

REPUBLIC OF SOUTH AFRICA



IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

**APPEAL CASE NO: 142/CAC/JUNE 16
143/CAC/JUNE 16
COURT A QUO NO: CR049 JULY 2012**

In the matter between:

OMNICO (PTY) LIMITED

First Appellant

COOL HEAT AGENCIES (PTY) LIMITED

Second Appellant

and

THE COMPETITION COMMISSION

First Respondent

FRITZ PIENAAR CYCLES (PTY) LIMITED

Second Respondent

MELODY STREET 18 (PTY) LIMITED

Third Respondent

**MONEYMINE 88 CC
t/a HOT SPOT CYCLES**

Fourth Respondent

**PEDDLE-ON MARKETING (PTY) LIMITED
t/a MAVERICK CYCLES**

Fifth Respondent

SALOOJEE'S CYCLES CC

Sixth Respondent

WESTRAND CYCLES CC

Seventh Respondent

BOWMAN CYCLES (PTY) LIMITED

Eighth Respondent

ALBATROS FISHING AND CYCLING

Ninth Respondent

CYTEK CYCLE DISTRIBUTORS CC	Eleventh Respondent
MAILLOT JAUNE TRADING (PTY) LIMITED	Twelfth Respondent
TRIDIRECT SA (PTY) LIMITED t/a VICICLETTA	Thirteenth Respondent
LE PELETON (PTY) LIMITED	Fourteenth Respondent
DBS DISTRIBUTING t/a THULE CARRACK SYSTEMS CC	Fifteenth Respondent
PEDALLING DYNAMIC CC t/a DUNKELD CYCLES	Sixteenth Respondent
SUMMIT CYCLES	Seventeenth Respondent
DYNAMIC CHOICES TWO CC t/a BESTER CYCLES	Eighteenth Respondent
JOHNSON CYCLE WORKS CC	Nineteenth Respondent
THE NEW JUST FUND GROUP (PTY) LIMITED	Twentieth Respondent

J U D G M E N T

VICTOR, AJA:

[1] The issue for determination in this case is whether the silent participation by firms at a meeting where cartel activity was discussed amounts to a contravention s 4(1)(b)(i) of the Competition Act 89 of 1998 ("the Act). Section 4 of the Act provides that an agreement or concerted practice is prohibited if it is between parties in a horizontal relationship and 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 therefrom it outweighs the effect. This can consist of directly or indirectly fixing prices or other trading conditions.

[2] The appellants, Omnico (Pty) Ltd, (Omnico) and Coolheat Cycle Agencies (Pty) Ltd (Coolheat) are wholesalers that supply bicycles and bicycle accessories to the retail trade. Omnico and Coolheat attended a series of meetings together with various retailers and wholesalers of bicycles and bicycle accessories to discuss ways in which retailers could improve their retail margins. This would be achieved by the wholesalers increasing the recommended retail prices (RRP) for the products they sold.

[3] The meetings culminated in a critical meeting on 10 September 2008 (the September meeting) attended by some 60 wholesalers and retailers. It is common cause that at the September meeting the issue of wholesalers collectively raising the RRP at the same time was discussed. Such a step would have resulted in the retailers maximising their profit margins, although the appellants appear to dispute any 'active' participation by the wholesalers in these discussions.

[4] This case highlights the reasons for why there is so much writing on what constitutes cartel conduct. The Nobel laureate winner in economic sciences for 1982 George Stigler, in discussing cartels defined cartel conduct as whether or not joint profit-maximizing-collusion yields a meaningful and durable departure from competition. He postulated two principal hurdles for

assessing a cartel: firstly, reaching a consensus on the terms of coordination, and secondly establishing a system to detect and punish cheaters. What constitutes cartel conduct is often a significant challenge for a competition authority.

[5] Corlia van Heerden and Monray Botha (Challenges to the South African corporate leniency policy and cartel enforcement 2015 TSAR 306 at 309) correctly observe:

'The hallmark of cartels is that they are collusive, deceptive and secretive, and are conducted through a conspiracy among a group of firms. The result of this secretive collusion is that it is notoriously difficult to detect or prove the existence of a cartel without the assistance of a member who is part of it. Scormagdalia remarks that irrespective of their clandestine character, the existence of cartels is difficult to prove due to their varying and mutating characteristics. Cartels can be evidentially complex in the sense that the duration and intensity of participation and the subsequent anti-competitive conduct on the market of each individual undertaking may vary and take different forms. He points out that these specifics impose a near-unbearable task on competition authorities to prove in detail the cartel infringement and to impose an appropriate sanction reflecting the cartelists' real participation.'

[6] Because of the complex and clandestine nature of cartel conduct, assessing whether the conduct is prohibited becomes more difficult and it is necessary to scrutinise the conduct and any other evidential material in its entirety and not piecemeal by what occurred only at any particular meeting, as in this case the primary September meeting. Investigating the conduct in

this matter requires the -assessment of circumstantial evidence holistically giving its cumulative effect rather than an item-by- item basis, an approach referred to in the OECD Secretariat.¹ In this case, as I shall describe, there is also a substantial amount of direct evidence, in the form of correspondence between members of Omnico and Coolheat and other wholesalers, , agendas for meetings and minutes of meetings. .

[7] In this case, Omnico and Coolheat participated in three meetings, exchanged and received correspondence copies of agendas and minutes of meetings which were unchallenged by them. The legal significance of these meetings lie at the heart of this case.

Background

[8] It was common cause in this case that most bicycles and cycling accessories are imported and only minimal manufacturing takes place locally in the form of re-assembling component parts. The products are imported under license from foreign brand manufacturers. In South Africa the cycles attract a 15% import duty. This import tariff troubled the industry as it reduces profits. A customer could also buy components of a bicycle, such as the frame, tyres, rims, brakes and gears which would then be assembled to the customers specifications.

¹ OECD Journal of Competition Law and Policy Vol No3, 2007

[9] The supply chain was described as follows: the importer who is the wholesaler would supply the retailer who sells the product to the customer. Retailers consist of large national chain stores such as Makro, Sportsman's Warehouse and a host of independents that are also larger retailers and a number of smaller outlets typically established by cycling enthusiasts. Marketing is undertaken by the wholesalers by placing advertisements in cycling magazines and other relevant media. Internet sales has also increased during the referral period. A RRP would be recommended by the wholesalers in the advertising.

