REPUBLIC OF KENYA
IN THE COMPETITION TRIBUNAL AT NAIROBI
CASE NO. 005 OF 2023
BETWEEN
BLUE NILE WIRE PRODUCTS LIMITED.....APPELLANT
AND
COMPETITION AUTHORITY OF KENYA.....RESPONDENT
(Appeal from the decision of the competition Authority of Kenya at Nairobi dated 17th of August 2023)

JUDGEMENT

A. BACKGROUND

1. This appeal arises from the decision of the Respondent against the Appellant dated 17th August 2023.[1] The Appellant is in the business of manufacturing chain links, barbed wires, wire mesh and nails since 2007 under the brand name 'Kifaru'.[2] The Appellant is a member of Kenya Association of Manufacturers (KAM) operating in the steel industry and more specifically in the wire sector.[3] At the hearing, the Appellant was categorical that it does not deal in metal tubes.[4]

2. The Respondent is a State Corporation established under the Competition Act No 12 (hereinafter referred to as "The Act") of Kenya. It has a wide mandate on matters competition law and policy under the Act. For purposes of this appeal, we shall focus on the Respondent's mandate to regulate market conduct in relation to restrictive trade practices of price fixing and output restriction under Section 21 of the Act.[5]

3. The Respondent states that sometime in August 2020, it initiated investigations in the steel manufacturing and distribution sector in Kenya. This was precipitated by market intelligence that market players in the sector were engaged in coordinated conduct contrary to Section 21 of the Act.

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[1] Replying affidavit sworn by Gideon Mokaya on 15/09/2023 Page 49 to 79.
[2] Statement of facts dated 30th August 2023 filed by the Appellant, Paragraph 1.
[3] Ibid paragraph 2.
[4] Ibid.
[5] The Competition Act of Kenya.

4. The Appellant confirmed that on or about 14th September 2021, the Appellant was invited to a KAM meeting at Zen Gardens, Lower Kabete, Nairobi ("The Zen Meeting"). Mr. Kotni Rao, a director of the Appellant, represented the Appellant at the said meeting.[6]

5. Mr. Rao says that when he arrived at the meeting, he realized that the agenda of the meeting was to discuss the tubes sector. Consequently, Mr. Rao left the meeting as Appellant does not manufacture, sell or import tubes. The Appellant insists that it is not privy to the discussions which took place at the Zen Meeting after Mr. Rao's departure.[7]

6. On or about 15th December 2021, the Respondent in accordance with Sections 31 and 32 of the Act as read with sections 118 and 118A of the Criminal Procedure Code (CAP 75) Laws of Kenya, conducted a search and seizure exercise pursuant to the investigations referred to under paragraph 3 above. This exercise was simultaneously conducted in the premises of Doshi Group, Devki Steel Mills Limited, Tarmal Wire Products Limited, Mabati Rolling Mills Limited, Tononoka Rolling Mills, Abyssinia Group Industries, Apex Steel Limited and Insteel Limited.[8]

7. After analysis of the documentation seized, the Respondent established that another 8 companies, not subject to the search and seizure exercise, including the Appellant, were also subjects of interest in the investigation.[9] Based on a preliminary review of the material before it, the Respondent issued a Notice of Investigation (NOI) and summons for appearance dated 11th of March 2022 to the Appellant.[10] In the said NOI the Respondent summoned the Appellant's director, the said Mr. Rao, to appear before the Respondent on 24th March 2022 to clarify information found in the course of the said search.[11]

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[6] Statement of facts dated 30th August 2023 filed by the Appellant Paragraph 3.
[7] Ibid.
[8] Replying affidavit sworn by Gideon Mokaya on 15/09/2023, at paragraph 5.
[9] Replying affidavit sworn by Gideon Mokaya on 15/09/2023 paragraph 6.
[10] Replying affidavit sworn by Gideon Mokaya on 15/09/2023 paragraph 7.
[11] Replying affidavit sworn by Gideon Mokaya on 15/09/2023 paragraph 8.

8. By a letter dated 23rd March 2022, the Appellant's Advocate requested the Respondent for more time and for copies of the documents to be relied upon at the interview.[12] On 25th March 2024 the Respondent rescheduled the meeting to 30th March 2022 and provided the Appellant's advocates with copies of evidence to be relied on at the interview, more specifically Evidence 7 and Evidence 45.[13]

9. The Respondent confirms in its affidavit that the meeting took place on 30th March 2022.[14] Through a letter dated 14th April 2022, the Appellant's Advocate forwarded a witness statement to the Respondent signed by the said Mr. Rao on 30th March 2022.[15] The said statement inter alia addressed Evidence 7 and 45 alluded to earlier.[16]

10. The Respondent states that it considered the evidence and the Appellant's explanation and, on that basis, issued the Appellant with a Notice of Proposed Decision (NOPD) dated 4th May 2022.[17] The Appellant was also supplied with the evidence against which the NOPD was issued and granted 21days to make its written representations on the same.[18]

11. On 26th May 2022, the Appellant submitted its written submissions in response to the NOPD.[19] The Respondent states that on 16th June 2022, it convened a Hearing Conference pursuant to section 35 of the Act and Section 4 of the Fair Administrative Action Act.[20] From the Minutes Mr. Rao and Mr. Anthony Mbugua were in attendance on behalf of the Appellant.[21]

12. After the said Hearing Conference, the Respondent made its final decision on 17th August 2023 pursuant to section 36 of the Act.[22] The Respondent in its decision held:

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[12] Replying affidavit sworn by Gideon Mokaya on 15/09/2023 page 3.
[13] Replying affidavit sworn by Gideon Mokaya on 15/09/2023 page 5.
[14] Replying affidavit sworn by Gideon Mokaya on 15/09/2023 paragraph 8.
[15] Replying affidavit sworn by Gideon Mokaya on 15/09/2023 page 6 to 14.
[16] Ibid.
[17] Replying affidavit sworn by Gideon Mokaya on 15/09/2023 page 15 to 36 (Exhibit GM-3).
[18] Replying affidavit sworn by Gideon Mokaya on 15/09/2023 Paragraph 9 and 10.
[19] Replying affidavit sworn by Gideon Mokaya on 15/09/2023 page 37 to 42.
[20] Replying affidavit sworn by Gideon Mokaya on 15/09/2023 page 45 to 47.
[21] Ibid.
[22] Replying affidavit sworn by Gideon Mokaya on 15/09/2023

i. That the conduct of Blue Wire Products Limited:

a. together **with Apex, Brollo, Abyssinia, Insteel, Jumbo, MRM, Devki, Doshi, Accurate, Nail,** and **Steel, Corrugated, Tononoka** and **Tarmal** constituted an infringement of section 21(1) as read together with section 21(3)(a) of the Act; and

b. together with **Apex, Doshi, MRM, Inteel, Devki, Jumbo, Corrugated, Accurate, Tononoka, Brollo** and Abyssinia constitutes an infringement of section 21(1) as read together section 21(3)(e) of the Act.

ii. the Authority restrained Blue Nile from engaging in conduct that violates section 21(1) of the Act as read together with section 21(3) and section 21(3)(e) of the act.

iii. the Authority restrains Blue Nile from engaging in future violations of the Act.

iv. the Authority directs Blue Nile to develop and furnish the Authority with a competition compliance programme within 6 months from the date of this determination for approval.

v. the Authority directs Blue Nile to implement the approved competition compliance programme within 12 months from the date of its approval whose implementation will be subjected to a compliance check by the Authority

vi. the Authority imposes a financial penalty of 0.5 % of Blue Nile's 2021 gross annual turnover in Kenya amounting to Kes. **9,1160,89.30.**[23]

13. The Appellant dissatisfied with the decision of the Respondent filed a Notice of Appeal to this Tribunal dated 30th August 2023 and urges its appeal on the grounds set out in its Memorandum of Appeal dated 30th August 2023.

