



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No:CR192Oct18

In the matter between:

The Competition Commission

Applicant

and

Totalgaz Southern Africa (Pty) Ltd

First Respondent

Oryx Oil South Africa (Pty) Ltd

Second Respondent

KayaGas (Pty) Ltd

Third Respondent

Easigas (Pty) Ltd

Fourth Respondent

African Oxygen Limited

Fifth Respondent

Panel : Yasmin Carrim (Presiding Member)
: Enver Daniels (Tribunal Member)
: AW Wessels (Tribunal Member)

Heard on : 10,11,12 March 2020; 22, 23, 24, 25, 28, 29, 30
March 2022; 13 & 14 April 2022

Reasons issued on : 29 June 2023

REASONS FOR DECISION AND ORDER

Introduction

- [1] This matter concerns whether the Respondents, Totalgaz Southern Africa (Pty) Ltd ("Totalgaz"), Oryx Oil South Africa (Pty) Ltd ("Oryx"), KayaGas (Pty) Ltd ("KayaGas"), Easigas (Pty) Ltd ("Easigas") and African Oxygen Limited ("Afrox"), entered into an agreement, alternatively, a concerted practice which directly or indirectly fixed the amount charged as the deposit fee for cylinders paid by first time purchasers of liquefied

petroleum gas (“LPG”), in contravention of section 4(1)(b)(i) of the Competition Act, No. 89 of 1998 (“the Act”).

- [2] The Competition Commission (“the Commission”) alleges that during the South African Petroleum Industry Association (“SAPIA”) meetings the Respondents concluded an agreement to increase the deposit fees on LPG cylinders for first time buyers, in contravention of section 4(1)(b)(i).
- [3] The Commission did not seek an administrative penalty against the Fifth Respondent, Afrox because it was the Commission’s Corporate Leniency Program (“CLP”) applicant.
- [4] In these reasons we first sketch out relevant background information which includes a summary of the Commission’s case and the defences raised by the Respondents. We then deal with some salient features of the LPG market in South Africa. We then turn to evaluate the evidence before us and assess whether the Commission has on balance of probability established that the Respondents have contravened section 4(1)(b)(i). Finally, we provide our order.

Background

- [5] On 27 August 2015 the Commission referred a complaint against all five Respondents for allegedly entering into an agreement and/or engaging in a concerted practice to fix the amount charged, as a deposit fee for the cylinders to first time buyers, in contravention of section 4(1)(b)(i) of the Act.

Commission’s case

- [6] The Commission alleges that the Respondents had an agreement that fixed the amount of the deposit fee paid by the customers who buy LPG cylinders for the first time. The agreement is alleged to have arisen during the SAPIA LPG sub-committee meetings in the first half of 2015, and which was then implemented during the first week of June 2015 (the “alleged agreement”).
- [7] Consumers buy LPG from retailers who sell gas supplied by the various wholesalers, whether directly or through designated distributors. First time customers pay a deposit for cylinders in addition to the purchase price of the actual LPG.
- [8] The changes in deposit fees since 2005 have been as follows:

8.1. 2005 – R75.00

8.2. 2009 – R150.00

8.3. 2015 – R300.00

[9] The 2015 increase is the focus of the Commission's case.

[10] The alleged agreement resulted in the Respondents simultaneously increasing the deposit fee paid for cylinders during or around June 2015 from R150 to R300 for cylinders ranging in sizes of 9kg - 48kg.

[11] Whilst LPG is also sold in 3kg, 5kg and 6 kg cylinders by some of the Respondents and on similar terms, these did not form part of the Commission's case.

[12] KayaGas was not part of SAPIA at the relevant time the alleged agreement was said to have been reached and/or implemented. Although KayaGas did not participate in the SAPIA meetings, the Commission was of the view that KayaGas adjusted its own deposit in accordance with long-standing practice in the industry when the market leader, Afrox, signaled the deposit increase by way of public announcement. The Commission therefore submitted that KayaGas' non-participation in these meetings was immaterial and that it engaged in a concerted practice prohibited by section 4(1)(b) of the Act.

[13] The Commission called the following witnesses to advance its case:

13.1. Mr Mark Radford of Afrox;

13.2. Mr Ben Cohn of Afrox; and

13.3. Mr Roger Rudd of Reatile Gas.

Respondents' case

[14] The Respondents all raise similar defences to the Commission's complaint referral as follows:

- 14.1. Firstly, the pricing conduct of the Respondents (following the increase in deposit fees charged for LPG cylinders) was not the product of any agreement or concerted practice with any of the fellow Respondents. Each Respondent avers that its conduct was unilateral in nature and taken as a result of commercial decisions; and
- 14.2. Second, all the Respondents, save for Afrox the CLP applicant, raised as a preliminary point in their answers, that they were not competitors in the supply of cylinders and that properly characterised they were in a vertical relationship in relation to the LPG cylinders, due to the operation of the Cylinder Exchange Program (“CEP”), in which they were all participants. In other words, the decision of the Respondents to adopt the same increase in the cylinder deposit fee was not a function of any horizontal relationship between them but was rather a necessary incident of the vertical relationship between the Respondents as participants in the CEP. Accordingly, they could not be found to have contravened section 4(1)(b)(i).
- 14.3. An alternative to this defence is that even if the Tribunal found that the Respondents were in a horizontal relationship regarding the supply of cylinders, the CEP delivered benefits to consumers and/or new/smaller entrants. It was not designed to restrict competition in the sale of LPG; on the contrary the CEP facilitated the increased sale of LPG by a rapid return of cylinders to each wholesaler. The CEP necessitated a uniform deposit fee for its smooth functioning. This is not the type of conduct that, properly characterised, is contemplated in the scope of section 4(1)(b) which prohibits hard core cartels.

[15] The Respondents called the following witnesses to defend their position:

- 15.1. Totalgaz – Mr Vincent Scarmure and an expert witness Mr Richard Murgatroyd;
- 15.2. Oryx – Mr Roger Solliez.
- 15.3. Easygas – Mr Frédéric Royer and Mr Walter Sanchez.
- 15.4. KayaGas – Mr George Tatham.

[16] We now turn to set out some salient features of the LPG cylinder market in South Africa.