The Recommended Retail Price (RRP)

[10] As noted a number of meetings were held involving retailers and wholesalers who were in a vertical relationship and wholesalers who were in a horizontal relationship. A common theme in the discussions at these meetings was the increase in the mark-up on wholesale prices of bicycles and accessories by increasing the RRP suggested by all the wholesalers, to all their retail customers. The meetings included how to co-ordinate conduct so that it would take place simultaneously.

[11] By recommending a higher RRP the retailer would benefit by increasing profits. Without close co-ordination between wholesalers inter se and between retailers and wholesalers there would be no increased margins for the retailers. It should be recorded that the appellants contended that the meetings did not give rise to any agreement however defined. It is necessary

to analyse whether the facts and the inferential reasoning based on proven facts prove cartel conduct.

The relevant meetings

[12] As early as September 2007 Mr Allan Hodson, the managing director of Omnico and a doyen in the wholesale cycle and accessory industry had attempted to establish a cycling/supplier association. He based this concept on an American cycling association model. The purpose of the association would be to tackle industry wide issues such as lobbying government to do away with the 15% import duty on bicycles. The purpose of this association would also address the question of increasing the RRP for bicycles to assist retailers. Because of the long-term problems with eliminating the 15% import duty there could not be resolution of the problem in the short-term and improved margins for the retailers was the only immediately practical instrument to adopt.

[13] On 26 September 2007 Mr Hodson sent an email to Mr Stephen Meltzer of Coolheat, also a wholesaler, attaching articles of the American Bicycle Suppliers Association. He proposed that they meet to discuss the establishment of an association. On 2 April 2008 Mr Hodson circulated the suppliers' meeting minutes that was held during the preceding Argus Expo under the banner of discussing matters of mutual interest and the possibility of putting together a bicycle suppliers association. He recorded in the letter that many matters were discussed and there were broad consensus on most of

them. It was proposed that they would be discussed further at a meeting which would be held in the first week of May 2008. This email was followed up on 11 April 2008 by another from Mr Hodson to Mr Meltzer confirming arrangements for the meeting of 7 May 2008 at Kempton Park. On 17 April 2008 Mr White of Pro Bike stated that it would not be taking part in the forum in May 2008 as they wished to communicate with their suppliers as they deemed fit.

[14] The Commission based its case of cartel conduct primarily on the meetings leading up to the September meeting convened by retailers. The purpose of the September meeting was to discuss ways of improving their retail margins including by increasing the recommended retail prices for the products they sold. Several wholesalers were invited to attend including Omnico and Coolheat and they attended.

[15] From the minutes provided in the record, it appears that Mr Stevens of Omnico was silent during the September meeting. The essence of the meeting was that the wholesalers would utilise the RRP as a mechanism by which the downstream prices and margins of bicycles and cycling accessories could be increased from 1 October 2008 onwards. Both Omnico and Coolheat in fact raised the RRP on 1 October. The Commission alleged further that those wholesalers who did not attend the September meeting engaged in subsequent electronic communication evidencing and confirming their agreement with the consensus already reached at the meeting.

[16] The Tribunal found that Omnico' and Coolheat's silence at that meeting amounted to an agreement in terms of s 4 of the Act:

'The evidence before us shows that both Omnico and Coolheat attended the September 2008 meeting, where an agreement was reached amongst wholesalers that mark-ups on wholesale prices for bicycles and cycling accessories would be increased and such increases were to be achieved by increasing RRP's, to allow more margin for retailers off the higher RRP. The implementation date was also agreed at the meeting. Omnico and Coolheat did nothing to distance themselves from these discussions.'

[17] Omnico and Coolheat contend that to find that silent participation gave rise to liability is to apply the incorrect legal test. Omnico contends that in addition to the silent participation, it was incumbent to show that the other competitors (wholesalers) engaged in collusive conduct with it and that the parties regarded the agreement as binding on them.

[18] Omnico contends that the facts in this case do not support such a test. The discussions at the meeting were potential measures to increase retail margins but no consensus was agreed between retailers or wholesalers in regard to the measures. Omnico submitted that the lack of direct evidence was overcome by the Tribunal relying on inferences from circumstantial evidence and that this circumstantial evidence was misconstrued and could not give rise to the inferences to be drawn. Coolheat submits that there were no proven primary facts from which to draw these inferences.

[19] The further issue raised was that there was no basis for an administrative penalty imposed on Omnico or Coolheat even if it did amount to a contravention because the penalty was disproportionately large and based on an erroneous and inconsistent application of the evidence and the methodology. They contended that the affected turnover was miscalculated and the duration of the alleged contravention was also incorrectly calculated. It is within this context that the meetings must now be analysed.

The facts surrounding the 10 September meeting

[20] An analysis of the agenda of the September meeting demonstrates unequivocally that there were financial problems for the retailers in the industry in 2008. Certain retailers were scrambling to try and come up with plans to alleviate their adverse financial situation as a result of the 2008 financial downturn.

The agenda for the September meeting was as follows:

Margins in the bicycle retail industry-10 September 2008.

1. *Welcome and background to meeting*
2. *Current situation / problems in retail industry*
 - a. *Industry have changed a lot in recent years, but the retail margins have stayed too low*
 - b. *Retail shops in SA not on par with international shop:*
 - (i) *Much smaller margins*
 - (ii) *Smaller industry*
3. *Proposed new mark-ups*
 - a. *Bicycles - 50%*
 - b. *Accessories - 75%*
4. *Proposed date to start increased margins (1 October '08)*
 - a. *Why now?*

b. Everyone needs to start simultaneously

5. Benefits to everyone

a. Wholesalers:

(i) Stronger retailers = better payments = better cash-flow

(ii) Improved shops = better presentation of product

(iii) Retailers won't need to wholesale to make a profit

b. Retailers:

(i) More profit means stable business

(ii) Less shops closing down and less stock dumping

6. Issues to address:

a. Discount mentality in cycling industry

b. Price fixing concerns

c. Importance of everyone's buy-in

d. Retailer's commitment to dealers

(underlining for emphasis)