B. DOCUMENTS AND EVIDENCE

14. The Appellant filed the following documents before the Tribunal: -

Record of Appeal containing: -

a) The Notice of Appeal dated 30th August 2023
b) The Memorandum of Appeal dated 30th August 2023.
c) Supporting Affidavit sworn by Kotni Rao on 30th August 2023.
d) Statement of facts dated 30th August 2023.

[23]Replying affidavit sworn by Gideon Mokaya on 15/09/2023 page 78-79.

e) List of documents dated 30th August 2023 (Volume I and II)

f) Appellant's written Submissions dated 28th November 2023.

g) Appellant List of Authorities and case digest dated 24th May 2024.

15. The Respondent filed the following documents:

a) Replying Affidavit sworn by Gideon Mokaya on the 15th day of September 2023 and the annexures thereto.

b) Respondent's written Submissions dated 21st day of February 2024 together with the list and bundle of authorities attached thereto.

c) Respondent's Case Digest dated 23rd May 2024.

d) Letter dated 5th October 2022 from the Respondent to the Commissioner General Kenya Revenue Authority requesting for the Appellant's financial information.

16. The matter came up for hearing on 22nd May 2024 when the parties' advocates highlighted each party's respective submissions on the appeal.

C. APPELLANT'S CASE

17. **First**, the Appellant claims that it does not manufacture nor deal in the products which are the subject matter of the Respondent's investigation and decision. The Appellant states that it deals in metal plates and wires and yet the Respondent's decision was in respect of metal tubes and pipes. The Appellant maintains that the Respondent did not have sufficient evidence to sustain a finding against the Appellant in this regard.

18. **Second**, the Appellant denies that it substantively participated in the meeting of 14th September 2021 at Zen Gardens in Nairobi. The events of this meeting were a principal object of the Respondent's investigation and decision. The Appellant's director, the said Mr. Rao, admits that he attended the meeting on invitation by other players in the industry.[24] Mr. Rao, however, insisted that he left the meeting on realizing that the agenda was centered on metal tubes which the Appellant does not deal in.[25]

[24] Affidavit sworn by Kotni Rao on 30/08/2023 Paragraph 5.

[25] Ibid.

19. The Appellant therefore maintains that it was not privy to the discussions which took place at the said meeting. Consequently, the Respondent was misguided in finding that the Appellant, by attending this meeting, had been involved in price fixing contrary to section 21 of the Act.

20. **Third**, the Appellant challenges the emails relied upon by the Respondent on the basis that they only pointed to the subject of the meeting and did not constitute minutes.[26] The Appellant criticizes the Respondent for failing to consider that the emails contained discussions on regulation of sub-standard materials.[27] Further that the position of the attendees was to steer off discussions around prices.[28] The Appellant posits that this omission by the Respondent is evidence that the Respondent only wanted to propel the narrative that suited the Respondent.[29]

21. **Fourth,** the Appellant argues that the Respondent erred when it charged the Appellant under section 21 (1) and (3) of the Act in isolation of section 21(5) and 21(6) of the Act. The Appellant contends that Section 21 of the Act should be applied and considered in its entirety.[30]

22. The Appellant submits that Section 21(5) lays down the particulars of what constitutes a concerted practice or agreement in the nature that is prohibited under Section 21(1) of the Act.[31] The Appellant further submits that for Section 21 (1) to kick in, Section 21(6) requires the existence of a significant interest by one undertaking in the other or at least one common director or shareholder between the entities.[32] According to the Appellant, the Respondent has neither demonstrated nor proven the existence of the relationships or interests contemplated under section 21(5) of the Act.[33]

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[26] Submissions dated 28/11/2023 filed on behalf of the Appellant paragraph 26.
[27] Submissions dated 28/11/2023 filed on behalf of the Appellant, paragraph 30.
[28] Ibid.
[29] Ibid.
[30] Submissions dated 28/11/2023 filed on behalf of the Appellant paragraph 13.
[31] Submissions dated 28/11/2023 filed on behalf of the Appellant paragraph 14.
[32] Submissions dated 28/11/2023 filed on behalf of the Appellant paragraph 15.
[33] Submissions dated 28/11/2023 filed on behalf of the Appellant paragraph 16.

23. The Appellant argues that section 21(6) of the Act provides for the rebuttal of a presumption of a concerted practice or agreement; an undertaking or director or shareholder may rebut this presumption if they establish that a reasonable basis for the practice engaged by the parties is a normal commercial response to conditions prevailing in the market.[34]

24. According to the Appellant, the emails relied upon by the Respondent in making its decision showed that the subject of the meeting was to rid the market of substandard goods. These emails rebutted the presumption of a concerted practice or agreement as contemplated by section 21(6) of the Act. The Respondent therefore erred in failing to consider this rebuttal in its decision.[35]

25. The Appellant relied on the case of **Reserve Bank of India V Peerless General Finance and Investment Co. Ltd 1987SCR (2) 1 the Supreme Court of India** where the court was of the view that the basis of interpretation of statutes must depend on text and context. The court further stated that when interpreting statutes using glasses of law makers on one hand and glasses of citizens on the other hand, the results would be different. Therefore, no part of a statute or words can be construed in isolation.

26. **Fifth**, the Appellant argued that the Respondent did not discharge the evidentiary burden of proof as required by law. The Appellant urged that the Respondent's case did not achieve the evidentiary threshold to sustain a finding that the Appellant was guilty of price fixing and exchange of commercially sensitive information. According to the Appellant, the Respondent's Statement of reasons for the decision did not adversely mention the Appellant as it dealt with players in the pipes and tubes industry which the Appellant is not. Further, there was no correspondence involving the Appellant, and there was similarly no evidence that the Appellant participated in the September 14 meeting at Zen Gardens.[36]

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[34] Submissions dated 28/11/2023 filed on behalf of the Appellant paragraph 28.
[35] Submissions dated 28/11/2023 filed on behalf of the Appellant paragraph 29.
[36] Submissions dated 28/11/2023 filed on behalf of the Appellant paragraph 21 to 22.

27. The Appellant cited the case of **Hellen Wangari Wangechi v Carumera Muthini Gathua [2005] eKLR** where **Justice Mativo, "it is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed'.**

28. The Appellant also relied on **Section 107 of the Evidence Act Cap 80 Laws of Kenya** which provides that whoever desires any court judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that indeed such facts exist. The burden of proof only shifts when sufficient evidence has been provided.

