreements with the appellant,in terms of which they agreed to pay various amounts of moneys as administrative penalties. A hearing was held on the quantum of administrative penalties payable by the two and an appeal against the amounts determined by the Tribunal as administrative penalties payable by the two respondents was heard by this Court.[2]

3. Only the complaint against the respondent in this appeal was heard on the merits.

4. The complaintemanated from receipt by the appellant, on 7 December 2007, of information on a long-running cartel in the market of pre-cast concrete products. According to the referral, the information was provided by **Rocla (Pty)(Ltd), (first respondent in the complaint referral).** During its leniency application **Rocla** explained to the appellanthow the cartel operated in prescribing pricing methods, and in allocating contracts, tenders and customers in Gauteng, KwaZulu – Natal and the Western Cape.The cartel operated both nationally and in the stated regions.

5. The appellant alleged in the referral that the cartel started operating in 1973, at the instance of Rocla and Infraset.[3]Over time other players in the concrete manufacturing and supply sector, such as the respondent, also joined the cartel. Cartel members attended regular meetings around the country whereat they discussed and reached agreements on details of

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cartel activities in pursuance of the cartel objectives. To ensure that participants did not exceed their allocated tonnage, at these meetings one of the cartel members, referred to as the banker, would present a comprehensive list of all contracts available in the various regions and a summary of tons of products supplied by each member over a period. The participants were identified at the meetings by number, rather than name, to conceal their identity. The venues at which meetings were held, changed each time to avoid detection. The participants agreed on an applicable price list and price increments. The allegation in the referral was that the respondent was represented at the cartel meetings by one **Hedley Hansen**.

6. In the main, the cartel agreements related to supply of concrete pipes and culverts to construction companies involved in building roads, pipelines, bridges, sewerage systems and other major infrastructural developments. The participants split the pre-cast products and sizes thereof which each firm could produce and sell to the market. In respect of some of the products, payments were made to firms to keep them out of the market. Contracts were allocated among cartel members in accordance with agreed market shares in the various designated regions.

7. In pursuing the terms of the allocation arrangement, the participant, to whom a contract was allocated, would offer to a building contractor, in its tender or quote, higher discounts whilst the non-allocatees would offer less or no discounts.

8. Regarding the respondent, the allegation was that it had participated in the KwaZulu Natal regional cartel by concluding an agreement with Rocla, Infraset and Cobro in terms of which Rocla would supply culverts in KwaZulu Natal, within a designated area,without competition from the others (i.e. Infraset, Cobro and the respondent).In this way the

respondent agreed not to participate in the manufacture and supply of culverts. These companies also agreed to share the market for production of pipes in KwaZulu Natal as follows: Rocla-54%, Infraset-19%, the respondent-10% and Cobro-17%.

9. In 2007, subsequent to Rocla's leniency application to the appellant, the cartel disbanded and ceased operating.

10. Before the Tribunal the issue was whether the respondent had, in fact, concluded an agreement and participated in a concerted practice of cartel activities as alleged.

11. The Tribunal accepted that the mere conclusion of the agreement (if proved) constituted contravention of the Act. But it found the evidence before it insufficient to prove that the respondent had concluded the agreement.The Tribunal then considered whether the respondent had participated in a concerted practice, and whether it could be held liable on the basis of Hansen's conduct.[4]

12. The Tribunal found that there was no evidence that the respondent had participated in the alleged concerted practice and further that the appellant had not proved that **Hansen** had authority to represent the respondent and to agree andbind it to participation in the cartel activities. The Tribunal also found no basis in the evidencefrom which it could be inferredthat **Hansen** had or would have conveyed the resolutions and agreements concluded at the cartel meetings to those in authority within the respondent.

13. The appellant contended before us on appeal that the Tribunal should have found that the evidence proved that both prior to and subsequent to change of share ownership and control of the respondent, the respondent had participated in the cartel.

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14. It was common cause before the Tribunal that, prior to October 2003, the shares in the respondent were owned by a company known as Ukumba Brick and Quarry(Pty)(Ltd). In October 2003 a family Trust controlled by Jagadasan "Jay" Singh ("Singh") acquired all the shares in the respondent and Singh became the Chief Executive Officer of the respondent.