[21] Mr Pienaar of Fritz Pienaar Cycles CC (in liquidation by the time of the 49A enquiry) attended the September meeting and testified that increasing mark-ups on bicycles from 35% to 50% and accessories to 50% and 75% respectively (from the industry norm of 35% and 50% respectively) simultaneously on 1 October 2008 was discussed. In stark contrast, Mr Stevens of Omnico testified that it was a coincidence that this increase of the RRP would happen on 1 October 2008, an aspect referred to more fully below. The minutes of the September meeting confirm the increase referred to at the meeting Mr Pienaar clarified that the minutes recorded an increase in 'margin' when what he was talking about was 'mark-up'. In other words the retailers needed a higher recommended mark-up from wholesalers on the wholesale price (which in turn would increase the RRP) so that they could improve their margins by starting off on a higher RRP. He confirmed, as reflected in the minutes, that 'The only way we can do this is by all agreeing and uniting with the price increase, and getting the wholesalers to back this decision and help us by providing new suggested retail price (sic) to the retail

shop who they supply, and advertise that price to the public. (underlining for emphasis)

[22] He also confirmed that the minute correctly reflects what he said as minuted: 'Many of you are concerned that this may be some form of price fixing, it isn't and this is not illegal. By any means it could be seen as price fixing from suppliers that we need to sell at only 35% margins.'

[23] Mr Pienaar testified that the mark-up would take place on 1 October 2008. This was corroborated by the minutes. Consensus on the effective date was significant so as to avoid wholesalers undercutting each other. Mr Stevens also confirmed that increasing the RRP, as described on 1 October 2008 was discussed. Neither Mr Pienaar nor Mr Stevens contested the accuracy of the minutes on the proposed percentage increases and date of implementation. These two features were also confirmed by Mr Els of ProBike who had sent someone from his organisation else to the meeting.

[24] Mr Els testified that a few weeks prior to the September meeting, Mr Pienaar had visited Pro Bike's offices and 'the gist of the meeting [with Pienaar] was that the discounters are making life difficult for the retailers and that something needed to be done about it. And he requested me to increase our pricing to Cajey's [sic] [one of the discounters] and he requested me to increase our advertised pricing. I [sic] recommended retail pricing to that 50% and 75%'.

[25] Mr Els testified that he refused to comply with Mr Pienaar's request and warned him that he regarded that these discussions raised competition law

concerns. When he refused to comply, Mr Pienaar threatened a group boycott against Pro Bike or any wholesalers who did not co-operate. This threat although not emanating from Omnico or Coolheat is consistent with Stigler's second proposition of cartels of punishing cheaters. In this case it is unnecessary to deal with this issue.

[26] According to Mr Els, it was this threat that made him decide to send Mr Wyatt to the September meeting. Mr Pienaar did not dispute Mr Els' account of the meeting between them but denied making any threat to Pro Bike.

[27] Historically the cycle industry utilised the RRP to the retailers. The RRP could be advertised by wholesalers to the public and may have provided a guideline to the retailers for their pricing. The retailers were allowed to discount from the RRP so the RRP was not the final actual retail price. The RRP was historically determined by adding 30% to 35% to the wholesale price of cycles and 50% to that of cycling accessories. The Tribunal found that the agreement was reached on the increase of the baseline from which the retailers could discount in order to secure sales and thereby ensure greater retail margins.

[28] The Commission contends that the cycling industry in 2008 was facing financial pressure due to the global financial downturn. The exchange rate deteriorated. There was little domestic manufacturing of cycling products and they had to be imported. The uniformity of mark-up structured by the RRP provided the instrument to improve the margins of the retailers.

[29] An evaluation of the facts and historical context surrounding the September meeting must take into account facts pertaining to the other meetings and relevant correspondence and testimony.

Relevant background facts prior to 10 September 2008 meeting

The 7 May 2008 meeting

[30] Mr Hodson organised the first formal meeting. This took place on 07 May 2008 in Kempton Park, Gauteng. Mr Hodson confirmed in Omnico's answering affidavit that he prepared an agenda and took minutes at the meeting. He further confirmed that the meeting was attended by eleven wholesalers, including Coolheat. He confirmed that the wholesaler Pro Bike, declined the invitation. When asked by Mr Hodson why Pro Bike was not attending he replied: 'should we want to convey anything or make comments to any suppliers we will do so ourselves'.

[31] The minutes reflect that a discussion took place regarding a possible lobbying of government to remove the 15% duty on imports. Mr Els of Pro Bike was not in support of this as this was an advantage it enjoyed over its competitors. The minutes also recorded the following regarding 'support for cycle dealers'. 'cycle dealers are struggling with a mark-up that was lower than the international mark-up and discussion would take place in future to ask association members to adjust their recommended retail price which would allow the cycle dealers a higher mark-up on goods. It was emphasised that this would be recommended and there would be no aspect of price fixing or controlling the prices by the association - just recommending prices to cycle dealers'.

[32] Mr Stevens of Omnico testified that the issue of raising the RRP at that meeting was never part of the agenda for the meeting. According to him, the issue was only raised towards the end of the meeting by one wholesaler who raised this issue because his customer had enquired about it. The Commission emphasised that all the wholesalers that were present at that meeting would as early as 7 May 2008, become 'aware of the fact that retailers desired the wholesalers to act collaboratively, as opposed to independently of each other, in raising the RRP and that future discussions in this regard will be taking place.' Both Omnico and Coolheat were present at this meeting. No agreement was reached on the RRP and the minutes record that 'a discussion around the RRP would take place in future'. It is common cause that the association was never actually formed due to a lack of support from some of the major wholesale suppliers.

[33] The meeting was held on 7 May 2008. Mr Hodson took minutes of the meeting. The minutes record that 'Cycle dealers are struggling with the mark-up that was lower than the international mark-up and discussion would take place in future as to association members to adjust their recommended retail selling price which would allow the cycle dealers a higher mark-up on goods. It was emphasised that this would be recommended and there would be no aspect of price fixing or controlling the prices by the association – just recommending prices to retail dealers.'

The 11 June 2008 meeting

[34] The second meeting took place on 11 June 2008 at Coolheat's offices in Johannesburg. Mr Stevens testified that the meeting was attended by four retailers; Pienaar, Mclean, Bruce Reynecke of Bruce Reynecke Cycles, and

Lee Durham of Lee Cycle Centre, and three wholesalers; himself from Omnico, Meltzer from Coolheat and Mr Michael Hirschfield from Dragon Sports.