29. **Sixth**, the Appellant submits that it was not accorded the right to a fair hearing as envisaged in Article 25 of the Constitution of Kenya and the right to fair administrative action as contained in Article 47 of the Constitution of Kenya. The Appellant argues that it was not given an opportunity to challenge the evidence presented against it. [37]

30. The Appellant alleged that prior to the Respondent issuing its decision, the Respondent only supplied the Appellant with Evidence 45A, 45B and 45C. The Respondent, however, made reference to additional Evidence 1, 2, 3, 23, 57, 45E, 45F, 36, 53, 40A, 34,31,38,26,8,19, 51A, 48,41,59,53A, 53B, 53C, 53D, 54, 56 AND 52 in its decision and the Appellant only became aware of this evidence after the final decision. [38]

31. The Appellant relied on the case of **Republic V Capital Markets Authority & Ano Ex Parte Jonathan Irungu Ciano (2018) eKLR** where the tribunal held that the law places an onus on administrative bodies to furnish the person against whom allegations are made with information and materials and evidence to be relied on upon taking administrative action.[39]

32. The Appellant also relied on the case of **Selvarajan V Race Relations Board (1976) 1 AII ER 12** where Lord Denning held that an investigating body is under a duty to act fairly but the fairness required depends on the nature of the investigations and the consequences it

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[37]Submissions dated 28/11/2023 filed on behalf of the Appellant , paragraphs 32 to 35.
[38]Submissions dated 28/11/2023 filed on behalf of the Appellant , paragraphs 36 to 37.
[39] Submissions dated 28/11/2023 filed on behalf of the Appellant, paragraph 37

may have on the person affected. The Respondent conducted an investigation without giving the Appellant the opportunity to challenge the evidence that was used in the decision making.[40]

33. The Appellant also relied on Article 47 of the Constitution read together with Section 4(3) of the Fair Administrative Action Act (2015) provides that;

> "Where an administrative action is likely to adversely affect the party the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-
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> a) Prior and adequate notice of the nature and reasons for the proposed administrative action.
> b) An opportunity to be heard and to make representations in that regard.
> c) Notice of a right to a review or internal appeal against an administrative decision, where applicable.
> d) A statement of reasons pursuant to section 6.
> e) Notice of the right to legal representation where applicable.
> f) Notice of the right to cross-examine or where applicable.
> g) Information, materials and evidence to be relied on in making the decision or taking the administrative action."

34. It is the Appellant's case that the Respondent did not act fairly as it failed to accord the Appellant an opportunity to challenge and interrogate the evidence that the Respondent relied upon to make its decision against the Appellant.[41]

D. RESPONDENT'S CASE.

35. In response, the Respondent stated that sometime in August 2020, it initiated investigations in the steel manufacturing and distribution industry in Kenya.[42] Upon conclusion of the investigations, and the hearing conference, the Respondent found that the Appellant together

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[40] Submissions dated 28/11/2023 filed on behalf of the Appellant paragraph 41.
[41] Submissions dated 28/11/2023 filed on behalf of the Appellant paragraph 42.
[42] Replying affidavit sworn by Gideon Mokaya on 15/09/2023 paragraph 4.

with others had engaged in conduct that infringed section 21(1) and Section 21(3)(a) and 21(3)(e) of the Act. [43]

36. In its submissions before the Tribunal the Respondent **first** sought to define and illustrate the meaning of the key concepts. With respect to **price fixing** the Respondent cited the provisions of the Federal Trade Commission to wit "it as an agreement written or verbal among competitors that lowers, raises, or stabilizes prices or competitive terms".[44] The Respondent also cited the provisions of Clause 30 of the Consolidated Guidelines on Restrictive Trade Practices under the Competition Act ("The Guidelines") which defines price fixing to include: fixing the price itself; or fixing an element of the price of such as a discount; setting percentage price increase; setting the permitted range between competitors; setting the price of transport charges, credit interest rates terms and an agreement to indirectly restrict price competition.[45]

37. With respect to **out-put restriction** the Respondent cited the provisions of Clause 39 of the Guidelines. Output restriction is said to occur when competitors agree to prevent, restrict, and reduce supply or production with aim of creating scarcity. The effect of this is an increase in price or a halt in a price fall.[46]

38. On the conduct of the Appellant and what constitutes **concerted practice** the Respondent drew this Tribunal's attention to the provisions Section 2 of the Act that "**a co-operative or coordinated conduct between firms achieved through direct and indirect contact that replaced their independent action, but which did not amount to an agreement**".[47] Clause 12 of the Guidelines gives the definition of a concerted practice as a coordinated activity between undertakings that substitutes practical cooperation between them for the risks presented by effective competition. The object of this is to influence the conduct of these

[43] Replying affidavit sworn by Gideon Mokaya on 15/09/2023, paragraph 5 and 6.
[44] Submissions dated 21/02/2024 filed by the Respondent at paragraph 19.
[45] Submissions dated 21/02/2024 filed by the Respondent, paragraph 20.
[46] Submissions dated 21/02/2024 filed by the Respondent paragraph 22.
[47] Submissions dated 21/02/2024 filed by the Respondent paragraph 23.

undertakings on a market or disclose the expected conduct contemplated which would not have been disclosed otherwise.[48]

39. The Respondent clarified that the concerted practice complained of in the present matter was one between parties in a **horizontal relationship** as encapsulated by Section 21(2)(a) of the Act. Clause 27 of the said Guidelines provides that a horizontal agreement is an agreement between undertakings which operate at the same level of the value chain. Guideline No 27 further states that horizontal collusive agreements described are subject to "object" strict assessment with no defense and the regulator only considers the content and nature and not the effect.[49]

40. Guideline No 28 further states that concerted practice between undertakings in a horizontal relationship is considered a hardcore restriction which hinders competition and cannot be redeemed.[50] Clause 29 of the Guidelines provides that price fixing and output restriction between undertakings in a horizontal relationship are hardcore restrictions that are by their very nature injurious to the proper functioning of competition and have no redeeming value whatsoever.[51]

41. The Respondent **next** sought to illustrate, through the evidence it had obtained, that: the Appellant's conduct amounted to price fixing and output restriction; this conduct was a concerted practice as it was a coordinated activity between the steel manufacturing and distribution companies; the conduct substituted practical cooperation between the players for the risks presented by effective competition; there was direct contact and communication between the steel manufacturing and distribution companies; and the object of which was either to influence the conduct of the companies or to disclose the course of conduct in the market; the companies were in competition and therefore in a horizontal relationship; and their conduct amounted to hardcore restrictions.[52]

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[48] Submissions dated 21/02/2024 filed by the Respondent paragraph 25.
[49] Submissions dated 21/02/2024 filed by the Respondent paragraph 26 to 27.
[50] Submissions dated 21/02/2024 filed by the Respondent paragraph 29.
[51] Submissions dated 21/02/2024 filed by the Respondent paragraph 30.
[52] Submissions dated 21/02/2024 filed by the Respondent paragraph 32.

42. **With respect to Price Fixing: First,** the Respondent relies on Evidence 45E which is an email exchanged between Mr. Manish and Mr. Nilesh both of MRM. The Respondent states that this email shows that there was an informal meeting held on 14th September 2021 between industry players; the agenda of the meeting was price fixing in the metal sector; and the Appellant was present at the meeting. [53]

43. The Respondent relies on a statement in that email which reads, "*Abyssinia seems to be the main player which does not want to increase the price.*" The Respondent submits that this statement was an indication that price fixing was an agenda at the meeting and Abyssinia the main player had declined to participate in a proposed price increase.[54]

44. **Second**, the Respondent also relies on Evidence 45F which is an email exchanged between Mr. Abhijeet and Mr. Manish both of MRM. In that email Mr. Abhijeet states that *"all will have high price RM [raw materials] hence everybody decided to increase on price by going slowly as 30% market price downsize was also to be taken care of"*. The Respondent concluded that the meeting attendees had decided on a gradual price increase as they were all faced with high raw material prices.[55]

45. **Third,** the Respondent relies on **Evidence 45A** and **45C** which are emails dated 11th September 2021 and 13th September 2021 exchanged between Abhijeet and Sundaresa both of MRM. The meeting that was held at Zen Gardens on 14th September 2021. In addition, Mr. Sundaresa stated that "*therefore, best is to be just present in the meeting as usual and let others suggest and decide. I am sure as usual they will do undercutting without anybody knowing according to the situation to manage their sales and cashflow.*[56]

46. In respect of both emails, the Respondent submits that the "subject" was "metal sector pricing" and therefore the meeting was about price fixing; the meetings and discussions on

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[53] Submissions dated 21/02/2024 filed by the Respondent paragraph 33
[54] Submissions dated 21/02/2024 filed by the Respondent paragraph 34.
[55] Submissions dated 21/02/2024 filed by the Respondent paragraph 35.
[56] Submissions dated 21/02/2024 filed by the Respondent paragraph 36.