The LPG market

- [17] LPG is predominantly a mix of propane and butane which, at normal temperatures and atmospheric pressure, are found in a gas form. Like petrol, propane and butane are produced in the distillation process of crude petroleum.
- [18] LPG is highly flammable and is primarily burned to provide energy. In a domestic environment it is used for cooking and heating. LPG is further used as an industrial fuel in certain industrial applications.
- [19] The sale of LPG itself is regulated under the Petroleum Products Act, 120 of 1977 and in accordance with section 2(1)(c) of that Act, the relevant Minister may by notice or regulation *“prescribe the price, or a maximum price, or a maximum and a minimum price, at which any petroleum product may be sold or bought by any person.”*
- [20] Acting in terms of section 2, the Minister published regulations in Notice R377 of 1 April 2008, regulating the Maximum Refinery Gate Price of LPG (that is, the maximum price at which a refinery is permitted to sell LPG for consumption in South Africa) (“the MRGP”) and the Maximum Retail Price (“the MRP”). The MRP and the MRGP only relate to the LPG and not to the cylinder.
- [21] LPG is conveyed by bulk road or rail transport to the depots of the LPG suppliers, or their distributors, where it is stored in cylinders. The purpose of the bulk depots is to fill, store and distribute LPG cylinders.
- [22] The storage and distribution of LPG necessitates the use of LPG cylinders which can withstand the pressure that is required to keep LPG in its liquid form. These cylinders are also designed to withstand the vapour pressure exerted by LPG under normal atmospheric conditions.
- [23] The cylinders at the bulk depots of distributors are generally provided on loan by one of the LPG wholesalers to whom the distributor is contracted.
- [24] It follows that a significant segment of the LPG market is the *“cylinder market”*, as opposed to the *“bulk market”*.
- [25] The South African LPG cylinder market is served by the supply of LPG in cylinders of standard sizes, being 5kg, 9kg, 14kg, 19kg and 48kg.

- [26] The design, handling, filling, maintenance, and inspection of the cylinders is an important safety matter and is therefore covered by a code issued by the South African Bureau of Standards (“SABS”) and reinforced by regulations under the Occupational Health and Safety Act, 85 of 1993 (the “OHS Act”). Under the SABS code, an LPG cylinder may only be refilled by its owner, or by a person authorized to do so by the owner.
- [27] Despite the sale of LPG in cylinders to an ultimate end-user, an LPG wholesaler retains ownership of its cylinders and bears the responsibility to refurbish and maintain them at its cost. It also bears the risks associated with defective cylinders.
- [28] In South Africa, first time customers of LPG are required to pay a deposit fee for the cylinder in addition to the purchase price of the LPG. In almost all instances the deposit fee is paid to a retailer of LPG gas which carries stock of LPG cylinders (not necessarily all belonging to the same LPG wholesaler). The retailer is required to pay the deposit to the distributor, which in turn pays the deposit to the LPG wholesaler.
- [29] Cylinders are imported into South Africa and the average landed cost of a 9kg cylinder during 2015 was approximately R350.¹ The cost of cylinders may be a barrier to entry and expansion for new or smaller entrants who may have working capital restrictions to purchase sufficient volumes of cylinders to grow their market share.²
- [30] According to the Department of Energy (“DoE”), cylinder deposits were put in place to help lower the cost of acquiring a cylinder for domestic end-users.³
- [31] The DoE had previously sought to regulate the level of the cylinder deposit.
- [32] The history of this regulation is somewhat patchy (we deal with it in greater detail later). However, from a policy perspective it appears that the DoE intended to regulate the level of the cylinder deposit, accepting that the regulatory framework of the industry included the notion of a cylinder deposit to be paid by the customer of LPG.
- [33] This position now appears to be changing. On 01 April 2021 the Department of Mineral Resources and Energy issued for public comment its Draft Liquified Petroleum Gas

¹ Transcript, page 990 at line 15 & page 1002 at lines 12 – 14.

² Transcript, page 376-377, 410 and 411.

³ LPG Market Inquiry Report para 1.37 Bundle B page 7690.

Rollout Strategy, in terms of the Petroleum Product Act 120, of 1977. Under the heading of “LPG Cylinder Deposits” the strategy describes the following:

“Cylinders are a necessary tool to market and compete effectively in this sector. Consequently, wholesalers have invested in the cylinder market to ensure that their stock of cylinders is sufficient to meet market demand. Therefore wholesalers' investments in cylinders need to be somehow protected. The latter however need to be affordable in order to expand the usage of LPG. It is the Department's view that cylinder deposit must be excluded from the working rules for setting the monthly Maximum Retail Price (MRP) for LPG. Customers must pay for the actual cost of the cylinder and own the cylinder. Ownership of a cylinder (s) by the customer will assist in curbing the practice of cross -border stealing of cylinders thus assisting the distribution of LPG to residential households.”

- [34] It would appear from the above that the industry is moving toward a customer ownership model of LPG cylinders rather than the deposit model used during the complaint period.
- [35] Notwithstanding this recent development, at the time that the matter was heard, first time customers of LPG were still required to pay a cylinder deposit.
- [36] A unique feature of the South African LPG market is that although a wholesaler or its agent may not refill a competitor's cylinder, major LPG wholesalers permit the exchange by customers of their respective LPG cylinders through the mechanism of the CEP.
- [37] Consequently, a customer which has an empty LPG cylinder may purchase LPG from any retailer and is not restricted to purchasing LPG supplied by the wholesaler whose cylinder it presently has. When a sale of LPG occurs, a customer that already has an LPG cylinder exchanges its empty cylinder for a full one and only pays for the LPG purchased and not the LPG cylinder deposit in respect of the new cylinder. Similarly, if a customer wishes to return a cylinder and claim his deposit back, he can do so at any retailer without producing any documentation.

Legal Framework

[38] The Respondents raised a characterisation type defence that they were in a vertical relationship as a function of the CEP and therefore the conduct did not fall within the ambit of section 4(1)(b), alternatively that the conduct is not the type of conduct contemplated under section 4(1)(b) by virtue of the beneficial aspects of the CEP. This was raised as a point in *limine*. The onus would then be on the Commission to show that the conduct complained of (the alleged agreement) is the type of conduct contemplated by section 4(1)(b) of the Act.

[39] The approach to characterising alleged conduct contravening section 4(1)(b) was first set out in *American Natural Soda Ash Corporation v Competition Commission*⁴ (“ANSAC”) where the Supreme Court of Appeal (“SCA”) held:

*“the essential enquiry . . . 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. In ordinary language this can be termed “characterising” the conduct.”*⁵

*“... 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 Competition 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.”*⁶

[40] This was then expanded on by the Competition Appeal Court (“CAC”) in *Competition Commission v South African Breweries Limited and Others*⁷ (“SAB”):

⁴ 2005 (6) SA 158 (SCA).