[35] Mr Stevens confirmed that the issue of the RRP was discussed. According to Mr Stevens, the meeting was driven by Mr Mclean who wanted wholesalers to collectively push up their RRP to retailers. Mr Stevens testified further that no agreement was reached at this meeting. His evidence was that the wholesalers 'kept pushing back saying Andrew [Mclean], we have tried to form an association on much easier topics than this ... We cannot agree on anything.' He also said although the meeting was 'getting nowhere' he had a feeling that Mclean was not going to give up the quest to increase the RRP.

[36] As to whose initiative the meeting was, both Omnico and Coolheat have consistently argued that the initiative of raising the RRP was not that of the wholesalers' but of the retailers. Mr Els of Pro Bike received the e-mail but declined the invitation again. He testified that he believed it was Omnico who set the retailers up to arrange the meeting. Mr Els responded by e-mail, saying: 'This is the 2nd approach for us to meet to discuss and I will give you our honest position after just having communicated that telephonically to Michael [Hirschfield of Dragons] and Andrew [Mclean of Cycle Lab]. Pro Bike will resolve problems and strategies directly with our customers – whether individually or as a group. Pro Bike finds it odd that we have been approached by players that have dedicated considerable effort over the recent past to get retailers and suppliers in the East reasons why they shouldn't deal with Pro Bike. Thanks for the invite, but Pro Bike will not attend.'

[37] Mr Stevens described the meeting thus:

ADV WILSON: There is another meeting that was referred to by the Commission through their witnesses, which is a meeting that was convened at the instance of Mr McLean in June 2008. Were you in attendance at that meeting?

MR STEVENS: Yes, I was.

ADV WILSON: And are you able to give the Tribunal an indication as to how that meeting came about?

MR STEVENS: Andrew McLean was one of the, if not in my eyes, certainly in his interaction with me, the person most keen and driving the move towards increasing recommended retail selling prices. He discussed this with me earlier in the year. Just saying listen, you know, I need to make a higher margin. I don't know how he got wind of the suppliers meeting, but obviously the word gets out, not that we were keeping it a secret, but you know.

MR STEVENS: It was definitely a recommended retail selling price meeting. It was driven by Andrew McLean. He was the one who did most of the talking on behalf of the retailers if I remember correctly and he was adamant that he wanted all wholesalers collectively to get together and push up recommended retail selling prices. That was his stance. (my emphasis) As wholesalers, we just kept pushing back and saying Andrew, we have tried to form an association on much easier topics than this. It is not going to work. We cannot come together as a body on anything. We cannot agree on anything. This is not going to work and that was the dynamic of the meeting for, I cannot remember how long it lasted. A frustrating meeting for everybody.'

[38] Of importance is the following letter written by Mr Hodson of Omnico dated 16 July 2008 regarding the 'stalling of the attempt to form a proposed supplier association. He recorded that:

'Three out of the top six major suppliers to the trade have indicated their unwillingness to join the association – for various reasons. So be it. I think this

is a decision that is going to be ruled in the future; we are about to go through hard times and the better regulated the industry is – the better it would be for the trade and indeed for our businesses.’

[39] It was the Commission’s case that as early as 7 May 2008 the wholesalers knew that the retailers desired the wholesalers to act collaboratively as opposed to independently of each other in raising the RRP. Both Omnico and Cool Heat who were direct competitors were present at that meeting and it was obvious that they would have known about ‘joint-maximizing efforts’ which required their participation.

[40] The prelude to the September meeting according to Mr Pienaar was that Mr Maclean determined that one further attempt was to be given to address the dire financial position of the retailers. Mr Maclean wanted the meeting for both wholesalers and retailers. The sole and primary focus of the meeting according to Mr Pienaar was that the increase of the RRP would afford greater margin to the retailers. According to Mr Els the discounters were making life difficult for the retailers and something needed to be done about this. Mr Pienaar denied making a threat to Mr Els about boycotting Pro Bike but he admitted to putting pressure on the wholesalers to attend the September meeting.

[41] Mr Els testified that Pienaar threatened Pro Bike’s relationships with the retailers if it did not cooperate by suggesting that if he did not increase the RRP the retailers would not buy from him in the future. Mr Pienaar by way of email invited Mr Hodson of Omnico and Stephens of Coolheat. The email

states ' ... I have numerous meetings with retail shops and wholesalers over the last couple of months and everyone seems to agree that the retail shops are not making enough profit and that something needs to be done about it. The bicycle wholesalers agree that a healthier retail industry will also allow for a healthier wholesale industry. ... The aim of the meeting is to increase the profit margins of retailers. Please invite all your retailers to have a representative there. I would also like all the retailers to invite the wholesalers ... It is of utmost importance that we get all the major wholesalers and retailers in Gauteng to this meeting as we need everyone's support to be able to make a change and to be able to implement these changes right away'. Although Mr Stevens testified that Omnico attended the meeting as a fact finding mission and as a PR exercise, the Commission contends that these explanation do not assist the appellants in avoiding liability.

[42] The email also stated:

'We will mainly discuss the margins on bikes, but all importers are welcome.'

[43] Mr Pienaar prepared the agenda which dealt *inter alia* with margins being too low. He stated that retail shops in South Africa are not on par with international shops and South Africa had much smaller margins. Mr Pienaar stated that '... it is this RRP pricing mechanism which was the subject of that meeting. Specifically the proposal was made that the RRP for bicycles be increased by a mark-up from 35% to 40% or 50% for bicycles and from 50% to 75% for bicycle accessories. This increase would result in the increase of the selling price of these products by a similar percentage'.

Evaluation of the evidence

[44] On behalf of the Commission Ms Le Roux contended that The uniformity of an agreed increase in the mark-up between the wholesale price and the effect of this on the RRP is the mechanism by which the wholesaler respondents achieved the direct or indirect fixing of the selling price or any other trading condition of bicycles and cycling accessories, respectively by agreement.

[45] Significantly, the minutes of the September meeting were posted on the HUB, a social media platform largely for cyclists.

