REPUBLIC OF KENYA

IN THE COMPETITION TRIBUNAL AT NAIROBI

CASE NO. 006 OF 2023

BETWEEN

ACCURATE STEEL MILLS LIMITED.......................................APPELLANT AND

COMPETITION AUTHORITY OF KENYA.................................RESPONDENT

(Appeal from the decision of the Respondent dated 17th of August 2023, at Nairobi)

JUDGEMENT

A. BACKGROUND

1. This appeal arises from the decision of the Respondent rendered on 17th August 2023.[1]The Appellant states that it is a corporate entity and a steel manufacturing Company duly incorporated under the laws of Kenya.[2]
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.[3]
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.[4]
4. The Respondent states that 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. The 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.[5]

[1] Record of Appeal dated 21/09/2023 page 209-321.
[2] Supra note 1, page 5.
[3] Competition Act of Kenya.
[4] Replying Affidavit sworn by Gideon Mokaya on 26th October, 2023 paragraph 4.
[5] Supra note 4, paragraph 5.

5. After analysis of the documentation seized, the Respondent established that another 8 companies, including the Appellant, were also subjects of interest in the investigation.[6] 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.[7]
6. In the said Notice the Respondent invited the Appellant for an interview on 24th March 2022 at 9:00am to explain information found in the seized gadgets relating to the steel sector.[8]
7. The Respondent confirms in its affidavit that the meeting took place on 24th March 2022.[9]In the said meeting, the Appellant's representatives Avraj Bhachu and Davinder Bhachu recorded written statements.[10]The said statements inter alia addressed Evidence 1, 2, 6, 13 and 36.[11]
8. 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.[12]The Appellant was also supplied with the evidence upon which the NOPD was issued and granted 21days to make its written representations on the same.[13]
9. On 26th May 2022, the Appellant submitted its written submissions in response to the NOPD.[14]The Respondent states that on 13th June 2022, it convened a Hearing Conference pursuant to section 35 of the Act and Section 4 of the Fair Administrative Action Act.[15] From the minutes Mr. Avraj Bhachu, Amos Kisilu and Purity Kioko were in attendance on behalf of the Appellant.[16]
10. After the said Hearing Conference, the Respondent made their final decision on 17th August 2023 pursuant to section 36 of the Act.[17]The Respondent in its decision held:

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[6] Supra note 4, paragraph 6.
[7] Supra note 4, paragraph 1.
[8] Ibid.
[9] Supra note 4, paragraph 8.
[10] Supra note 4, page 3 to 12.
[11] Ibid.
[12] Supra note 4, page 13 to 34 (Exhibit GM-3).
[13] Supra note 4, paragraph 9.
[14] Supra note 4, page 35 to 40.
[15] Supra note 4, page 44 to 47.
[16] Ibid.
[17] Supra note 1.

I. that the conduct of the Appellant together with Apex, Brollo, Tononoka, Insteel, Jumbo, MRM, Devki, Doshi, Abyssinia, Nail and Steel, Corrugated, Blue Nile and Tarmal constitutes an infringement of section 21(1) of the Act as read together with section 21(3)(a) of the Act.

II. The Respondent restrains the Appellant from engaging in conduct that violates section 21(1) of the Act as read together with section 21(3)(a) of the Act.

III. The Respondent restrains the Appellant from engaging in future violations of the Act.

IV. The Respondent directs the Appellant to develop and furnish the Respondent with a competition compliance programme within 6 months from the date of this Determination for approval.

V. The Respondent directs the Appellant 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 Respondent.

VI. The Authority directs the Appellant 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 Respondent.

VII. The Authority imposes a financial penalty of 0.5% of the Appellants 2021 gross annual turnover in Kenya amounting to Kes. 26,826,344.31.

DOCUMENTS AND EVIDENCE

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

Record of Appeal containing: -

a. The Notice of Appeal dated 31st August 2023.
b. The Memorandum of Appeal dated 14th September2023.
c. Statement of facts dated 14th September 2023.
d. Supporting Affidavit sworn by Davinder Bhachu on 14th September 2023.
e. Documents appearing as item 4 – 11 and 13 in the index of record of appeal dated 21st September 2023.

f. Appellant's written Submissions dated 21st March 2024 and Supplementary submissions date 1st July 2024 together with the list and bundle of authorities attached thereto.

12. The Respondent filed the following documents:

a. Replying Affidavit sworn by Gideon Mokaya on 26th day of October 2023 and the annexures thereto.

b. Respondent's written Submissions dated 10th day of June 2024 together with the list and bundle of authorities attached thereto.

c. Respondent's Case digest dated 23rd May 2024.

13. The matter came up for hearing on 6th August 2024 when the parties' advocates highlighted their respective submissions.