⁵ ANSAC at para 47.

⁶ ANSAC at para 49.

⁷ [2014] 2 CPLR 339 CAC.

*“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 section 4(1)(b). However, since characterisation in this sense involves statutory interpretation, the bodies entrusted with interpreting and applying the Act (principally the Tribunal and this Court) must inevitably shape the scope of the prohibition, drawing on their legal and economic expertise and on the experience and wisdom of other legal systems which have grappled with similar issues for longer than we have.”*⁸

*“The animating idea of the characterisation principle is to ensure that section 4(1)(b) is so construed that only those economic activities in regard to which no defence should be tolerated are held to be within the scope of the prohibition. Whether conduct is of such a character that no defence should be entertained is informed both by common sense and competition economics.”*⁹

[41] In *Dawn Consolidated Holdings (Pty) Ltd and Others v Competition Commission*¹⁰ (“*Dawn*”), the CAC confirmed the approach of the SCA in *ANSAC* that it is necessary to establish whether the *conduct* complained of coincides with the character of the prohibited practice. The CAC held that:

*“Conduct, which on its face may seem to contravene the prohibition, may be found not to do so pursuant to a proper process of characterisation.”*¹¹

[42] Thus, the CAC in *Dawn* endorsed the test in *SAB*, and provided guidance to the characterisation enquiry. The first step was to ask whether or not at the time the shareholders agreement was concluded, the parties were in a horizontal relationship i.e. competitors (characterisation of the economic relationship). The second step was to characterise the offending clause of the agreement (characterisation of the conduct).¹²

⁸ *SAB* at paras 36 & 37.

⁹ *SAB* at para 44.

¹⁰ 155/CAC/Oct2017 [2018] ZACAC 2 (4 May 2018).

¹¹ *Dawn* at para 13.

¹² *Dawn* at paras 12-13.

[43] More recently the CAC has elucidated the proper application of economic theory and competition law in the characterisation exercise to be undertaken under section 4(1)(b) of the Act in *Competition Commission v Karan Beef and I&J*¹³ and *Tourvest Holdings v the Competition Commission & Siyazisiza Trust*.¹⁴

Analysis

[44] Section 4(1)(b)(i) reads:

“4. Restrictive horizontal practices prohibited – (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-

....

(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.”

[45] The Commission states the following in paragraph 13 of its referral affidavit (pleading):

*“The Respondents are competitors in the market for the supply of Liquefied Petroleum Gas (“LPG”). The Respondents also supply cylinders in which LPG is contained. They are therefore in a horizontal relationship as contemplated in Section 4(1) of the Competition Act 89 of 1998 as amended (“the Act”).”*¹⁵

[46] While the Commission makes clear that the Respondents are competitors in the market for the supply of LPG i.e. they are in a horizontal relationship as contemplated in section 4(1) of the Act, it does not clarify why or how, in its view, the Respondents are competitors or in a horizontal relationship for the supply of LPG cylinders as for purposes of section 4(1).

¹³ CAC/196/Nov21.

¹⁴ CAC/195/Oct21.

¹⁵ Commission’s Referral Affidavit at para 13.

[47] Other than this allegation in paragraph 13, the Commission does not set out any further details in its referral affidavit why the Respondents are to be viewed in a horizontal relationship for the supply of cylinders as required by section 4(1)(b).

[48] No details are provided by the Commission in its pleadings whether the cylinder deposit constitutes a component of price, or whether it could be construed as a trading condition for first time buyers of LPG.

[49] The Respondents do not dispute that they are competitors in the market for the supply of LPG. What they dispute is that they are competitors in the supply of cylinders.

Vertical relationship?

[50] As discussed above the Respondents have argued that their relationship in relation to the supply of cylinders, properly characterised, is a vertical one. In their view the Commission has not even met the essential threshold requirement for section 4(1)(b), namely that they are competitors in the supply of cylinders.

[51] As we have already discussed, the characterisation type defence put forth by the Respondents suggests that we should decide this first and in so doing the onus would shift to the Commission to show that the Respondents were in a horizontal competitive relationship when the alleged agreement was reached and that the conduct was the type of conduct that is so egregious as to be a contravention of section 4(1)(b)(i).

[52] It is a prerequisite of section 4(1)(b)(i) that the Respondents are in a horizontal relationship or competitors in the market in which the alleged agreement is said to take place.

[53] The CEP provides the framework in which the structured retrieval and exchange of cylinders between competitor wholesalers (such as the Respondents) occurs.

[54] The CEP enables each wholesaler to take back possession of its own cylinders so that these may be refilled, and more of its LPG can be sold to the end consumer.

Price/trading condition?

- [55] In response to the Respondents' submission that they are in a vertical relationship the Commission went on to suggest that the way the Respondents treated the deposit in their financial statements and their business suggested that the deposit was a form of income and utilised by the Respondents as working capital.
- [56] Hence, it was argued by the Commission, that the deposit for a cylinder was in fact a component of the price of LPG or a parameter of competition. If this was found to be so, then the Respondents would be in a competitive horizontal relationship regarding the cylinder deposit fee.
- [57] It was common cause that consumers rarely claimed their deposits back. This is why from an accounting policy perspective, after a certain number of years, proceeds from deposits (as a provisional or contingent liability) were transferred in accounting terms into the income statement of the Respondents but that the nature of it was still a liability.
- [58] In the case of Oryx, the applicable accounting policy was to retain deposits as a contingent liability on the books.

"MR SOLLIEZ: Yes, as Oryx I will try to simplify. If Oryx buys a cylinder from supplier A. I need to, when I receive my good and I've paid in, I recognise my goods as stock. Then I will inject my cylinder 15 in the marketplace. So, I will issue, I will put my cylinder on loan to a distributor and issue a deposit invoice for the number of cylinders that I have put on loan to this distributor times the cylinder deposit rate, okay.

I recognise ... so, here I'm giving credit or not credit. So, that 20 may take me one day, one month or more to recover the money for the metal. In the meantime, when I send and deliver my distributor with this new cylinder, I take this cylinder out of the stock. I start to depreciate this cylinder from the fixed asset register where I have put the cylinder in and more importantly, I recognise the proceeds of the deposit as a long-term liability in the balance sheet that is not recognised in the profit and loss. It is not a trading condition"¹⁶

¹⁶ Transcript, page 1188 – 1189.