[46] Ms Le Roux submitted that the minutes, the agenda and the testimony established the absence of any defence, disagreement or distancing by anyone at the meeting with the contents referred to. According to her, Mr Pienaar stated he could not recall anyone speaking against it (that is the RRP). Everybody that was at the meeting knew there was a concern and everyone felt that there should be some change.

[47] Other companies noted in emails that it would be hard to drive the concept with bike suppliers but they had to keep at it. To a participant in the September meeting it was clear that agreement was reached and the only outstanding issue was the actual implementation. Further emails demonstrate that Mr Maclean asked Mr Pienaar to ask Mr Meltzer of Coolheat to send a mail out for 'us to all retailers to explain new margins'. In my view consensus had been reached on the increased RRP on 1 October 2008. Mr Van der Walt on 17 September 2008 circulated an email stating that:

'We've had a great response from the meeting of 10 September 2008! With all major bicycle wholesalers and retailers in Gauteng, we have all come to an agreement that raising the margins is a resolution to the problem. It is of utmost importance that we sign-up and state that you support this decision, we need everyone's support to be able to make this change and to be able to implement the changes right away.'

It is significant that there was no attempt by Omnico or Coolheat to correct the minutes regarding the increase in the RRP on 1 October 2008.

[48] Mr Pienaar testified that only once the initiative surfaced on the Hub there was a flurry of responses. The email from Mr Els of 19 September 2008 is instructive. It was sent to Mr Meltzer of Coolheat.

'Pro Bike would like to make it clear that we attended the meeting reluctantly. Our company does not agree with the contents of your email which implies dealers must collude achieve an agreed margin or exclude suppliers. Our company encourages competition amongst wholesalers and retailers. Please take this as our company's official response to the minutes of the meeting which would be circulated by yourself.'

[49] Various other allegations were made by Mr Els. He wanted to expose Omnico who changed approach by using the retailers to collude. Pursuant to the agreement reached at the September meeting, Omnico changed its pricing on 1 October 2008 from 35% to 40%. Mr Hodson said he decided to

do so because of the September meeting in that the bicycle dealers were not making enough money. He also explained that an increase to 50% RRP in one move was 'crazy' and hence he decided upon the incremental increase to 40%.

[50] Mr Stevens' evidence with regard to what lead to the increase on 1 October is particularly instructive:

MR STEVENS: That it was a forum, a discussion, with retailers and wholesalers on, certainly from them, of pushing up recommended retail and increasing margin up, a combination of the two or something like that.

ADV LE ROUX: Okay.

MR STEVENS: I would rather say it was clear from my discussion with Fritz Pienaar he was not making enough money. He wanted to make more money.

ADV LE ROUX: And then just for completeness, what did you understand after receiving the invitation and talking to Mr Pienaar, the purpose of the meeting was? It is what you have just testified. That it was to make more money by increasing recommended retail. That is what they wanted.

MR STEVENS: The purpose of the meeting was to be a forum to discuss it. That is what I understood. This was a discussion.

ADV LE ROUX: Your witness statement then goes on to say, *"Given the nature and purpose of the meeting, Mr Hodson did not see the need to attend the meeting himself, but suggested it will be prudent for you to attend in order to stay abreast of the general state of the 10 industry."*

MR STEVENS: Correct.

ADV LE ROUX: And this is where you testified in chief that Mr Hodson essentially said to you look, go and get the gossip. Find out what is going on.

MR STEVENS: Ja sure and be polite. You know, this is your customer asking you to do something. So, you have got to show face

and then just hear what people are saying, you know? You pick up titbits. Who knows?

ADV LE ROUX: And did you say to Mr Hodson I will go to the meeting, but I am going to tell them we are not doing this. That something else has got to happen instead.

MR STEVENS: Alan and I would roll eyes. This thing was a total waste of time. There was no doubt in our minds that nothing will come of this going into the meeting. We have tried before to have a wholesalers meeting. You cannot get consensus. To now get 5 everybody here to discuss something, to discuss a topic that we know would ultimately result in absolute failure is a waste of time. We knew this would be a discussion about pushing up recommended retail prices, increasing their margins, whatever. We knew it was a discussion about it. We knew it was a waste of a discussion, because ultimately when all is said and done, it cannot work. It will never work. So, why even have the discussion in the first place?

ADV LE ROUX: And it cannot work and it will not work, because the other wholesalers are not going to support it.

MR STEVENS: Ja, people never agree on anything in this industry.

ADV LE ROUX: So, when you saw Mr Dave Wyatt representing ProBike, did you see him at the meeting?

MR STEVENS: I did see Mr Wyatt at the meeting.

ADV LE ROUX: Did anything cross your mind that oh, maybe ProBike are interested?

MR STEVENS: No, it just reinforced what I always thought. The reason why ProBike never attended any of the other meetings is because they don't like Alan Hodson. When Alan Hodson is not at the meeting, well okay, I will be there.

ADV LE ROUX: Okay. If I can ask you in your witness statement to look at the final sentence in paragraph 12, it says, "*There was no suggestion in the invitation of any agreement or other action being sought from the wholesalers like Omnico.*" That is not correct, is it?

You understood that action was being sought from the wholesalers.

MR STEVENS: No.

ADV LE ROUX: Leave aside for the moment whether or not you say Omnico agreed to anything. You understood you were being asked to attend a meeting where the retailers were going to say, wholesalers, get your recommended retail price up.

MR STEVENS: I understood we were attending a meeting where that was going to be discussed. That is what I understood. Not for one split second did I think anybody was going to make any decision at a meeting like that ever. You cannot. It is not practical.

ADV LE ROUX: And then finally I just want to understand, your evidence as to why Omnico increased its recommended retail price on 15 bikes to 40% from the beginning of October 2008 essentially boils down to all the reasons you've given, all the reasons Mr Hodson gave his evidence, but the bottom line for your purposes to the Tribunal is that it's a coincidence that you increased your recommended retail price on the date and in the manner that was requested at the meeting and discussed at the meeting. Is it your evidence that it's a coincidence? You had all sorts of other reasons why you did and it's just a coincidence that Omnico increased its recommended retail price in the beginning of October 2008.

MR STEVENS: Yes, I stand by my reasons why I increased it on the 1st of October. (underlining for emphasis)

5ADV LE ROUX: And it's just a coincidence that it coincides with the discussions at the meeting?