price fixing were a common practice; and that there existed price agreements which some parties failed to adhere to.[57]

47. **Fourth**, the Respondent relies on Evidence 52 which is WhatsApp message between Mr. Kush Nathwani and Samir Patel both of Apex dated 23rd January 2020. The message confirmed that there was a planned price increment to be effected as at 20th January 2020 and various companies including the Appellant were in agreement. The Respondent argued that this was proof that there was a discussion and an agreement on the pricing of deformed bars between the said companies.[58]

48. The Respondent therefore came to the conclusion that the Appellant together with other steel manufacturers and distributors, who were competitors, had been having discussions to agree on steel prices; the Appellant attended one such meeting on 14th September 2021; and in this meeting they agreed to increase the price of steel prices which amounted to price fixing; and this was contrary to Section 21(1) as read with Section 21(3)(a) of the Act; and the Appellant did not produce plausible evidence to exonerate itself.[59]

49. The Respondent submits that discussions on prices between competitors are strictly precluded by Section 21(1) of the Act. The Respondent relied on the case of:

> **Case T -687/08- Fresh Del Monte Produce v Commission.**
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> **While it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it does, nonetheless, strictly preclude any direct or indirect contact between such operators by which an undertaking may influence the conduct of the market where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number**

[57] Submissions dated 21/02/2024 filed by the Respondent paragraph 37.
[58] Submissions dated 21/02/2024 filed by the Respondent paragraph 40.
[59] Submissions dated 21/02/2024 filed by the Respondent paragraph 42.

of the undertakings involved and the volume of that market (see, to that effect, Suiker Unie and Other v Commission, paragraph 151 above, paragraph 174; Zuchner, paragraph 87; and T-Mobile Netherlands and Others, paragraph 297 above, paragraph 33).

It follows that the exchange of information between competitors is liable to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in the question, with the result that competition between undertakings is restricted (John Deere v Commission paragraph 301 above, paragraph 90; Case C-194/99 P Thyssen Stahl v Commission [2003] ECR I -10821, paragraph 81; and T-Mobile Netherlands and Others, paragraph 297 above, paragraph 35).[60]

50. The Respondent also submitted that adherence to the discussions is not required for a finding of infringement. The Respondent relied on the case of **Associated Lead Manufacturers LTD (white lead) V OJ (1979)1 CMLR 464.** Where the Commission held that an agreement did not cease to be anti-competitive because it was temporarily or even repeatedly circumvented by a party to it.[61]

51. **With respect to output Restriction: First,** the Respondent relies on Evidence 45E an email dated 15th September 2021exchanged between Mr. Manish and Mr. Neelesh which confirms that a meeting had taken place on 14th September 2021 and the Appellant was represented. The email confirms that at the meeting the attendees discussed:

i. Availability of 1mm by some manufacturers mainly with Abyssinia

ii. Discussion on how to prevent the < 1mm pipes and tubes coming from Uganda

iii. Two shipments coming into the country in Dec 21 which had the material for various manufacturers including Brollo, Nails and Steel which would mean around 25000 to 30000 MT

iv. Submissions alluding that Abyssinia had overstocked and had over 5k of 1mm

[60] Submissions dated 21/02/2024 filed by the Respondent paragraph 43.
[61] Submissions dated 21/02/2024 filed by the Respondent paragraph 44 and 45.

52. From the foregoing the Respondent asserts that the attendees of the Zen gardens meeting discussed shipments. With that knowledge, the players were collectively able to monitor the quantity of raw materials, their stock levels, and importation of those raw materials as well as restrictions on importation. The detailed discussions on capacities (which is commercially sensitive information), made it possible for the players to use this information to manage the output per player.[62]

53. **Second,** the Respondent relied on the contents of Evidence 45F and on the submissions reproduced at paragraph 49 therein. The Respondent asserts that the attendees of the meeting resolved to reduce production by 30%, which is indicative of output restriction.

54. **Third**, the Respondent also relied on Evidence 39 which demonstrated an intention by the industry players to control volumes of raw material in the country; Evidence 28 shows discussions surrounding skipping the January 2017 shipment with a view to control discounts in the tube market. It also records an observation that Doshi was not complying with the agreement on shipping quantities; Evidence 31 shows a meeting that took place to discuss reduction of stock to ensure price stability; Evidence 3 speaks to a meeting of certain industry players who discussed and agreed to restrict importation of 0.9mm coils and plates.[63]

55. The Respondent submitted that it had demonstrated that there was an agreement, concerted practice and or decision by the players in the steel manufacturing and distribution industry on output restriction; the Appellant had participated in the agreement or concerted practice; and anything said or done by any of the persons in furtherance of the agreement or concerted practice, with reference to their common intention, is a relevant fact against each of the parties to the agreement or concerted practice. [64]

56. From the foregoing, the Respondent reiterates that the corroborating evidence from other players in the industry is relevant against the Appellant and proves existence of an agreement

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[62] Submissions dated 21/02/2024 filed by the Respondent paragraph 46
[63] Submissions dated 21/02/2024 filed by the Respondent paragraph 50.
[64] Submissions dated 21/02/2024 filed by the Respondent paragraph 54 to 55.

to restrict output. Consequently, the Appellant's conduct amounted to output restriction contrary to section 21(1) ,21(3)(e) of the Act. According to the Respondent, the Appellant had failed to produce evidence or any explanations to exonerate itself.[65]

57. **With respect to the Respondent's response to the Appellant's submissions: First,** the Appellant asserts that Respondent conducted an investigation and made a decision on products which the Appellant does not deal in. The Respondent insists that Evidence 52 shows that the Appellant produces TMT bars and Evidence 45F shows that the Appellant deals with galvanized wire. All these products were part of the investigation and decision. Further, the scope of the investigation was the manufacture and distribution of steel products.[66]

58. **Second**, the Appellant's director stated that he left the meeting early. The Respondent insists that this does not rebut its findings that he participated in the said meeting. Further a mere denial in the circumstances would not be sufficient.[67]

59. **Third,** the Appellant submitted that the Respondent failed to apply the provisions of section 21 of the Act holistically. That the Respondent failed to consider the provisions of section 21(5) and (6) of the Act and in so doing failed to prove essential requirements to sustain culpability on the part of the Appellant. The Respondent insists that the Appellant has misapprehended the meaning and intent of Section 21(5) and (6) which provisions are not applicable in the circumstances.[68]

60. **Fourth**, the Respondent states that the emails relied upon were sufficient proof of the discussions of the attendees as they were written by persons who attended the meeting and therefore had probative value. [69] Further, the nature of the violations on price fixing were per se and the burden was of proof was discharged by the Respondent once it demonstrated that the Appellant had attended a meeting.[70]

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[65]Submissions dated 21/02/2024 filed by the Respondent paragraph 56 to 57.
[66] Submissions dated 21/02/2024 filed by the Respondent paragraph 61 and 62.
[67] Submissions dated 21/02/2024 filed by the Respondent paragraph 63 and 64.
[68] Submissions dated 21/02/2024 filed by the Respondent paragraph 65 and 66.
[69] Submissions dated 21/02/2024 filed by the Respondent paragraph 68 to 70
[70] Submissions dated 21/02/2024 filed by the Respondent paragraph 70 and 71.