- [59] The Commission submitted that the Respondents present the deposit fee as a form of security for the cylinder i.e. to incentivise the customer to return it but in reality the primary purpose of a high cylinder deposit was to fund the Respondents' businesses and growth.
- [60] The Respondents do not deny using proceeds from deposits as working capital to finance the purchase of new cylinders or for cash flow purposes. Mr Royer of Easigas testified that even though the profitability of the business is based on the sale of gas and not really based on the cylinders, the deposit is important for the cashflow of the business as it funds the operations of the business.¹⁷ He further stated that there is a need to have a deposit that is equal to or very close to the landed cost of the cylinder because they needed the deposit to raise cashflow for their business in order to buy more cylinders in future in order to sell more gas.¹⁸
- [61] Mr Tatham of KayaGas also confirmed that the deposits are used to fund new purchases, thus obviating the need to raise the requisite funding from funders or shareholders. Mr Tatham confirmed that for a small or new entrant in particular "... a low cylinder deposit fee is a barrier to entry. The lower the level of the deposit fee, the higher the barrier becomes for new entrants..."¹⁹ A new entrant would not be able to raise the requisite working capital for entry and expansion. A high deposit ensured that it had cash flow and could purchase more cylinders.
- [62] Hence, most of the witnesses, including those of the Commission, confirmed that they utilised deposits for the growth and expansion of the business – either as working capital or cash flow – and that a low deposit fee (relative to the landed cost of a cylinder) would not be beneficial for small or new entrants.
- [63] But there is nothing inherently anti-competitive about businesses raising capital through a deposit mechanism from customers in order to increase uptake of the product or increase penetration in the market while recouping some of their investment.

¹⁷ Transcript, page 783 at line 5

¹⁸ Transcript, page 785 at line 3

¹⁹ Mr Tatham's Witness Statement at para 5.2.

- [64] In the LPG market the deposit was considered precisely as a mechanism to allow players to enter the market where the costs of the cylinder are borne by both the supplier and the customer albeit conditionally.
- [65] Other industries also utilise a variety of mechanisms to on the one hand promote uptake of their product but on the other recoup the costs of expensive devices. For example, in the ICT sector a supplier may provide a device to a consumer at no charge provided the consumer commits to a fixed term contract of 24 months. If the consumer were to cancel the contract before its expiry date, he was required to repay the supplier for the cost of the device.²⁰
- [66] In any event, even if the deposit was treated differently in the books of the suppliers from an accounting perspective after a reasonable period of time, this does not affect its legal nature i.e. that a customer could claim it back at any time provided the cylinder was still functional.
- [67] Nor does the payment of the deposit by the consumer constitute a sale of the cylinder. The LPG wholesaler remains the owner thereof and bears the legal responsibility for maintenance of the asset and compliance with health and safety regulations. They continue to bear the risks associated with defective cylinders. As Mr Sanchez put it in his witness statement, "*Easigas is not in the business of selling LPG cylinders*".²¹ When a customer purchases packed LPG, it acquires the LPG that is packed inside the cylinder.
- [68] Finally, we note that a consumer is not obliged to pay a deposit on a supplier's cylinder, he can purchase his own cylinder and have it filled by any supplier authorised to do so. In other words, in order to purchase LPG from Firm A, the consumer is not compelled to obtain a cylinder from Firm A, he can buy the cylinder from any other cylinder supplier from a hardware store and in such a case is not obliged to pay the deposit.²²
- [69] Notwithstanding all of this, there is another perspective from which to consider the deposit fee, namely that of the first-time buyer of LPG who does not purchase his/her own cylinder but elects to pay a deposit fee. While no evidence was led as to the relative percentage of the market of first-time buyers who elect to pay a deposit fee ("the

²⁰ See Clause 3(3) of ICASA's Regulations on handset Subsidies No. 31156 as Gazetted.

²¹ Sanchez Witness Statement at para 14.

²² For example. CADAC cylinders can be bought at hardware and outdoor stores.

first-time buyer segment”), we can assume for purposes of this enquiry that they would constitute a larger proportion of the first-time buyer segment of the market especially for larger cylinders. For such customers the cylinder and the LPG could be viewed as a “basket” of goods required to purchase LPG. It then follows that the cylinder itself would form part of the “price” under section 4(1)(b)(i) of the Act.

[70] In light of all of this, we find that it is not necessary for us to make firm findings on either of these issues namely, whether the respondents are in a vertical relationship and whether the deposit fee is a component of pricing or a trading condition but rather to take the approach of a worst-case scenario analysis and make assumptions in relation to both these issues. In other words, we ask the ultimate question first. Does this conduct, properly characterised, fall foul of section 4(1)(b)?

[71] We assume (without arriving at a firm finding) for purposes of this enquiry that the deposit fee is a component of pricing, that the respondents are in a horizontal relationship and that they have agreed on a uniform deposit fee for the CEP.

[72] In our view such an approach would be favourable to both the Commission and the respondents. For the Commission, it posits, as a hypothesis that the respondents are in a horizontal arrangement and the deposit fee is a component of pricing. For the respondents it posits the worst-case scenario contemplated in the alternative characterisation defence namely that even if were to find that they were in a horizontal relationship the alleged conduct does not contravene section 4(1)(b).

[73] While the CEP itself has not been challenged by the Commission – and no evidence has been led by it whatsoever that the CEP itself is a contravention of section 4(1)(b) – this approach would put to rest the issue of whether a uniform deposit fee contravenes section 4(1)(b).

[74] We turn to consider the CEP which is the context in which the uniform fee was implemented.

The CEP

[75] The origin of the CEP and its purpose are recorded in the 1999 Memorandum of Agreement:

“The [wholesalers] have been operating a cylinder exchange scheme for a number of years, the purpose of which was to promote gas sales by eliminating inconvenience to customers who wished to exchange empty cylinders an agent and/or distributor’s outlets in exchange for a full cylinder of gas as supplied by that agent/distributor’s supplying [wholesaler], irrespective of the fact that said empty cylinder may be the property of another [wholesaler].”

[76] It is common cause that the last written agreement which regulated the CEP was the 1999 Memorandum of Agreement. Since then, it has been a common practice in the industry, albeit with participants concluding bilateral agreements which regulate the collection and exchange/payment of cylinders between them.