MR STEVENS: Ja, I think at the meeting they did say they wanted it from October. I can't remember correctly. It's just not a factor for me. Like I explained, there's a very good reason why it has to be the 1st of October.

[51] Read as a whole, Mr Stevens' evidence was replete with attempts to evade the clear consequences of Omnico's role. Thus he tried to distance himself from the conclusion that Omnico had reacted positively to the decision of the meeting by emphasising that Mr Hodson made pricing decisions and he could not bind Omnico at the meeting in September. Mr Hodson's concession, under oath, that the increase was as a result of the meeting led to the finding that the increase of the RRP was as a result of a common approach agreed at the September meeting to future price.

[52] Mr Meltzer and Mr Stevens claim that they did not know prior to the September meeting that the objective was inconsistent with the meetings held prior to September and the express language of the invitation to the September meeting.

[53] The following passage of evidence is equally indicative of his penchant for evasion:

ADV WILSON: Well can I ask you to go to that, because you will see after the first four paragraphs on page 154, which track the agenda there is then at the top of page 155 at fifth heading, which is not reflected in the agenda, which is support for cycle dealers. And it says the following *"cycle dealers are struggling with the mark-up that was lower than the international mark-up and discussions would take place in future to ask association members to adjust their recommended retail selling price, which would allow the cycle dealers a higher mark-up on goods. It was emphasised that this would be recommended and there will be no aspects of price fixing or controlling the prices by the association, just recommending prices to cycle dealers."*

Now you said this wasn't on the agenda, how did it come into the discussion?

MR STEVENS: There was a time for general discussion towards the end of the meeting, once Alan was satisfied that all his points had been addressed. It would have been rude for us not to allow other views. And it then came up, and I can't remember who brought up ...

ADV WILSON: Was it Omnico?

MR STEVENS: Sorry?

ADV WILSON: Was it Omnico?

MR STEVENS: No. Omnico, like I say, what Omnico wanted to say we said and that was in the agenda, anything else was brought up from the floor. It wasn't a very long discussion, number 1 because Alan now wanted to wrap the meeting up and was making quite clear right guys, this is it now. And number 2, because there was no agreement here. Some people are saying, okay, ja, I've heard that, other people are saying, no, well I haven't heard about that. You know, depending on who was at the meeting.

[54] Coolheat did not express agreement at the meeting but significantly it did not distance itself from the proposals at the meeting or thereafter. It was argued that the suggestion by Mr Treger that legal advice be obtained according to Mr Meltzer meant that there was no agreement. However this must be weighed against the fact that Coolheat actually increased its prices on 94 of its 4000 stock items in accordance with the discussion at the meeting and, in particular, on 1 October.

Legal Framework

[55] Once there is sufficient evidence put up by the Commission that there is cartel conduct it is incumbent on the firm to put forward rebuttal evidence to establish that its participation was without any anti-competitive intention. This it did not do. As stated in *Mac Neil Agencies Pty Ltd vs Commission CAC No 121/CAC Jul12* it is not necessary to apply rigid concepts found in our common law of contract to prove offer and acceptance. It is clear from the record that Coolheat did not demonstrate to its competitors that it was participating for a purpose inconsistent with anti-competitive behaviour. It is not important that the parties are legally bound but that they regard themselves as bound. The United States definition of an agreement as:

‘Conscious commitment to a common scheme. (See *Monsanto Co v Spray-Rite Services Corp* 465 US 752 1984 768), is helpful in this regard.

[56] This definition finds support in South Africa. See *Competition Commission v Pioneer Foods (Pty) Ltd* para [35]. The Tribunal has determined that a positive meeting of minds is not the same as understood in

the law of contract. See *Competition Commission v DPR Plastics (Pty) Limited* paras [94] to [97]. It is sufficient to be a passive participant, in that

'Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs.'

[57] The evidence, as I have evaluated it, reveals that neither Omnico nor Coolheat distanced themselves at the meeting after consensus had been reached. They gave no indication thereafter that they disagreed and they placed no evidence before the Tribunal that the increased RRP following the September meeting was as a result of an independent decision without anti-competitive effect.

[58] In my view, the Commission provided sufficient evidence that there was an agreement in place regarding the RRP. It was then incumbent on Omnico and Coolheat to provide sufficient evidence to the contrary. Upon scrutinising the Commission's evidence it demonstrated that the conduct in question would have the effect of undermining competition.² In assessing the necessary level of proof Philip Lowe indicates that the evidence must be, as *Tetra Laval*³ (for example) suggests, sufficiently precise, consistent and

² Philip Lowe, *Taking Sound Decisions on the Basis of Available Evidence*, EUROPEAN COMPETITION LAW ANNUAL 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases

³ These judgments quickly raised the profile of questions such as what standard of proof applies in competition cases and with what rigor the enforcer's decisions will be controlled. More generally, the value of exploring these issues relates to the ancient insight that

convincing (which does not necessarily imply the 'clear and convincing' standard known in common law countries). The claimed non-participation at the meeting does not end the evidential enquiry. The undisputed evidence of their failure to overtly disagree or distance themselves from the contents of the final September meeting meets the necessary standard of proof as being consistent, clear and convincing in determining participation in a cartel.

[59] In *Mac Neil* supra, the question was left open whether the South African approach to passive attendance and public distancing should be the same as the European or US law. Obviously each case will turn on its own facts. Our competition jurisprudence however has evolved and the time has come to analyse more carefully the context of the alleged cartel behaviour, the evidence read with all the surrounding circumstances of the undertaking's participation or passive participation in meetings. Silence within a specialized context can never equal non participation. There does not have to be a single pressing piece of conduct demonstrating cartel behaviour. The cumulative effect of conduct whether active or passive when assessed within a particular context is equally compelling.

[60] The assertion by Mr Stevens that the collective raising of the RRP on 1 October 2008 by all concerned was simply a coincidence not only stands to be rejected but it illustrates most vividly that the evidence must be evaluated as whole and the adjudicator must not be confined to a strict application of a pre-defined burden of proof.

principles of procedure cannot or should not be regarded as neatly dissociable from substance, as one often bears decisively on the other.