61. **Fifth**, the Appellant accused the Respondent of failing to consider a critical objective of the meeting which was to control sub-standard products in the market. The Respondent reiterates that the subject matter being horizontal collusive agreements or concerted practice, there was no defence for the Appellant. The Respondent was only required to demonstrate the content and nature of the agreement and not its effect. Further a legitimate objective cannot be a defense for engaging in a restrictive trade practice.[71]

62. **With respect to the allegation that the Appellant was accorded a fair hearing: First,** the Respondent states that it followed the laid-out procedure under the provisions of Section 34 and 35 of the Act. The Respondent maintains that it provided the Appellant with the evidence it had relied on in making its decision.[72]

63. Second, the Appellant was accorded an opportunity to interrogate and respond to the evidence against it. The Appellant was called to an oral interview and thereafter invited to an oral hearing conference. The Appellant also filed its written submissions which the Respondent took into account before rendering its final decision. [73]

E. ISSUES FOR DETERMINATION.

Having carefully examined the pleadings of the parties as well as their submissions, the following issues emerged;

I. Whether the Appellant was accorded the right to fair hearing and
II. Whether the Appellant engaged in a concerted horizontal practice of price fixing and /or output restriction contrary to section 21(1) as read together with section 21(3) (a) and (e) of the Act
III. Who bears the cost of this Appeal

F. ANALYSIS AND DETERMINATION

I. WHETHER THE APPELLANT WAS ACCORDED THE RIGHT TO FAIR HEARING.

[71] Submissions dated 21/02/2024 filed by the Respondent paragraph 75
[72] Submissions dated 21/02/2024 filed by the Respondent paragraph 78 to 82.
[73] Ibid.

64. This ground of appeal by its very nature ought to be determined in *limine*. If the Appellant succeeds on this ground, then this Tribunal would have no business addressing itself to the subsequent issues. This ground is akin to a Judicial Review application. It brings to the fore constitutional and administrative law issues. *Section 73 of the Act* provides:

> *"The following persons may exercise the right of appeal to the Tribunal conferred under this Act—*
>
> *(a) any person who, by a determination made by the Authority under this Act—*
>
> *(i) is directed to discontinue or not to repeat any trade practice;*
> *(ii) is issued with a stop and desist order or any other interim order;*
> *(iii) is permitted to continue or repeat a trade practice subject to conditions prescribed by the order;*
> *(iv) is directed to take certain steps to assist existing or potential suppliers or customers adversely affected by any prohibited trade practices;*
> *(v) is ordered to pay a pecuniary penalty or fine; or*
> *(vi) is aggrieved by a stop and desist order or any other interim order of the Authority;*

65. As this Tribunal previously observed In Royal Mabati Case[74]

> "We are, however, mindful, as an appellate tribunal, that appeals against exercises of discretion and questions of law tend to be indistinguishable many a times from judicial review claims.[75] This is because, they are both directed to re-examine the same exercise of power by administrative decision makers.[76] Consequently, the distinction is at times equivalent to "serving a fruitless task of categorisation for categorisation's sake". [77] This is not to say that this distinction is without meaning, but rather to recognise this overlap and be mindful not to exceed our jurisdiction."

66. As was the case in the Royal Mabati case above, we have similarly considered that the Appellant is not seeking the prerogative writs of judicial review which are the preserve of the Court. Further, this Tribunal is conscious that it is called upon to uphold, defend and protect

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[74] Competition Tribunal at Nairobi Case No CT/009 of 2021 Royal Mabati Limited and Competition Authority of Kenya.

[75] Rodriguez Ferrere, "The Functional Convergence of Appeal and Judicial Review", (2016), The New Zealand Law Review, 157 at p. 159 available at https://ourarchive.otago.ac.nz/handle/10523/8824 as at 25th March 2021.

[76] Ibid, pp 160 -162.

[77] Ibid, p.177.

the Constitution (Article 3 (1), protection of the bill of rights in interpretation (Article 20 (4), and the values and principles under Article 10, Article 20 and 47 (1) of the Constitution.

67. We are also guided by the Court of Appeal decision in the case of **Republic v National Environmental Management Authority [2011] eKLR** where the Court of Appeal stated that the availability of a statutory mechanism should be explored before judicial review issues are considered. The Court of Appeal more particularly held that:-

> *"On the remaining issues we think they must be looked at in the light of our finding, in agreement with the trial Judge, that the Appellant ought to have appealed to the Tribunal rather than coming to the High Court for orders of judicial review. So that whether he ought to have been heard before the stop order was made and the other remaining issues really fell by the wayside once the conclusion was reached that the appeal process was a much more efficacious and quicker way of resolving those issues than the process of judicial review." (Emphasis* ours)

68. Similarly, The High Court in **Republic v Kenya Revenue Authority Ex Parte Style Industries Limited** dismissed a Judicial Review application before it as the dispute resolution mechanism established under the Tax Appeals Tribunal was competent to resolve the issues raised in the matter before it. The court in the said case held that:-

> *"...The next question is whether the dispute resolution mechanism established under the Act is competent to resolve the issues raised in this application. The jurisdiction of the Tribunal is expressly provided under the act. A reading of the act shows that the Tribunal is clothed with jurisdiction to determine the dispute. 49. In view of my analysis and the determination of the issues discussed above, it is my conclusion that the applicant ought to have exhausted the available mechanism before approaching this court. This case offends section 9 (2) of the FAA Act."*

69. In the premises we find that the Act as read together with the Constitution of Kenya empowers this Tribunal to determine this issue as raised by the Appellant in this matter.

70. On determining the issue of a fair trial this Tribunal will seek to answer two questions:
    a. Whether the Respondent conducted itself with regard to the duly laid out procedure under the Act
    b. Whether the Appellant was provided with and given an opportunity to interrogate all relevant evidence, documents and material.

i. **Whether the Respondent conducted itself with regard to the duly laid out procedure under the Act**

71. The Respondent states that it conducted a search and seizure operation against certain players (not the Appellant) in the steel industry. From the operation, the Respondent obtained documents which mentioned the Appellant. Consequently, the Respondent issued Notice of Investigation and Summons for Appearance to the Appellant to attend an interview under Section 31 of the Act.

72. The oral interview initially slated for 24th March 2022 was adjourned to 30th March 2024 at the request of the Appellant. The purpose of the interview was disclosed in the summons as "*an interview to clarify on the contents found in the seized gadgets, inclusive of, but not limited to chats, email communications, documents and conducts relating to the steel sector*". The Appellant requested for the documents the subject matter of the interview via a letter from their Advocate dated 23rd March 2022 which the Respondent responded to by forwarding Evidence 7 and 45 to the Appellant via a letter dated 25th March 2022.

73. The Appellant through its director Kotni Rao thereafter filed a statement dated 30th March 2022. On 4th May 2024, the Respondent issued a Notice of Proposed Decision (NOPD) under section 34 of the Act and attached thereto copies of all the Evidence in support of the NOPD.

74. The NOPD invited the Appellant to make written submissions on the NOPD and indicate if it was interested in virtual oral hearing. The Appellant availed itself of both opportunities. The Appellant's Advocate filed written submissions dated 26th May 2022 and the parties had a hearing conference on 16th June 2022.The Respondent thereafter rendered its final decision on 17th August 2023.

75. We have looked at the provisions of the Act and are satisfied that the Respondent acted according to the laid down procedure under section 31, 34 and 35 of the Act.

ii. **Whether the Appellant was provided with and given an opportunity to interrogate all relevant evidence, documents and material.**

76. The Appellant argues that it was not given an opportunity to interrogate the evidence used against it by the Respondent. The Appellant states that the only evidence provided to it was Evidence 7 and 45. The other evidence was only provided after the Respondent had made its decision. In the case of

> **Republic -vs- Capital Markets Authority & Another Ex Parte Jonathan Irungu Ciano** the High Court held:
>
> > *that the law places the onus on an administrative body to furnish the person against whom allegations are made with information, materials, and evidence to be relied upon in making the decision or taking administrative action.*

77. We note that the Respondent in the first instance supplied Evidence 7 and 45 to the Appellant and invited them for an interview on the same. The rest of the evidence was supplied to the Appellant together with the NOPD. At this point, the Appellant was invited for an oral hearing and to make submissions on all the evidence. We further note that the Appellant through its written submissions and at the case conference chose not to address the rest of the evidence on the basis that it was not initially furnished to it.