[77] Mr Rudd testified that the CEP was *“industry accepted practice that has grown over a number of years”*.²³ It does not exist in any written or formal agreement, rather it is considered a *“custom that has been in place for at least 30 years”*.²⁴

[78] In this scheme customers exchange different wholesalers’ cylinders at various stores. This results in the LPG distributors and wholesalers being in possession of LPG cylinders which belong to competing wholesalers. Since these cylinders cannot be refilled by non-owners and the wholesaler (owner of the cylinder) is responsible for the safety of the LPG cylinder, it is necessary for the LPG wholesalers to exchange cylinders amongst one another for safety validation and refilling.

[79] The LPG wholesaler which has cylinders belonging to another LPG wholesaler returns those cylinders to their owner against payment of the deposit fee (this deposit fee would have ultimately been paid to the LPG wholesaler owning the cylinder when the cylinder was first ‘sold’ to the first-time customer who paid such deposit fee) or pursuant to a one-for-one exchange of cylinders.

Events leading up to the alleged agreement

[80] During May 2005, the LPG wholesalers increased the cylinder deposits for 9kg cylinders from R75 to R150. It is unclear what this increase was based on.

²³ Transcript page 415.

²⁴ Transcript page 417.

- [81] A few years later, after this increase took place, the DoE then released the *Working Rules to set the monthly maximum retail price for LPG*. There are two versions of the Draft Working Rules: the first one is dated 12 November 2009 and published in the Government Gazette ("2009 Draft Working Rules"). The second is undated and simply bears the title of the document with year 2010 in parenthesis ("2010 Draft Working Rules") and was not published in the Government Gazette.
- [82] Even though the 2009 Draft Working Rules were published and required comments by no later than 16h30, 07 December 2009,²⁵ it seems that a final version of the rules was never published.²⁶
- [83] The 2009 Draft Working Rules contemplated a maximum cylinder deposit amount capped at 45% of the cost of a 9kg cylinder.
- [84] The second version of the Draft Working Rules - the 2010 Draft Working Rules - was not published in the Government Gazette but referred to a consideration of prescribing a maximum deposit amount of 45% of the cost of a cylinder irrespective of its size.
- [85] These draft working rules were also not finalised.
- [86] By 2011, the Respondents were faced with a situation where the deposit fee did not come near covering the landed costs of a 9kg cylinder. In the context of regulatory uncertainty brought about by the failure of the DoE to promulgate regulations on the deposit fee various attempts were made by Respondents to increase the deposit amount in some way.
- [87] Around May 2011 Easigas introduced a non-refundable levy to the R150 refundable deposit amount payable for its 9kg (+R20), 14kg (+R25) and 19kg (+R30) cylinders. The deposit payable for 48kg cylinders remained at R250 plus a R40 non-refundable levy, while the 48kg double valve cylinder deposit remained at R330 plus a R20 non-refundable levy.
- [88] On 01 January 2013, Easigas once again increased the non-refundable levy citing the weakness of the rand against the Euro as the primary reason for doing so. The non-refundable levies were increased as follows: 9kg now (+R30); 14kg now (+R30); 19kg

²⁵ See item 8 in the document.

²⁶ Totalgaz Answering Affidavit at para 87.

now (+R40); and 48kg now (+R60, applicable to both the single valve and double valve cylinders).

[89] On 06 March 2013, the members of what was to become SAPIA executed its constitution and established the association.

[90] By 2014 it was submitted that the Respondents could not continue absorbing the cost of acquisition and maintenance of cylinders without the protection of an appropriate deposit fee. Various strategies were embarked upon as a result.

90.1. Oryx, for example, explained that the R150 deposit was not sustainable.²⁷ In an attempt to curb losses, it decided to increase its cylinder deposit fee to R250. Because the other LPG Wholesalers did not follow, Oryx's participation in the CEP was placed in jeopardy and ultimately it reverted to the R150 deposit in April 2014. It then added an "incremental maintenance charge" of R100 for any new customers and for any foreign cylinder swop with an Oryx one.²⁸ In November 2014, Oryx withdrew its R100 non-refundable maintenance fee and reverted to only the R150 deposit for cylinders 9kg and above. However, in January 2015 the "incremental maintenance charge" was once again levied only for new customers.²⁹

90.2. Totalgaz retracted its refundable cylinder deposit increase effective from 03 April 2014, after "*assessing the process of exchanging and returning cylinders and with a view to facilitating the ease at which customers can swap brand of LPG cylinder for another...*" Totalgaz simultaneously introduced a "non-refundable rental fee" of R100 for all "extra cylinders".

90.3. In 2014, Reatile Gas increased the cylinder deposit from R150 to R250 for 9kg cylinders only in the Western Cape on a pilot basis in order to cover the landed cost of their cylinders. However, at the time all other suppliers maintained the R150 deposit.

[91] Following an announcement by Afrox of a once off non-refundable rental fee of R140, Totalgaz increased its cylinder deposit in 2014 to R250 to alleviate the pressure on its

²⁷ Oryx Answering Affidavit at para 27.

²⁸ Scarmure Witness Statement at para 70.6.

²⁹ Scarmure Witness Statement at para 70.9.

working capital of continuously acquiring cylinders. This led to administrative inefficiency and customer dissatisfaction, so that Totalgaz reverted to a R150 deposit.³⁰ It added a once-off user fee, which also caused problems. It then reverted to the R150 deposit without the once-off user fee.

[92] Easigas explained that:

*“With effect from 2 May 2014, Easigas charged an additional levy to its new consumers over and above the uniform R150.00 deposit prevailing at that time, in order to cover at least some of the costs associated with maintaining the cylinders and obtaining new cylinders. This was not an increase in Easigas’ deposits, but a non-refundable levy paid by new consumer acquiring an Easigas LPG cylinder”.*³¹

[93] Thus, the Respondents were attempting to recoup some of the landed costs of their cylinders with little success.

[94] On 18 March 2015, the members of the SAPIA LPG Sub-Committee held a special workshop focusing on Maximum Refinery Gate Price (MRGP) and Maximum Retail Price (MRP), in which it is noted that:

“(1) Cylinder deposit values have not been revised since 2005.

(2) The industry acknowledges that all costs related to the cylinders procurement importation, maintenance, revalidation etc. have gone up dramatically since 2005

(3) Cylinders are very valuable assets which are currently disappearing in the market due to illegal fillers who are using these assets at the detriment of the Companies which are owning them

(4) The current rule dated 2009, which is still in a draft format and not in a final article of law advises that the deposit amount should equate to 45% of the purchase price of a 9KGS cylinder, i.e., R150 as it was proposed in 2005. This

³⁰ Scarmure Witness Statement at para 70.5.