15. Singh's evidence before the Tribunal was that the respondent never participated in cartel activities during the time that the business was under his controland that he only became aware of the existence of the cartel in KwaZulu Natal when he was confronted by the appellant pursuant to information furnished to the appellant by Rocla. According to Singh, Hansen and two other personswere respondent's sales agents when the Trust acquired shares to the respondent. They operated independently and were not employed by the respondent and they jointly earned commission of 5% on all sales of concrete pipes sold by the respondent. During Singh's control the relationship between the respondent and the three sales agents continued as before.

16. Singh maintained that neither he nor the directors of respondent ever authorized Hansen to attend cartel meetings and that since the Trust acquired the shares in the respondent, he (Singh) had always personally set the respondent's prices for pipes.

17. Francois Myburgh ("Myburgh") and Daniel Greeff("Greeff")testified on behalf of the appellant. Myburgh was the general manager of infrastructure projects at Infraset (which had since been absorbed into Aveng). His evidence was that Hansen "appeared to be" the respondent's representative in the KwaZulu-Natalprovincial cartel and that he (Hansen) would attend the cartel meetings and declare sales figures on behalf of the respondent. Hansen had toldMyburgh that he was an "agent" who sold pipes for the respondent.

Myburgh had also been told that the respondent had joined the cartel in about 2002 at the invitation of Rocla, when the respondent was owned by a construction group known as Stefanutti Bressan (i.e. prior to the Singh's control).

18. Greeffwas one of Rocla's managers in the Western Cape,but for some time he worked in Durban and in that capacity he attended the KwaZulu Natal Regional cartel meetings from 2004 until mid 2005. It is at these meetings that he met Hansen whom he understood to be representing the respondent.

19. One of the submissions made to us on appeal was that the Tribunal erred in failing to insist that Hansen attend the Tribunal hearing and give evidence thereat. The contention was that, in light of this error on the part of the Tribunal, we should direct that the matter revert to the Tribunal for Hansen's evidence to be heard.

20. The record reveals that the respondent had subpoenaed Hansen to give evidence before the Tribunal.However according to correspondence from Hansen's attorney, Hansen's doctor had advised that his health did not permit that he attend the hearing before the Tribunal. We learnt a few days after the hearing of the appeal that Hansen was already deceased at the time of the hearing of the appeal. For that reason I deem it unnecessary to deal any further with the appellant's submission in this regard, save to agree that the Tribunal is, as a specialist administrative tribunal and a fact seeking authority, entitled to play an active role in its conduct of the hearings before it, subject of course, to the requirements of fairness.

As Sutherland and Kemp write:

"The Tribunal does not function in the same way as an ordinary court, refereeing a dispute based only on the material presented by the adversaries before it and in accordance with fixed rules of play. In contrast to ordinary civil proceedings, competition proceedings always

involve the public interest and, under the Act, the Tribunal is given an active role in protecting that interest. As a result, the Tribunal conducts its proceedings in an inquisitorial manner, potentially calling its own witnesses, accepting evidence not normally admissible in a court of law, allowing a broad range of participants, and adjusting its procedures as it sees fit. This should always be tempered, however, by the requirement that the Tribunal conduct its hearings expeditiously and in accordance with the principles of natural justice."[5]

21. I do not agreethat the Tribunal was wrong in its finding that there was insufficient evidence before it to concludethat the respondent had agreed to and participated in cartel conduct as alleged. Firstly, the appellant relied for its submission that the respondent had agreed to participate in the cartel,on a document referred to in the record as the "*modus operandi"*. This document purports to set outthe terms of the KwaZulu Natal cartel. It refers, amongst others, to the area of operation of the cartel, the price fixing method, price lists, the method of dealing withcontracts and tenders and market share allocation between the relevant participants.