78. Our understanding of the process is that when the Appellant was initially invited for an oral interview, the Respondent was still investigating the matter. Upon conclusion of the investigations, the Respondent issued NOPD together with all the Evidence and invited the Appellant for a hearing.

> **In Mea Limited vs Competition Authority & Another (2016)eKLR**, the Court observed:
>
> > *"...decisions and determinations by administrative bodies as well as tribunals ordinarily commence with an investigation whether preliminary or substantive. An investigation essentially helps to determine whether a wrong has been committed. It is a critical step in any administrative, judicial or even quasi -judicial proceedings which may lead to prosecution..."*

79. It is our considered opinion that the Appellant was furnished with all the evidence prior to the hearing of the matter. Further, the NOPD is not a final decision but a preliminary finding which the Appellant is invited to rebut. The Appellant, however, chose not to address the evidence in both its written submissions and the oral case conference before the Respondent.

80. In view of the foregoing, we are satisfied that the Appellant was provided with all the evidence before the hearing and was given an opportunity to interrogate the same before a final decision was made.

II. WHETHER THE APPELLANT ENGAGED IN A CONCERTED HORIZONTAL PRACTICE OF PRICE FIXING AND /OR OUTPUT RESTRICTION.

81. On this issue, the Respondent's case is that the Appellant contravened sections 21(1) as read together with Section 21(3) (a) and 21(3) (e) of the Act. The Appellant was found guilty of, and in concert with others, engaging in practices whose object or effect was to distort, lessen or prevent competition by directly or indirectly fixing the selling prices and through limiting or controlling production.

82. The Appellant's case is that the Respondent relied on the wrong provisions of the law and therefore arrived at a conclusion unsupported by law. The Appellant argued that Appellant cherry-picked the provisions of Section 21 and failed to consider section 21 in its entirety. In particular, the Appellant opined those provisions of section 21(5) and (6) of the Act should have been considered. Further, had the same been applied, the conclusion of the Respondent would have been different. The Appellant denies that it acted in concert with other industry players. And further denies that it participated in the said prohibited activities namely price fixing and output restriction.

83. From the foregoing, we will seek to answer the following questions in addressing this broader issue.

    c. Did the Respondent apply the relevant provisions of the law?
    d. Did the Appellant enjoy a horizontal relationship with other players the subject matter of the Respondent's investigation?
    e. Did the Appellant acting in concert engage in Price-fixing contrary to Section 21(1) as read together Section 21(3) (a) of the Act and output restriction contrary to Section 21(1) as read together Section 21(3) (e) of the Act?

a) Did the Respondent apply the relevant provisions of the Law

84. **Section 21(1) the Act provides**:

(1) Agreements between undertakings, decisions by associations of undertakings, decisions by undertakings or concerted practices by undertakings which have as their object or effect the prevention, distortion or lessening of competition in trade in any goods or services in Kenya, or a part of Kenya, are prohibited, unless they are exempt in accordance with the provisions of Section D of this Part...

Section 21(3) (a) and (e) provide:

(3) Without prejudice to the generality of the provisions of subsection (1), that subsection applies in particular to any agreement, decision or concerted practice which—

(a) directly or indirectly fixes purchase or selling prices or any other trading conditions;

(e) limits or controls production, market outlets or access, technical development or investment;

Section 21(5) of the Act provides:

An agreement or a concerted practice of the nature prohibited by subsection

(1) shall be deemed to exist between two or more undertakings if—

(a) any one of the undertakings owns a significant interest in the other or

has at least one director or one substantial shareholder in common;

and

(b) any combination of the undertakings engages in any of the practices

mentioned in subsection (3).

Section 21(6) provides:

The presumption under subsection (5) may be rebutted if an undertaking or a director or shareholder concerned establishes that a reasonable basis exists to conclude that any practice in which any of the undertakings engaged was a normal commercial response to conditions prevailing in the market.

85. The Appellant submitted that the Respondent, charged the Appellant under Section 21(1) and section 21(3) of the Act without holistically considering and reading the entire section. Further, that section 21(5) as read with section 21(6) provides that an agreement or a concerted practice in the nature prohibited under section 21of the Act shall be deemed to exist between two or more undertakings if any one of the undertakings owns as significant interest

in the other or has at least one director or one substantial shareholder in common and if any combination of the undertaking engages in practices mentioned in the subsection. Consequently, the Respondent cherry-picked clauses in rendering its decision. The Respondent failed to demonstrate the nexus between the Appellant and the other players in the industry.

86. The Appellant interpreted the provisions of section 21(5) and (6) to mean that an entity could only be guilty of a concerted practice contemplated under section 21(1) of the Act where one or more of the entities owned a significant interest in the other or where they shared at least one director or where they had substantial common shareholding.

87. We have looked at the provisions of section 21(5) and (6) of the Act and we respectfully disagree with the interpretation of the Appellant on the same. It is our considered opinion that section 21(5) of the Act expresses a statutory presumption of a concerted practice. Where one or more entities have a common shareholding or directorship or where one is a subsidiary of the other, the law will automatically presume that they are engaging in concerted practice. Consequently, the burden of proving that the entities are not engaged in concerted practice is by law placed on the said entities.

88. Section 21(6), however, is the avenue through which these entities may rebut the presumption imposed by law. The entities may rebut this presumption by demonstrating that the reasonable basis exists to conclude that any practice in which any of the undertakings engaged was a normal commercial response to conditions prevailing in the market.

89. In the premises we find that the provisions of section 21(5) and (6) were not relevant in this matter. That the Respondent did not need to prove the facts outlined in Section 21(5) for the Appellant to be deemed to be acting in concert with other players in the industry. It is possible for unrelated and or unconnected entities to be guilty of a concerted practice. Consequently, the claim by the Appellant that the Respondent cherry-picked the law to the Appellant's detriment must fail.

b) Did the Appellant enjoy a horizontal relationship with other players the subject matter of the investigation

90. The **second** sub-issue is whether the Appellant was in a horizontal relationship with other players who were the subject of the Respondent's investigation. The Appellant argued that the evidence relied upon by the Respondent was that the Appellant attended a meeting at Zen Gardens where price fixing was discussed. The Appellant, however, insisted that the attendees of the said meeting were discussing metal tubes, and the Appellant does not deal with metal tubes. The Appellant was categorical that it only deals with metal plates and wires and not with tubes. It is the case of Appellant therefore that the players in this meeting were not its competitors and therefore it was incapable of engaging in a horizontal concerted practice with them. The Respondent submitted that the scope of its investigation and collection of evidence was not limited to any of the sub-sectors in the wider steel industry but encompassed the whole.

91. We have reviewed the evidence before us on this issue. The subject matter of the email dated 13th September 2021 is **"Metal Sector Price meeting 3.00pm Monday Zain Garden"**.[78] The email dated 12th September 2021 has its subject matter indicated as **"Kenya Re-Bars Market"**[79] which the Appellant deals in. We have also looked at the email of 15th September 2021[80] gives a summary of what was discussed at the Zen Meeting and the participants discussed **"Rebars"**[81] and **"Wire products/Nails"**[82] which the Appellant deals with. In the premises we are convinced the scope and extent of the investigation covered players with whom the Appellant not only enjoys a horizontal relationship but is in direct competition with.

c) Did the Appellant acting in concert engage in the prohibited practices of Price-fixing and output restrictions

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[78] Appellants List of documents dated 30/08/2023 pages 67 to 68 and 87.
[79] Appellants List of documents dated 30/08/2023 pages 69 to 72
[80] Appellants List of documents dated 30/08/2023 page 72.
[81] Appellants List of documents dated 30/08/2023 page 72 item 9 a
[82] Appellants List of documents dated 30/08/2023 page 72 item 9 c.