³¹ Easigas Answering Affidavit at para 8.2.

amount does not address the other cylinder sizes (the bigger the cylinder, the more expensive the purchase cost). In addition, the R150 amount is outdated.

(5) The industry calls for an immediate revision of the latter and will propose such revision to DoE as part of the MRP review.”

[95] It was common cause that the SAPIA LPG Sub-Committee was of the view that the deposit price as prescribed by the DoE was outdated and did not cover the landed cost of a cylinder (R329.99 in June 2015 as per the evidence of Mr Rudd). The LPG Sub-Committee resolved to lobby the DoE. The DoE did not revise the cylinder deposit fee, nor did it publish any final regulations.

[96] Ultimately, on 01 June 2015, Afrox announced its increase in the refundable deposit to R300 for 9kg LPG cylinders. The other LPG wholesalers (Oryx, Easigas, KayaGas, Totalgaz, and Reatile) followed.

Benefits of CEP

[97] We have already dealt to some extent with the convenience that the CEP delivers to the LPG market, but recap some of the salient features.

[98] Mr Murgatroyd was of the view that the CEP primarily benefits the consumer:

“Consumers win out of the cylinder exchange program. The cylinder exchange program is good for consumers, because they can switch their cylinders without having to first return their cylinders to the original supplier. That’s a clear benefit to consumers.”³²

[99] According to the Respondents, the main consumer benefits can be characterised as follows:

99.1. Convenience for the consumer. Mr Sanchez testified that *“It’s very convenient in South Africa, because you can bring any brand of cylinders, you go to any retailer, right and you say, this is my cylinder A empty, give me a cylinder B and*

³² Transcript page 1523.

there's no money exchanged, because the deposit is at the same level. I just have to take the cylinder B. I bring my A and I take the B, that's it. Very convenient, very easy and it takes, you know, there's no money exchange but I pay obviously for LPG in it, but there's no exchange of money. I don't have to bring in any proof where did I take my deposit, how much did I pay, nothing and all is done in the same retailer. So very, very convenient."

- 99.2. A consumer can exchange an empty cylinder for a full one at any retailer that is convenient to them, whether that retailer stocks the same brand of LPG or not.³³ This is beneficial particularly when there are shortages in the market and a consumer can then seamlessly go to another retailer and get his/her gas there.³⁴
- 99.3. The second benefit is reduced barriers to switching for consumers. Mr Murgatroyd stated that the CEP allows consumers *"to switch brands by visiting only one retailer and without having to first reclaim and then set down their deposit fee"*.³⁵ This means that a consumer can easily take advantage of the best price of LPG from any supplier.
- 99.4. The third is increased competition for the sale of LPG due to reduced barriers to switching.³⁶ This is separate from, although linked to, the second benefit above. Mr Murgatroyd explained that while this may be convenient, it is also important in removing barriers to switching, which, as a matter of economics, is good for competition amongst suppliers.³⁷ This, in turn leads to lower LPG prices and is therefore good for consumers.³⁸
- 99.5. The fourth is an expansion in LPG supply. Insofar as the CEP makes it quicker for the cylinders to be returned to wholesalers, this is a benefit for consumers because the wholesaler has more cylinders in hand to refill and therefore can supply more LPG into the market.³⁹ A greater supply puts a downwards pressure on prices, which is clearly a consumer benefit. Mr Murgatroyd explains it from an economic perspective:

³³ Transcript page 1336.

³⁴ Transcript page 342.

³⁵ Transcript page 1136.

³⁶ Overview Slides, Trial Bundle A, page 504.

³⁷ Transcript page 1136.

³⁸ Transcript page 1337.

³⁹ Transcript, Murgatroyd, page 1568; Transcript, Rudd, page 412.

“The cylinder exchange program with uniform deposit fees can be used to reduce cylinder turnaround times, reduce leakage, and reduce hoarding. As a consequence of that, that means that at any given point in time wholesalers have more of their cylinder stock on hand to be able to supply customers. That means they will be able to supply more LPG basically from any given amount of cylinder stock. That seems to be confirmed by the factual witnesses as well. So, there is a volume expanding effect there and, of course, as again we know as a matter of economics, if all our sequel is an expansion of volume, that’s going to place downward pressure on prices for any downward, sloping demand curve.”⁴⁰

99.6. The final benefit is a reduction in variable costs to be passed down to the consumer. By improving cylinder circulation and recovery of cylinders, the CEP allows wholesalers to use cylinder stock more efficiently and thereby decreases a wholesaler’s need to invest in more cylinders to supply the same amount of LPG. This decreases the variable costs incurred by wholesalers which, again as a matter of economics, reduces the costs passed down to consumers and therefore leads to price reductions.⁴¹ The same applies where a uniform deposit, forming part of a functioning CEP, reduces hoarding⁴² or leakage so that wholesalers are able to serve customers effectively while investing in few cylinders. The saving in cost is passed down to consumers as a price saving.

[100] The Commission tested the claimed benefits to consumers but spent an inordinate amount of time utilising the example of a consumer in a township who would in any event have access to limited outlets that sold 9kg LPG cylinders. The example was not very helpful to the Commission’s case for two essential reasons. The one is that most of the cylinders distributed in townships by some of the Respondents were of 3kg and 5kg sizes, which were not part of the Commission’s case. The second is that the Respondents did not claim that the benefit of CEP for larger cylinders was available to consumers irrespective of the requirement of transportation. In other words, it was common cause that the cylinders which were the subject matter of the referral would

⁴⁰ Transcript, Murgatroyd, page 1339.

⁴¹ Overview Slides, Trial Bundle A, page 507.

⁴² Hoarding refers to the opportunistic hoarding of cylinders by consumers or distributors in anticipation of an increase in cylinder deposits or as a tactic employed by smaller firms.

require some form of transportation either to be collected by the consumer himself/herself or delivered to him/her. The convenience that was being claimed was not that a consumer could find an LPG outlet within walking distance from their house but that a consumer of LPG could *exchange* any wholesaler's empty cylinder for any other wholesaler's cylinder, at any participating distributor without having to drive around looking for a specific brand or having to claim a refund of the deposit from one to pay to the other.

[101] Apart from the evidence put up by the Respondents, common sense and logic inform us that the CEP delivered considerable convenience to the consumers of LPG, in that they could exchange an empty for full cylinder at any participating retailer and switch brands without having to claim back and pay a new deposit.