22. The *modus operandi*,on the face of it, appears to have been drawnon 19 January1988 and thereafter was amended on a number of occasions; with the last amendment having been effected on 27 June 2001.[6]

23. None of those who gave evidence at the Tribunal hearing testified to having personal knowledge of the circumstances in which the terms of the*modus operandi*were concluded.

24. In particular, neither Myburgh nor Greeff had any personal involvement in the drawing or amendment of the *modus operandi* or at the negotiations leading thereto, nor were they signatories or witnesses thereto or to the amendments thereto.

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25. The only evidence linking the respondent to the *modus operandi* was Myburgh's evidence that at the cartel meetings he understood participant number 3 to be the respondent. But, apart from the fact that Myburgh had initially testified that the respondent was participant number 4 in the cartel, the value to be attached to his evidence is inextricably linked to Hansen's attendanceat the cartel meetings, to which I revert later in this judgment.

26. Further, contrary to Myburgh's evidence that he had been told that the respondent joined the cartel in 2002, the *modus operandi* records that cartel member 3 was already participating in the cartel as far back as 1988, when the document was drawn, or in 2001 when the last amendment to the *modus operandi* was effected.

27. It is significant that the terms of the *modus operandi*appear to have been concluded prior to the change of ownership of the respondent. No evidence was led on who represented the respondent whenthe terms of this documentwere negotiated and concluded or when it was amended.

28. The appellant further relied, in its case that the respondent agreed to participate on the cartel,on a note recordedonthe minutes of a meeting held by members of the cartel at the Oude Werf Hotel on 23 June 2006, reading "*at present 90% distribution with Gralio out".* In this regard, theappellant contended that this note falls to be construed to mean that at some stage the respondent had been "*in"* the cartel.

29. But again, no evidence was led of the author of the note regarding the meaning thereof and/or the source of the information relayed therein. Myburgh's evidence was that he had been told that the respondent had left or was getting out of the cartel due to dissatisfaction

with the size of its allocated quota in the cartel. No evidence was led of the person(s) who had personal knowledge of the respondent's participation in the cartelor who had told Myburgh that the respondent was getting out of the cartel. Even if it were to be accepted that such allegation was made about the respondent, one can only conclude that it was based on Hansen's conduct and/or utterances at the cartel meeting(s), whose authority is in dispute. The Tribunalremarked at paragraph 65 of the judgment that:

"What Hansen's true business was in the cartel is obscure. The Tribunal is left confronting the strange spectacle of Hansen participating for some time, possibly a number of years, in the meeting and procedures of the cartel, to all intents and purposes as a representative of Gralio, when in fact Gralio was, at least after its acquisition by the Singh family trust, wholly outside the cartel. One is reminded of Mata Hari and other double agents of legend."

30. It was common cause before the Tribunal that the respondent did not manufacture or supply culverts.The appellant's contention was that such non-participation could only be in pursuance of the cartel objectives, since the appellant had the capacity to participate in that market. But there was no evidence to support this contention. There was, for example, no evidence that the respondent had been manufacturing culverts until the time of the agreement, or that from the time of the agreement it received money from one or more of the other cartel members which falls to be construed as a payment for not participating in the culvert markets.

31. On the other hand,Singh's uncontested evidence was that the Family Trust bought the business or shares therein primarily as a "baseload" to his civils and construction business which was already in operation at the time. According to him he was not interested in the culvert market. A further motivation for acquiring the respondent was that the respondent already had an SABS accreditation. All this, in my view, rather supports the respondent's

contention that there was no incentive for the respondent to agree to the restricting terms of the cartel. The evidence was that,after the acquisition of the shares, the respondent's business was relocated from Richard's Bay where it had been operating when the Trust acquired it, to Verulam, outside Durban where Singh acquired a bigger plant with the aim of increasing production. The submission by Mr Marnewick, on behalf of the respondent, that the respondent would not agree to limit itself to allocated markets, after having expanded its business, is, in my view, persuasive.

32. There was no evidence before the Tribunal to gainsay Singh's version that, contrary to the terms of the *modus operandi* and Hansen's activities within the cartel, the respondent supplied pipes to contractors outside its purported area of allocation, in the Eastern Cape and the Free State.[7]

33. In the end, as the Tribunal found,there was no credible evidence before the Tribunal on which it could conclude that the respondent had agreed to participate in the cartel.