[61] The principle of passive attendance at meeting to listen to 'gossip' among companies cannot excuse an undertaking. Consistent with European competition jurisprudence, as it has now developed, there is a duty to speak or to report to authorities or publicly distance oneself from any uncompetitive behaviour. In *Tréfileurope v Commission* Case T-141/89 [1995] ECR 2-791 at para [85] the fact that an undertaking does not abide by the outcome of meetings which have a manifestly anti-competitive purpose does not relieve it a full responsibility for its participation in the cartel if it has not publicly distanced itself from what was agreed in the meeting. Several cases followed suit. The reason for this rule is that, having participated in the meeting without publicly distancing itself from what was discussed, the undertaking has given the other participants clear cause to believe that it subscribed to what was decided and that it would comply therewith.

[62] In the case of *Westfalen Gassen Nederland BV v Commission of the European Communities* Case T-303/02 (2006) the European Court of First Instance held at para 1: 'For the purposes of applying Article 81(1) EC, it is sufficient that the object of an agreement should be to restrict, prevent or distort competition irrespective of the actual effects of that agreement. Consequently, in the case of agreements reached at meetings of competing undertakings, that provision is infringed where those meetings have such an object and are thus intended to organise artificially the operation of the market.'

[63] The Court in *Westfalen Gassen Nederland, supra* also held that it was sufficient for the 'Commission to show that the undertaking concerned participated in meetings at which anticompetitive agreements were concluded, without manifestly

opposing them, to prove to the requisite standard that the undertaking participated in the cartel. Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs.' Para 2

[64] The principle emanating from *Westfalen Gassen Nederland* is based on the underlying principle of law that, 'having participated in the meeting without publicly distancing itself from what was discussed, the undertaking gave the other participants to believe that it subscribed to what was decided there and would comply with it. The notion of public distancing as a means of excluding liability must, in itself, be interpreted narrowly. In that regard, silence by an operator in a meeting during which the parties colluded unlawfully on a precise question of pricing policy is not tantamount to an expression of firm and unambiguous disapproval. On the other hand, a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery. That complicity constitutes a passive mode of participation in the infringement which is therefore capable of rendering the undertaking liable. ' para 2

[65] The Court went on to hold that 'The upshot is that the undertaking gave the other participants to believe that it subscribed to what was decided there and would comply with it. The narrow interpretation is that silence by an operator in a meeting during which other parties colluded unlawfully on a precise question of pricing policy is not tantamount to an expression of firm and unambiguous disapproval. On the other hand a party which tacitly approves of unlawful initiative

without publicly distancing itself from its content or reporting it to the authorities effectively encourages the continuation of the infringement and compromises its discovery. This complicity constitutes a passive mode of participation in the infringement which is therefore capable of rendering an undertaking liable. The prohibition on participating in anti-competitive agreements is well-known and it is normal for activities to take place in a clandestine fashion. The evidence is normally fragmentary and so that it is often necessary to reconstitute certain details by deduction.'

[66] In *Kaisa and Denka Chemicals GmbH v European Commission* Case T-83/08; a judgment of the General Court of 2/2/2012 at para 177 the following was said:

'In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.'

[67] Returning to the present dispute, the evidence adduced by the Commission is sufficient to show that agreement was reached amongst wholesalers that there would be an increase in mark-up in agreed percentages. This can also be inferred from Mr Steven 'coincidence' regarding the commencement date of 1 October 2008. This is an *indiciae* which taken together with all the other facts constitute clear evidence of an infringement of the competition. The evidence is also conclusive that 1 October would be the implementation date. The relevant background evidence, context, meetings of 7 May and 11 June 2008 and the emails

provides sufficient and consistent proof of agreement among the cartel participants, namely

1. Both appellants failed to distance themselves from the consensus reached at the meeting to increase the RRP from October 2008 so as to afford greater margins to the retailers;
2. Both appellants gave no indication – either at the September meeting or thereafter in any forum – that they disagreed with the increase and that they would not proceed on that basis; and
3. Both appellants have placed no evidence before the Tribunal that their pricing, and increased RRP in particular, following the September meeting was the result of their independent decision making, rather than as a result of the unlawful agreement reached at the September meeting.

The Tribunal correctly found that Omnico and Coolheat engaged in conduct directly and indirectly in contravention of s 4 (1)(b)(i) of the Act, since.

PENALTIES

[68] The Commission used the formula as set out in *Competition Commission v Aveng (Africa) Ltd and Others* Case No: 84/CR/DEC09 where six steps constitute the basis further calculation of penalties:

- Step 1: Determination of the affected turnover in the relevant year.
- Step 2: Calculation of the base amount being the proportion of the relevant turnover relied upon.

- Step 3: Where the contravention exceeds 1 year multiply the amount contained in Step 2 by the duration of the contravention.
- Step 4: Rounding off the figure obtained in Step 3 if it exceeds the cap provided for by s 50(2).
- Step 5: Consider the factors that might mitigate or aggravate the amount reached in Step 4 by way of a discount or premium expressed as a percentage of that amount that is either subtracted from or added to it.
- Step 6: Rounding off the amount in Step 5 if it exceeds the cap provided for in section 59(2).

[69] The Commission proposed a penalty based on affected turnover and used the entire turnover of Omnico for the year ended June 2009 which amounted to R92 548 238. The Commission ignored that the mark-up was only on cycles below R20 000; in other words cycles with an RRP above R20 000,00 remained at 35% throughout the relevant period. The Tribunal accepted this submission. The relevant mark-up was therefore from 35% to 40% on cycles under R20 000. That turnover was R38 507 331. The Commission submitted that in terms of Step 2 of *Aveng* the base amount of the penalty should be 15% of R92 548 238,00 which equals R13 882 235,00 and in terms of Step 3 the duration by a factor of one of the grounds that the Commission had evidence that the cartel ran from October 2008 to October 2009. The Commission also submitted that Step 5 there were no mitigating factors and there should be no discount on the amount of R13 882 235.

[70] Omnico submitted that there was an "elision" of two inconsistent cases brought by the Commission. For the reasons set out above there was no elision of the Commission's case. It was not based on two negative and abstract propositions as the concept of elision would suggest. The meeting of 10 September, the two prior meetings of 7 May and 11 June and the correspondence generated before and after the September meeting all lead to the permissible inferences as drawn out in this judgment.