[102] The Respondents explained further that a barrier to entry and expansion was the cylinder, both from an initial capital investment and from a cash flow perspective.

[103] For smaller suppliers and new entrants, the CEP was beneficial because it did not have to invest in a vast distribution/logistics network, its cylinders were returned to it more quickly (because others were collecting for them) and its cash flow was under less pressure.

[104] Smaller players stood to benefit from the CEP.

Benefits of a uniform deposit fee

[105] The essential reason why the CEP required a uniform deposit fee was succinctly explained by Mr Araman from Oryx. He explained that the deposit fee that any LPG wholesaler sets is the price that it must pay every other wholesaler in order to reclaim its cylinders from them. Hence, in his view, setting a higher cylinder deposit fee than other wholesalers will, all else being equal, raise the wholesaler in question's costs relative to its rivals.⁴³

[106] This was supported by all the other witnesses, including those of the Commission.

⁴³ Oryx Answering Affidavit, page 131 at para 23.

[107] Mr Radford, the Commission's own witness, submitted that *"in order for the cylinder deposit program to remain sustainable, any increase of the deposit fee would have to be uniform amongst them."*⁴⁴

[108] Mr Scarmure stated that *"having a uniform deposit fee is the only practical way to ensure an efficient and functional cylinder exchange system among LPG wholesalers."*⁴⁵

[109] Mr Tatham from KayaGas provided, with reference to prior instances where the Respondents sought to set non-uniform deposit fees, that *"[t]he differential deposit fees were unworkable, and in my view, seriously jeopardised the [cylinder exchange programme]."*⁴⁶

[110] Mr Sanchez from Easigas submitted that *"if the deposit amounts differ between LPG cylinders of a given capacity, I believe that the entire exchange programme will become ineffective and eventually collapse."*⁴⁷

[111] Moreover, the Respondents' witnesses, including the witnesses testifying on behalf of the Commission, were able to show why the Commission's insistence that the CEP would function as well with a non-uniform fee was not sustainable.

[112] In 2014 where for a period of time the cylinder deposit fees were not uniform. Mr Radford, the Commission's own witness, described the effect of the different deposit amounts as follows:

*"So, Afrox and the others, other than Oryx and Totalgaz, remained on R150. The result was very quickly [that] there was a problem in terms of the exchange process that then couldn't operate and, as a result of that, both Oryx and Totalgaz reversed their R250 deposit to R150. So, everyone was again aligned in terms of deposits."*⁴⁸

⁴⁴ Radford Witness Statement, page 6 at para 20.

⁴⁵ Scarmure Witness Statement, page 36 at para 106.

⁴⁶ KayaGas Answering Affidavit, paragraph 18.3, page 172.

⁴⁷ Sanchez Witness Statement, page 14 at para 40.

⁴⁸ Transcript, page 68.

[113] Mr Radford further testified that from the experience in March 2014 with different deposit fees, it was *“taken as a given by the participants in our view that everyone needed a uniform deposit fee for the exchange system to be sustained.”*⁴⁹

[114] The Commission’s other witness, Mr Cohn, testified that without a uniform deposit fee, the exchange of cylinders would become a logistical nightmare. He said that if the values are not aligned, *“you invoice different amounts and it becomes a logistical nightmare in terms of bringing cylinders into your plant, doing the documentation for return on cylinders and then offsetting the one cylinder versus the other.”*

[115] Mr Araman from Oryx confirmed that for the period of time where it set a higher refundable cylinder deposit fee than the other Respondents, that *“Oryx’s increased deposit fee placed its entire participation in the cylinder exchange programme in jeopardy.”*⁵⁰ In essence, Oryx was paying more than its rivals to reclaim its cylinders which led to an increase in costs relative to its rivals but also put pressure on its cash flow.

[116] Mr Royer testified that when Afrox increased its deposit to R300, Easigas could have chosen a figure of, say, R280 or R320. He went on to explain why that would not have been rational:

*“No, again because if I decided to have a different level of deposit, then it would have compromised the cylinder exchange... there would be no more exchange in fact.”*⁵¹

[117] Mr Rudd was asked how difficult it would be to maintain the system with different deposits. His answer was that different deposits *“would make it very, very, very problematic.”*⁵²

[118] Mr Sanchez of Easigas was clear about the need for uniformity: *“... there’s one pre-requisite for the exchange programme to work is to have the same level of deposit. If there’s a disconnect in the level of the deposit, then the cylinder exchange cannot work.”*⁵³

⁴⁹ Transcript, page 69.

⁵⁰ Oryx Answering Affidavit, pages 134 – 135 at para 32.

⁵¹ Transcript, page 803 line 15 – 19.

⁵² Transcript, page 405 line 1 – 5.

⁵³ Transcript, page 905 line 10 – 13.

[119] Mr Tatham confirmed that maintaining the exchange programme with different deposits would be “*administratively very challenging*.”⁵⁴

[120] Finally, the Commission’s own witness, Mr Radford, agreed that the benefits of the exchange programme can only be achieved at a uniform deposit fee.⁵⁵

[121] That was also confirmed by the Commission’s other witness, Mr Cohn.⁵⁶

[122] A lot of evidence was traversed during the hearing on the benefits of a uniform fee to reduce hoarding and leakage. We deal with both these issues in a summary fashion because they do not alter the conclusion we have drawn regarding the benefits of the CEP.

[123] As to leakage, the Respondents submitted that a low deposit fee on cylinders makes the cylinders susceptible to target by illegal re-fillers who would utilise these cylinders (not return them) and refill them illegally, alternatively into neighbouring countries, never to be seen again. During the hearing, it was clarified that if the deposit fee was lower than the landed cost of the cylinder this would render the Respondents’ cylinders susceptible to target by illegal fillers. This is common sense and sound economic logic. If the landed cost of a cylinder was R300 but the deposit fee only R150, illegal fillers would prefer to use the Respondents’ cylinders rather than purchase their own.⁵⁷ However, this justification is more relevant for the *increase* in the deposit fee from R150 to R300. A second stream to this argument is that if the deposit was not *uniform* amongst the Respondents, there was a fear that those with a lower deposit would be targeted by illegal re-fillers. There was some evidence in support of this. Mr Rudd from Reatile indicated that if he were to drop it below a uniform R150 he estimated that 15 – 20% of his cylinders would not be returned to him as a LPG wholesaler.⁵⁸ So, in order

⁵⁴ Transcript, page 1008 R line 5.