34. But the matter did not end there.At paragraph 59 of its judgment the Tribunal found that:

"... if the evidence falls short of establishing that such an agreement existed, that is not the end of the matter since Hansen's participation in the meetings of the KwaZulu Natal cartel might indicate that Gralio was engaged as a participant in a concerted practice of the cartel, and hence have been contravening Section 4 on that basis."

35. The question of whether Hansen's participation in the meetings of the cartel signified the respondent's participation in a concerted effort depended on his authority to represent the respondent at the meetings.

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36. Both Myburgh and Greeff had assumed that Hansen had the requisite authority to attend the meetings. They however, had no personal knowledge of the derivation of such authority. Myburgh's evidence was that his colleague Chris Blake would know more about the capacity in which Hansen attended the meetings. Blake never gave evidence before the Tribunal. Another person who, according to the evidence would have had personal knowledge of the events referred to was **Ted Brown.** He was also never called to give evidence before the Tribunal.

37. Mr Bhana, who appeared together with Mr Mooki on behalf of the appellant, listed the following factors from which, as he submitted, an inference should be drawn that the respondent participated in cartel activities:

1. Hansen's presence at cartel meetings;
2. The absence of a denial that the respondent participated in the cartel before 2003 (presumably prior to change of ownership);
3. The improbabilities that Hansen would have been attending the meetings on a "*frolic of his own"*, given that generally cartels do not readily admit an "*outsider"* to its meetings;
4. That the respondent was allocated a market share;
5. That Hansen gave the respondents production and sales figures at the meetings;
6. That respondent benefited from participation by virtue of the market division and exchange of information;
7. That Myburgh and Greeff dealt with Hansen as if he was a representative of the respondent;
8. That Hansen was the face of the respondent;
9. That at some stage Hansen agitated for increased market allocation for the respondent; and
10. The contents of the *modus operandi*.

38. As already stated,Myburgh's evidence before the Tribunal was that before Singh's time,hehad "heard" that the respondent, having been invited by Rocla, had agreed to accept a 10% market share of the KwaZulu Natal pipes (and culverts) market share. But Myburgh personally only met Hansen in "*the early 2000's"*. Even when he met him, he was never sure of Hansen's relationship with Gralio; Hansen had told him, that "*he was an agent that sold concrete pipes on behalf of Gralio*". Apart from reliance placed on the *modus operandi,*this was the only evidence led on the respondent's alleged participation in the cartel prior to Singh's control. Myburgh confessed his unfamiliarity with the operation of the cartel in KwaZulu Natal; his main area of operation having been in Johannesburg. In the end he did not know when exactly the respondent joined the cartel.

39. Apart from Hansen's attendance at the cartel meetings armed with the respondent's production or sales figures (referred to as "tonnage"), much was made, on behalf of the appellant both before the Tribunal, and before us on appeal, of Singh's inability to give details of, for example, the value of a big contract which the respondent had secured with the Department of Transport and the failure to list, as a separate and distinct expenditure, in the respondent's financial statements, the commission paid by the respondent to Hansen and the other sales agents in 2008. This, so it was contended on behalf of the appellant, was an indication that, contrary to Singh's evidence, Hansen was, in fact, an employee of the respondent who had been in control of the respondent during the relevant period. Hansen, so the argument went, had been the face of the respondent and the respondent would not have been in the business of selling pipes if it were not for its sales agents.

40. This argument, however, does not advance appellant's case any further. Even if the sales agentsmade most or all of the respondent's sales and could be seen as the "face" of the respondent, that did not necessarily give them authority to conclude agreements on behalf of

the respondent, other than in the ordinary course of their agreement with the respondent (as sales agents).

41. It would, in my view, not be proper to conclude, based on suspicion or to infer, based solely on perceived shortcomings in Singh's evidence, that Hansen had the necessary authority by virtue of having some relationship with the respondent.