92. The Appellant submits that the meeting which took place at Zen Gardens on 13th September 2021 was in respect of tubes which the Appellant does not deal with. Mr. Rao who attended the meeting on behalf of the Appellant, left the meeting prematurely as soon as he realized that the subject matter did not concern the Appellant's business. Consequently, he could not and did not participate in the meeting. The Appellant posits that the Respondent was gravely misguided in finding that the Appellant was guilty of price fixing yet it did not participate in the said meeting.

93. The Act prohibits, any agreement, decision or concerted practices by undertakings whose object or effect is to prevent, distort or lessen competition of goods or services in Kenya unless the said practices are exempted by law.

94. Concerted practice is defined in the Act as *'co-operative or coordinated conduct between firms achieved through direct or indirect conduct that replaces their independent action, but which does not amount to an agreement.*

95. Section 21(1) as read together with section 21(3) (a) prohibits the practice of price fixing whereas Section 21(1) as read together with Section 21(3) (e) prohibits output restriction.

96. Clause 30 of the Consolidated Guidelines on Restrictive Trade Practices under the Competition Act provides:

> ***The Authority considers price fixing to include:***
> ***i. fixing the price itself; or fixing an element of the price such as fixing a discount, setting percentage price increase; or***
> ***ii. setting the permitted range of prices between competitors;***
> ***iii. Setting the price of transport charges (such as fuel charges), credit interest rate terms etc.;***
> ***iv. An agreement or arrangement to indirectly restrict price competition in some way such as recommended pricing;***

97. Clause 31 Provides:

> ***Agreeing to share price lists before prices are increased either directly or indirectly through an industry or trade association or to require competitors to consult each other before making a pricing decision.***

98. Clause 39 provides:

> ***Output restriction occurs when competitors agree to prevent, reduce or restrict supply with the aim of creating scarcity. The purpose of the arrangement is to prop up or increase prices (or counter falling prices). This may be inferred where the arrangement directly or indirectly prevents, restricts or limits:***
>
> > ***i. the production, or likely production, of goods by any or all of the parties to the contract, arrangement or understanding; or***
> >
> > ***ii. the capacity, or likely capacity, of any or all of the parties to the contract, arrangements or understanding to supply services; or***
> >
> > ***iii. the supply, or likely supply, of goods or services to persons or classes of persons by any or all of the parties to the contract, arrangement or understanding.***

99. Clause 40 Provides:

> ***Any undertaking may independently decide to reduce output to respond to market demand. What is prohibited is an agreement with competitors on the coordinated restriction of output.***

100. We have had occasion to review the evidence which was presented against the Appellant by the Respondent against the background of the provisions of the Act and the Consolidated Guidelines on Restrictive Trade Practices replicated above.

101. Evidence 45E[83] is an internal email within Mabati Rolling Mills Limited. In the said email a Mr. Manish is apprising Mr. Neelesh of the outcome of a meeting held at Zen Gardens. The subject matter of the email is "Kenya-Rebars market". Mr. Manish confirms that Mr. Kotni Rao represented the Appellant at the meeting. This is corroborated by Mr. Kotni Rao in his affidavit where he confirms to have been in attendance.[84] Item 3 of the email reads:

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[83] Supra note 1, page 82.
[84] Supra note 24.

"The main manufacturers of Rebars ie Tononoka, Devki, Apex were speaking of proposing customs duty of 15% on rebars (currently at 10%) in the next budget proposal"

Item 4

1 mm appears to be available with some manufacturers mainly with Abysinia..

Item 5

There was some discussion on how to prevent the <1mm pipes and tubes from coming form Uganda but nothing concrete

Item 7

When we spoke whether we can move the market to 1.2mm the responses were as following:

a. *Shortage from China is temporary; there seems to be 2 ships coming into the country in Dec 21 (which is material for various manufacturers including Brollo, Nails and Steel) This would mean around 25000 to 30000MT...*
b. *The Market will never accept anything above 1mm*

and item 8

"Abyssinia seems to be the main player which does not want to increase prices"

Further,

The total market for steel products (as discussed with Abhijeet) is as following:

f. *Rebars: 300,000 to 350,000 MT*
g. *Pipes/Tubes and Plates: 250,000 to 300,000 MT (this is the space of INSTEEL)*
h. *Wire products/Nails etc: 300,000 to 350,000 MT*

Total around I mil MT per annum...

102. We have also looked at Evidence 45F[85] which is a follow up email to Evidence 45E. In this email Mr. Gupta expounds on Mr. Manish's email. Item 3 of the email reads:

On point regarding shortage of 1mm, manufacturers are confident that 1mm shall open up from January. The shortage cause due to allocation given by china government to

[85] Supra Note 1, Page 84.

Rizao under environmental laws (they have shipped 80% of allocation in this year). This year Abysenia/Prime has overstocked and has over 5k of 1mm, but good news is that half of that is at new prices. The upcoming 2 shipments have enough for local market consumptions.

Item 8 reads:

All will have High Priced RM, hence everybody decided to increase on Price by going slowly as 30% market downsize was also to be taken care off.

103. Evidence 45A, 45B, 45C and 45D[86] are internal emails exchanged between Sundaresa, Okeyo and Ghupta sharing ***"current discount/plate pricing as requested along with proposed discount for tomorrow's meeting.."***.
The subject matter of the emails is ***"Price sector meeting 3 Pm Monday at Zain Garden"***

104. Further, Neelesh writes to Manish and confirms that **"Navin of Tononoka told me there is also a Pipe Association meeting on Monday"**[87] The subject matter of the email is ***"Kenya-Re Bars Market"***.

105. Evidence 52[88] which is a phone chat between Samir and Kush reads:

"Hello. Please find below the prices of TMT bars effective from Monday 20th January 2020..... The prices above have been confirmed by Devki Steel Mills Limited... Blue Nile Rolling Mills Limited...."

106. From the evidence, it is not in doubt that steel industry players held a meeting to discuss pricing on 14th September 2021 at Zen Gardens, in Nairobi. The Appellant's representative Mr. Rao was aware of the meeting and attended the same albeit allegedly only briefly so. The trail of emails suggests that this meeting was one of many meetings.[89] The emails also show that the industry players customarily exchanged and agreed on pricing and discounts.[90] In

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[86] Appellants List and Bundle of Documents pages 67 to 69.
[87] Appellant's List and Bundle of Documents page 69.
[88] Supra note 1, page 85.
[89] Appellants List and Bundle of Documents page 69.
[90] Supra note 1, pages 85; Appellants List and Bundle of Documents pages 67-68.

those meetings the players also discussed output restrictions with a view to controlling the prices.[91] The parties also exchanged and discussed commercially sensitive information with a view to restricting output and price control.[92] They worked together to monitor the competition's stock and raw materials levels. The products, the subject matter of the meetings and emails, include Re-bars, pipes and nails, all of which the Appellant deals with.[93]

107. We, however, note that though adversely mentioned in emails and chats, there is no evidence that the Appellant contributed to any of the discussions. Mr. Rao stated that although he attended the Zen Gardens Meeting, he left soon thereafter, and he says he was not privy of the discussions that took place after he left.