⁵⁵ Transcript, page 114 at line 7 – 9.

⁵⁶ Transcript, page 246 at line 2 – 3.

⁵⁷ Radford, Transcript page 101 at lines 12 – 18: “A low deposit creates an opportunity for a new entrant who is not prepared to invest in cylinders at a much higher cost to acquire cylinders at the deposit fee, which is at R150.00, substantially below the replacement cost of a cylinder. So, by doing that and using the owner’s cylinders illegally, they are able to enter the market and they are able to trade with these cylinders without incurring the cost associated with purchasing new cylinders.”

⁵⁸ Transcript, page 435, lines 12 – 22: “MR DANIELS: And then Mr Rudd, if you don’t mind, one final question. Assuming you had dropped your deposit to 75 or even 100 or even 125, but below that uniform fee of R150.00, what percentage of your, and I’m now talking specifically about Reatile, what percentage of your gas cylinders do you think would now be leaked out of the system to the illegal fillers and others?

MR RUDD: I couldn’t even estimate a guess on that one, sir.

MR DANIELS: You wouldn’t.

to limit leakage, the deposit had to be as close as possible to the landed cost of the 9kg cylinder and had to be uniform amongst the LPG wholesalers. Whether or not the cylinders made their way to illegal operators or neighbouring countries, or whether the risk of leakage was a relatively small one (as argued by the Commission), doesn't take the matter any further or derogate from the benefits of the CEP already discussed above. Accordingly, we find it unnecessary to deal with this any further.

[124] As to the issue of hoarding, this involves retention of cylinders by consumers or distributors in anticipation of an increase in the deposit fee. In essence they would not return the cylinders (hoard them) until an increase in the deposit fee was implemented. Thus, they would score a margin when returning cylinders. Hoarding was also used as a tactic by players against each other to gain some advantage. For example, Mr Tatham of KayaGas hoarded cylinders to gain entry into the CEP:

"MR TATHAM: And just let me explain on the question, I did it because they weren't allowing me into the exchange arrangement. So I bought their cylinders and started shipping them out of Cape Town until they then said okay, okay, come to the party. So then they ... and once we were in, we certainly were not involved in any according, but we were quite clear with everybody what we were doing and all the time we were saying to them, we are quite happy to exchange your cylinders, come fetch them, just bring ours with you. So it was what we did to break into the exchange agreement and that's the kind of game playing that I was referring to.

"MR DANIELS: And then you said you had a yard full of cylinders?

MR TATHAM: Yes.

MR DANIELS: Belonging to the opposition?

MR TATHAM: Yes, a yard that everybody could see. So I was not hiding cylinders from anybody. I was just putting them there and letting 10 them see it and saying guys, let me into the exchange agreement. And I needed that because I wanted to take their market share from them."⁵⁹

MR RUDD: It would be a guess and that's all.

MR DANIELS: And you don't want to hazard a guess for my information?

MR RUDD: Probably 15, 20%, 15 to 20.

MR DANIELS: As high as that?

MR RUDD: It would be quite high over not just necessarily the Western Cape, but overall."

⁵⁹ Transcript, page 1132 – 1133.

[125] The Commission argued that this conduct was reminiscent of cartel-like punishment. However, it could also simply be exclusionary tactics by players in the market, making use of some arbitrage opportunities. Again, we find that this issue does not take the matter any further, nor does it derogate from the benefits of a uniform deposit fee to the efficient functioning of the CEP and the benefits of which we have already highlighted.

Conclusion

[126] In conclusion, we find that the CEP does deliver benefits to consumers and firms alike. Once first-time buyers have paid their cylinder deposit, they have the convenience of purchasing LPG from any supplier in exchange for an empty cylinder. Firms benefit from the CEP because they save on working capital and variable costs and they can sell more LPG because cylinders are returned to them more quickly. Small firms tend to gain the most from the CEP because they need not invest in a vast distribution network, are able to piggy-back on the larger players and compete for market share. A uniform fee is necessary for the effective functioning of the CEP. A uniform fee facilitates the smooth administration for the exchange of cylinders and serves to prevent increases in costs for wholesalers relative to their competitors. It also serves to prevent a cash flow crunch for smaller players. The Respondents have explained why a uniform fee limits opportunistic hoarding and prevents lower fee cylinders from being disproportionately targeted by illegal re-fillers.

[127] Even if we were to assume in the worst-case scenario – namely that the deposit was a component of the “price” of LPG and the Respondents were in a horizontal relationship – there are clear benefits flowing from the CEP which delivers benefits for both consumers and firms in the CEP. A uniform fee within the CEP delivers benefits to both consumers and firms alike.

[128] The impugned conduct thus cannot be associated with a “hardcore cartel”, which is what section 4(1)(b) is aimed at.

[129] Thus, even if the Respondents were assumed to be in a horizontal relationship for the supply of cylinders, we find that their conduct is not the type of conduct envisaged to be prohibited by section 4(1)(b)(i).

[130] This type of conduct could of course fall within the ambit of section 4(1)(a). Recall that section 4(1)(a) does not prohibit agreements, arrangements, understandings, or concerted practices amongst competitors on a *per se* basis. It is a rule of reason provision, where a substantial lessening of competition may be outweighed by pro-competitive gains. Under this provision the Commission would bear the onus to prove the conduct and that it led to a lessening of competition. The respondents would then be entitled to justify their arrangements on technological, efficiency and other pro-competitive grounds. However, this was not the case mounted by the Commission. The Commission persisted in pursuing a section 4(1)(b) case.

[131] We thus make the following order:

ORDER

1. The Applicant's case is dismissed.
2. There is no order as to costs.

Yasmin Tayeb Carrim

Ms Yasmin Carrim

29 June 2023

Date

Mr Enver Daniels and AW Wessels concurring.

Case Manager : Kameel Pancham

For the Commission : Adv. M Sello SC

For Totalgaz : Adv. M van der Nest SC, and Adv. P Ngongo
instructed by ENSafrica

For Oryx Oil : Adv. J Wilson SC and Adv. S Quinn instructed by
Primerio Law Incorporated

For KayaGas : Adv. A Gotz SC and Adv. L Buchler instructed by
Janine Nainkin Inc.

For Easigas : Adv. G Engelbrecht SC instructed by Herbert Smith
Freehills

For African Oxygen : D Lotter and M Angumuthoo of Bowmans