42. That Hansen possessed respondent's sales or production figures, on its own, does not justify a conclusion that Hansen had the necessary authority. As one of the respondent's three sales agents, Hansen would have had access to the respondent's sales or production figures.

43. The Tribunal was not entitled to ignore Singh's evidence; nor could it find that shortcomings in his evidence necessarily proved the appellant's allegations where there was no evidence to that effect. Singh's evidence was that the respondent's income from its big venture with the Department of Transport varied from month to month; ranging in the vicinity of R500 000 to R600 000.It is not unheard of that the execution of contracted work takes place over a lengthy period and payment is effected periodically, according to work done over time. Therefore, in the absence of evidence to the contrary, there was no basis to find this explanation improbable.

44. Singh's further evidence was that no commission was paid to the sales agents during 2008 because moneys due in respect of sales made by the agents had not been collected. Once again, no evidence to the contrary was placed before the Tribunal. On the other hand, it seems to have been common cause that commission had been paid by the respondent prior to 2008. Discrepancies between commission paid and sales made over a particular period did not, in my view, necessarily disprove Singh's evidence, as his explanation seems to imply that payments were not necessarily received at the same time as delivery of the product or

when sales were made.

45. Whilst it is true that cartels do not readily admit outsiders, in this case Hansen could hardly be regarded as an outsider. He had been involved in the precast industry since 1973. The evidence was that at some stage, it would seem in the late 90's or early 2000, he retired. He still wanted to work but could not do so on a fulltime basis, as that would violate the terms of his medical aid scheme. Hence he re-joined the industry on an "agency" basis. This much was common cause before the Tribunal. Therefore, there seems to be some confirmation of the evidence that he worked somewhat independently of the respondent.

46. Mr Bhanafurther submitted that there is no requirement for proof of authority in section 4 of the Act and that the introduction of this requirement would defeat the purpose of the Act. He argued that, if a party is accepted "by everyone" as having authority to represent his or her principal, the requirements for contravention of the Act are satisfied. I do not agree. A clear factual basis for theimpression that a party has authority is crucial to the determination of the validity of the alleged or perceived authority.

47. While the Tribunal is not a Court of law, and is entitled to afford itself significant flexibility in its hearings,particularly withregard to the ordinary rules of evidence, it remains bound by the requirements of fairness. Crisply expressed, Tribunal hearings need to adhere to the principles of legality and its decisions must be founded on credible evidence. The flexibility allowed in its proceedings is not intended to permit abuse of the process. Thus,

"... Circumstances will dictate the extent to which formal rules of evidence should be adhered to or relaxed, but the accused may in no circumstances be deprived of his constitutional right to a fair hearing."[8]

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48. The Tribunal in this case, in line with the flexibility afforded in its proceedings,admitted hearsay evidence by Myburgh and Greeff. But whether such evidence constituted sufficient proof of the allegations made is a different issue, particularly in the context of Singh's evidence disputing participation in the cartel.

49. The requirements for vicarious liability have become settled law in our jurisprudence. As submitted on behalf of the respondent, a company can only act through a person imbued with valid authority. Such authority may be express, implied or ostensible.[9]Whether an employee or representative of a company has the necessary authority to bind his or her principal is often determinable from his or her office within the principal (implied authority) or the principal's conduct regarding the relevant activity or transaction, either prior to or subsequent to the conclusion thereof (ostensible authority). It is the evidence relating to such authority that was lacking at the Tribunalhearing. Instead the evidence was that whilst the other attendees at the cartel meetings were Managers, Directors or Managing Directors, Hansen was only known to be an "*agent"* of the respondent.

50. An agent's *authority* to represent the principal is the basis of the agency and without that authority, the acts of an "agent" cannot bind the principal.Without evidence of this authority the Tribunal could not find contravention by the respondent.

51. Seldom, if ever, does legislation refer to proof of the circumstances which constitute a contravention thereof. This is a requirement of our law of evidence. Sufficiency of evidence cannot be ignored, if the Tribunal has to make a finding concerning the existence or non existence of alleged facts and to pronounce on the liability of a partyalleged to be engaged in unlawful conduct.