108. Prof Whish writes:

> It is also important to appreciate the prices can be fixed in numerous different ways, and that is fully effective competition law must be able to comprehend not only the most blatant forms of the practice but also a whole range of more subtle collusive behaviour whose object is to limit price competition.[94]
>
> The EU Courts and the Commission regard price-fixing agreements as having as their *object* the restriction of Competition for the purposes of Article 101(1), so that there is no need also to show that they have the effect of doing so.[95]

109. The standard/rule applied by the EU Courts and Commission is very similar to the Consolidated Guidelines on Restrictive Trade Practices applied by the Respondent.[96] Clause 41 of the same provides:

> **The Authority considers that horizontal collusive agreements are subject to "object" assessments, that is, strict or per se scrutiny for which no defenses**

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[91] Supra note 1 page 84 item 8.
[92] Appellants List of documents dated 30/08/2023 pages 68, 70 item 3; 72 item 9.
[93] Appellants List and Bundle of Documents pages 70 (item 2); page 71 (email reference); page 87 (item 3).
[94] Richard Whish and David Baily, Competition Law, 7th Edition, at Page 523.
[95] Ibid
[96] Clause 41 of Consolidated Guidelines on Restrictive Trade Practices under the Competition Act.

can be asserted. The Authority will only consider the content and nature of the agreement and not the effect of the agreement.

110. In the case of **Polypropylene OJ (1986) L 230/1, 4 CMLR 347**[97], the court held that:

> **The essence of the present case is the combination over a long period of the producers towards a common end, and each participant must take responsibility not only for its own direct role but also for the operation of the agreement as a whole. The degree of the involvement of each producer is not therefore fixed according to the period for which its pricing instructions happened to be available which is adhered to the common enterprise.**[98]

111. In the case of **T-305/94-LVM V Commission**[99], the court held that:

> **An undertaking may be held responsible for an overall cartel even though it is shown to have participated directly only in one or some of its constituent elements if it is shown that it knew, or must have known, that the collusion in which it participated, especially by means of regular meetings organised over several years, was part an overall plan intended to distort competition and that the overall plan included all the constituents of the cartel.**[100]

112. Also, in **Europe Asia Traders Agreement OJ (1999) L 193/23, (1999) 5 CMLR 1380**

Case T-83/08[101] **Denki Kagaku Kogyo Kabushiki Kaisha and Denka Chemicals GmbH v Commission**[102]**.** The Court held that:

> **When agreements of an anti-competitive nature are reached at meetings of competing undertakings, it is sufficient for the Commission to establish that the undertaking concerned participated in meetings during which agreements of an anti-competitive nature were concluded in order to prove that the**

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[97] The Respondent's List and Bundle of Authorities Pages 257 to 322.
[98] The Respondent's List and Bundle of Authorities at page 283.
[99] The Respondent's List and Bundle of Authorities pages 323 to 334.
[100] The Respondent's List and Bundle of Authorities at page 331.
[101] The Respondent's List and Bundle of Authorities at pages 335 to 372.
[102] The Respondent's List and Bundle of Authorities at pages 373 to 418.

undertakings participated in the cartel. Where participation in such meetings has been established, it is for that undertaking to put forward indicia 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. The reason underlying that rule is that, having participated in the meetings 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.[103]

113. Further,

> **It must be pointed out in this regard that the notion of publicly distancing oneself as a means of excluding liability must be interpreted narrowly. In order to disassociate itself effectively from ant-competitive discussions, it is for the undertaking concerned to indicate to its competitors that it does not in any way wish to be regarded as a member of the cartel and to participate in anti-competitive meetings. In any event, silence by an operator in a meeting during which an unlawful anti-competitive discussion takes place cannot be regarded as an expression of firm and unambiguous disapproval. 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.**[104]

114. The Tribunal has also taken note of the requests in some of the emails urging certain parties to "steer off the discussion on pricing". Mr. Manish's evidence 45E, stated that MRM should not be involved too much in industry price discussions lest they will be considered to act in a cartelized manner. We note that this was internal communication and was not addressed to the other firms.

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[103] The Respondent's List and Bundle of Authorities at page 381.
[104] Ibid.

115. We have also considered the Appellant's submissions and the evidence that the meetings held by the industry players had some positive points of discussion such as curbing importation of sub-standard materials. There was reference of meetings with the Kenya Bureau of Standards (KEBS) in furtherance of this objective.

116. In **FSL Holdings & 2 Others vs European Commission Case T-655/11**[105] the Court held that

> **That argument must be rejected without it being necessary to examine whether Mr. C1 and Mr. P1 had legitimate reasons to meet. It suffices to note that, although such legitimate reasons could indeed provide an alternative explanation for the meeting, they would in no way diminish the collusive nature - if established – of their contacts in other respects. As the Commission noted in recital 147 of the contested decision, the assertion that there were contacts between competitors which were allegedly legitimate in no way rules out the possibility that collusive contacts also took place. The court of justice has already stated that an agreement may be regarded as having restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objective (see Case C-551/03 P General Motors v Commission [2006] ECR I-3173, paragraph 64 and the case-law cited). As the Commission rightly states, in order to call into question, the findings made in the contested decision, it is not enough for the applicants merely to show that the contacts also served a legitimate objective; they must show that the contacts only served such objective.**[106]

117. In **Case C-209/07, Competition Authority v Beef Industry Development Society Ltd and Barry. Brothers (Carrigmore)Meats Ltd, ECR 2008 I-08637**[107] the court held:

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[105] The Respondent's List and Bundle of Authorities at pages 419 to 511.
[106] The Respondent's List and Bundle of Authorities at page 453.
[107] The Respondent's List and Bundle of Authorities at pages 535 to 541.

In that regard, even supposing it to be established that the parties to an agreement acted without any subjective intention of restricting competition, but with the object of remedying the effects of a crisis in their sector, such considerations are irrelevant for the purposes of applying that provision. Indeed, an agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives (*General Motors v Commission*, paragraph 64 and the case-law cited).[108]

118. In view of the evidence placed before this Tribunal it is our considered opinion the Respondent has demonstrated that there was an agreement, concerted practice and decision by the players in the steel manufacturing and distribution industry on price control and output restriction.

119. The Appellant participated in the agreement or concerted practice by attending the meeting at Zen Gardens on 14th September 2021. Further, the Appellant had been copied in emails where price control and output restrictions were under discussion. The Appellant was also copied in other emails suggesting that the Appellant had attended other meetings where players in the steel industry had deliberated price control and output restriction.

120. We agree with the Respondent that anything said or done by any of the persons in furtherance of the agreement or concerted practice, with reference to their common intention, is a relevant fact against each of the parties to the agreement or concerted practice. The Appellant has not produced any evidence or explanation exonerating itself or proving that it had publicly distanced itself from the activities of the other players on price fixing, output restriction, and exchange of commercially sensitive information.

F. ORDERS

[108] The Respondent's List and Bundle of Authorities at page 538.

121. *We accordingly arrive at the inevitable conclusion that* the Appellant by its conduct was guilty of a concerted practice of price fixing contrary to section 21(1) as read together with Section 21(3) (a) of the Act and output restriction contrary to section 21(1) as read together with section 21(3)(e) of the Act. *In the present circumstances we therefore order as follows:*

    a. *This appeal be and is hereby dismissed.*
    b. *The Respondent's decision dated 17th August 2023 be and is hereby upheld.*
    c. *The Appellant shall bear the costs of this Appeal.*

Orders accordingly.

DATED at **NAIROBI** this 9th day of July 2025

DANIEL OGOLA
CHAIRPERSON

VALENTINE MWENDE
MEMBER

KIPROP MARRIRMOI
MEMBER

RAYMOND NYAMWEYA
MEMBER

ODONGO MARK OKEYO
MEMBER

I certify that this is a true copy of the original

COMPETITION TRIBUNAL
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