[71] Once there is cartel activity that is sufficient to attract a penalty. In a work edited by *Dorota Leczykiewicz and Stephen Weatherill Bloomsbury Publishing Company* it was stated correctly that there is a growing international acceptance that such cartel activity poses a serious threat to economies and consumers and constitute the supreme evil of antitrust. In particular '... Parties to cartels deliberately set out to interfere with free competition'. Accordingly the submission by both Omnico and Coolheat that there should be no penalty must fail.

[72] In this case it is clear that the bottom line of the September meeting was agreement that the RRP would be increased in the industry standard from 35% to 40% on bicycles and 50% on accessories to 75%.

[73] It is no defence that Omnico had a consistent history of non-adherence to the industry norm. In further mitigation Omnico submitted that it did not change its RRP mark-up accessories which remained at 60% throughout the relevant period. This is a factor that must be taken into account. The only

RRP mark-up was in respect of bicycles below R20 000 and there was only a 5% increase from 35% to 40%. This fact cannot be overlooked and should be taken into account when determining the correct penalty.

[74] Based on Omnico's turnover on domestic sales and accessories for that financial year the relevant turnover to be taken into account is not R98 007 193 but R38 507 331. Other factors which would be appropriate to take into account is that the amount utilised in Step 2 of the *Aveng* methodology should remain at 15% proposed by the Commission.

[75] Other mitigating factors are that the proposal emanated from the retailers rather than from Omnico during the economic downturn in 2008.

[76] In my view, this in itself is not a mitigating factor as the culpability of Omnico arises the moment it went along with the agreement. The submission by Omnico that the wholesalers did not stand to profit from implementing the proposal does not mitigate the culpability, in particular having regard to the egregious consequences of cartel conduct. It is not clear from the submissions regarding the appropriate penalty that anti-competitive behaviour would result in a reduction of the volume of bicycles and accessories sold. The contention is that once the minutes were posted on the Hub on 19 September 2008, the agreement, at best, only lasted for approximately one week and that this factor should be applied in Step 3 of the methodology. Accordingly, Omnico submits that it should be one month and not twelve months as proposed by the Commission. Insufficient evidence was proffered

by Omnico in this regard. As regards Step 5 the mitigating factors include that Omnico had never previously been found to have contravened the Competition Act. It cooperated with the Commission's investigation and in the complaint referral proceedings. Omnico also submits it should not be punished for not accepting the Commission's settlement proposals because it was of the strong view that the conduct did not amount to a prohibited practice. Omnico submits further that the fact that other respondents elected to settle the proceedings against them should have a negative effect on Omnico's case. Omnico points out that all the respondents disputed the merits of the complaint. Omnico also submits that Mr Stevens was a passive and silent participant at the meeting and did not contribute a single word on behalf of Omnico. Having regard to what is stated above this is not a factor which assist Omnico. Silent participation can be as culpable as active participation depending on the context.

[77] In summary, I accept that in regard to Step 1 the affected turnover should be limited to domestic sales of bicycles under R20 000,00 and this amount was R38 507 331,00. As regards Step 2 the Commission should take into that the mark-ups emanated from the retailers. This submission cannot be justified in the light of the fact that the wholesalers had to engage in the cartel conduct for the RRP's to happen. Omnico also submits that the Commission did not adduce any evidence of any other wholesalers who were induced RRP mark-ups on bicycles. As regards Step 3 Omnico's RRP mark-up in respect of bicycles was restricted to cycles under R20 000,00. This remained in place throughout that financial year and not just for the week prior to the reaction to

the HUB posting. As regards Step 5 it was submitted that the Commission's proposed penalty ignored the various mitigating factors and therefore there should no penalty imposed or at most only a nominal penalty. Omnico claimed that it did not stand to gain from the cartel. There was insufficient evidence on this. In any event this does not matter as once there is an agreement the potential for gain was there. The Tribunal correctly found that it did not make a difference whether it was a retailer initiative the contravention was no less egregious. The Tribunal correctly took into account that the agreement pertained to luxury goods and not basic commodities. The base amount therefore of 15% on the affected turnover should take into account the limited application. The base amount of 10% in Omnico's affected turnover is R3 850 733. Giving the mitigating factors referred to a 50% discount should be applied. The penalty payable by Omnico is thus R1 925 366.

[78] Mr Meltzer of Coolheat did not testify what the turnover was on the limited amount of the increase on the 94 product out of 4000. The Tribunal used the turnover provided by Coolheat for the 2009 period which was R32 506 122, 00 as the affected turnover Step 1. The Tribunal also used the 10% as the base amount as for Omnico. The base amount calculated at 10% of Coolheat's affected turnover is R4 250 612 being Step 2. The multiplier of one year is also taken into account for the same reasons as Omnico. Coolheat's total turnover for the financial year ended June 2014 was R71 983 454 being the audited statements.

[79] The Tribunal used the base figure of 10% which is R7 198 345 and the figure arrived at in Step 3 is R4 250 612,00 which does not exceed 10% of Omnico's turnover.

[80] The Tribunal found no basis to give Coolheat a discount because Mr Meltzer was of no assistance to the Tribunal. A further punitive aspect raised by the Tribunal was that Mr Meltzer did not distance Coolheat from the agreement on the Hub. The Tribunal therefore found the penalty in Step 3 as remaining at R4 250 612 and that this did not exceed the statutory cap of 10% of Coolheat's total turnover in 2014 (Step 6). The penalty imposed is thus R4 250 612.

[81] In conclusion save for the reduction in Omnico's penalty to the amount of R 1 925 366 the appeal must be dismissed.

Costs

[82] Even though the first appellant met with some success it was unsuccessful in its substantive appeal and accordingly it must also pay the costs of the appeal. Mr Wilson submitted that in cases involving the commission no costs should be awarded. I have found no authority to support this view.

Order

1. Save for paragraph 2, the appeal is dismissed, with costs to be paid by first and second appellants jointly and severally.
2. The order of the Competition Tribunal is altered only to the extent that the penalty imposed upon first appellant is to be in the amount of R 1 925 366.



M VICTOR AJA

DAVIS JP & NP BOQWANA AJA

_____ Concurring

Adv. Michelle le Roux instructed by the

State Attorney

:Adv. Jerome Wilson SC instructed by

Lowndes Dlamini Inc.

For Coolheat: Adv. David Stephens instructed by Shaie Zindel Attorneys