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52. For this reasonMr Bhana's submission that allegations of contravention of the Act are sufficient to secure a finding of contravention of the Actfalls foul of a fundamental principle of our law. Credible evidence of existence of the allegation must be provided.

53. In my view, even in Tribunal hearings,inferences and probabilities must be distinguished from conjecture and speculation. There can be no proper inferences drawn unless there are objective facts from which to infer the facts sought to be established. If there are no positively proved facts from which the inference can be drawn, the method of inference fails and what is left is mere speculation.

54. I do not suggest that the appellant'scase depended solely on the existence of a strict binding contract between Hansen and the respondent for Hansen to represent the respondent in the cartel. But it seems to me that if the appellant had conducted a more thorough and objectiveassessment of the nature of the case it sought to prove before the Tribunal, it would have beenmore alive to the difficulties it could encounter in its reliance on the *modus operandi* and Hansen's attendance at the cartel meetings.

55. A critical evaluation of the two legs on which its case stood in the context of Singh's own allegations would have revealed the weaknesses in the evidence the appellant sought to present, such as the lack of sufficient detail regarding the respondent's representative at the cartel meetings prior to and subsequent to the change in ownership and whether representation at the cartel prior to the change of ownership transcended the change of ownership. Perhaps the appellant would then have been able to fortify its case accordingly. The evidence presented by the appellant fell far short of proving either an agreement to or actual participation in cartel activity.

56. In the result, I cannot find that the Tribunal was wrong in its conclusion that the respondent had not been shown to have been a party to an agreement or a concerted practice prohibited under section 4 of the Act.

COSTS

57. Mr Marnewick submitted that the costs should follow the cause. I agree. But I find no reason to interfere with the Tribunal's ruling that there should be no order as to costs. Generally each party participating in a Tribunal hearing must bear its own costs.[10]

58. Consequently:

1. The appeal is dismissed with costs.

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DAMBUZA, J

DAVIS, J: I agree.

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DAVIS, J

ZONDI, J: I agree.

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ZONDI, J

Rocla (Pty) Ltd (first respondent), Southern Pipeline Contractors (Pty) Ltd (second respondent), Concrete Units (Pty) Ltd (third respondent), Aveng (Pty) Ltd (fourth respondent), Gralio (Pty) Ltd (fifth respondent), Cobro (Pty) Ltd (sixth respondent), Cape Concrete Works (Pty) Ltd (seventh respondent); Conrite Walls (Pty) Ltd (eighth respondent), Craig Concrete Products (Pty) Ltd (ninth respondent), D&D (Pty) Ltd (tenth respondent).

See the judgment of this court in SPC and Another v The Competition Commission, Case No 105/CAC/DEC10 and Case No 106/CAC/DEC10; handed down on 4 August 2011.

See 1 (supra)

The Tribunal formulated its approach to the issues before it as follows:

> "These tests devolve into the following questions:
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> 1. Was Hansen authorised by Gralio to participate (as we accept he did) in the meetings and procedures of the KwaZulu Natal cartel, hence establishing the existence of an agreement prohibited under Section 4?
> 2. If not, is there evidence to show that Hansen's participation brought about conduct of Gralio that amounted to acceptance of, or implementation of, the rules and procedures of the KwaZulu Natal cartel, and hence Gralio's participation in a concerted practice prohibited under Section 4?"

Page 59 of the Tribunal's judgment.

Sutherland and Kemp: Competition Law of South Africa at 11-24 (11.4.6.1) and the authorities cited therein.

Amendments were effected on 9 November 1989 and on 18 May 1995.

Although the non-adherence to allocated markets would not on its own, absolve the respondent where there was sufficient evidence of participation in the cartel.

Schikkard et v.d. Merwe *(supra)* at 15.

Tuckers Land and Development Corporation (Pty) Ltd v Perpellief 1978 (2) SA 11 (T)

Section 57(1) of the Act, subject to section 57(2) of the Act and the Tribunal Rules.