APPELLANT'S CASE

14. Dissatisfied with the Decision of the Respondent, the Appellant has appealed to this Tribunal against the whole or part of the above-named decision on the following grounds:

i. The Respondent erred in law and in fact by failing to recognize and appreciate the fact that, the mere fact of the Appellant being copied in the emails marked **Evidence 1** and **Evidence 2** where the subject of the emails was **'pricing'** and **'proposed thickness of tubes and pipes'** respectively; could not of itself amount to the Appellant **'participating'** in discussions or in an agreement between undertakings so as to constitute a violation of Section 21(1) as read with Section 21(3)(a) of the Competition Act, where the Appellant had expressly denied being aware of the circumstances leading to the emails, where the Appellant had been copied in the emails without its request, knowledge or sanction, where the Appellant had not responded to any of the emails; and where there was no evidence that the Appellant had adjusted any of its prices after receipt of the said emails.

ii. The Respondent erred in law and in fact by failing to recognize the fact that once the Appellant had expressly denied knowledge of the circumstances leading to the emails marked as Evidence 1 and Evidence 2 in which it was only copied, denied that it ever requested to be copied in the emails, denied being consulted or being notified that it was going to be copied, denied giving authority to the sender to copy it in the emails; denied that it ever responded to the said emails, denied that it participated in any way in the discussions which were the subject of the emails, and denied ever adjusting or changing its prices following receipt of the said emails; this amounted to sufficient rebuttal of the presumption or inference that the Appellant was a participant in the restricted practices arising from the said emails; and the burden of proof effectively shifted to the Respondent to substantiate with evidence, its allegations that the Appellant participated in the restricted practices.

iii. The Respondent erred in law by relying on the decision in **Toshiba Corp vs. European Commission Case T-519/09 2014** at paragraph 206 which was distinguishable and hence inapplicable to the Appellant's case since the said decision related to what amounts to participation by an undertaking in a meeting; whereas the dispute regarding the Appellant's participation in the instant case was not in relation to any form of meeting whatsoever which the Appellant was being accused of having attended.

iv. The Respondent erred in law by relying on the decision in **Toshiba Corp vs. European Commission Case T-519/09 2014** at paragraph 206 which was distinguishable and hence inapplicable to the Appellant's case because even assuming that the decision was applicable to the Appellant's case, the said decision held that for an undertaking to be held to have participated in a meeting of undertakings, the subject undertaking was required to have participated to some degree even if not actively, in the meetings of the undertakings; yetin the Appellant's case herein, the Appellant never participated at all in any meetings or discussions whatsoever regarding pricing besides only appearing on account of being copied without its request, knowledge or sanction, in the emails marked Evidence 1 and Evidence 2 respectively.

v. The Respondent erred in law and in fact by relying on the decision in **Polyproylene case OJ [1986]L 230/1,[1988] 4 CMLR 347 (1986)** which was completely and utterly irrelevant and hence inapplicable to the Appellant's case because the said decision related to whether the failure by some of the members of a group of undertakings to attend all the meetings or to participate in all decision making aspects of the group excluded the said members from being deemed to have participated in the overall pre-established oral agreement of the group members which was to be effected through decisions passed in subsequent meetings; whereas the dispute regarding the Appellant's participation in the instant case was in relation to a completely different set of facts and circumstances from those in the decision relied on.

vi. The Respondent erred in law and in fact by making a definitive finding that the mere fact of the Appellant being copied in the emails comprising of Evidence No. 1 and Evidence No. 2 was sufficient evidence to prove that the Appellant was involved in price fixing agreements contrary to the established evidentiary standard of proof in civil cases.

vii. The Respondent erred in law and in fact by shifting to the Appellant, the burden of proof of the allegation that the Appellant had participated in restricted practices despite the Appellant's express denial of the said allegation; contrary to the trite principle of law that he who alleges must prove with sufficient and credible evidence.

viii. The Respondent erred in law and in fact by ignoring relevant facts and points of law advanced by the Appellant in its Defense; and instead considered irrelevant facts and made unsubstantiated inferences of fact and law resulting in an erroneous decision.

ix. The Respondent erred in law and in fact by penalizing the appellant for simply being a steel manufacture in Kenya with an email address that happened to be known to other steel manufactures in the country.

15. With respect to **ground 1 and 2** the Appellant submitted as follows: **First**, the Appellant denies knowledge of the circumstances leading to the emails being copied to them; it did not request, nor sanction the sending of the emails; nor did it respond to any of the emails; and that there was no evidence that he Appellant had adjusted any of its prices after receipts of the emails. **Therefore, the mere fact that the Appellant was copied in an email does not by itself amount to the Appellant participating in price fixing practices** contrary to Section 21 (1) as read together with Section 21 (3) (a) of the Act.

16. **Second,** the Appellant states in view of its submissions and encapsulated in paragraph 14 above the burden of proof effectively shifted to the Respondent to substantiate with evidence, its allegations that the Appellant participated in the said restricted practices.

17. **Third,** the Appellant argued that the Respondents erred in law by relying on the decision in **Toshiba Corporation vs European Commission Case T-519/09 2014** and in particular paragraph 206 which the Appellant argued that it is distinguishable and hence inapplicable to the appellant's case. In addition, the Appellant argued that the Respondent relied on the case of **Polyproylene case OJ(1986)L 230 /1,(1988) 4 CMLR 347 (1986)** which the Appellant argued to be completely irrelevant hence inapplicable to this case.

18. The Appellant cited the case of **Lewis Karungu Waruiro Vs Moses Muriuki** Muchiri, where the Court held that: -

All cases are decided on the legal burden of proof being discharged (or not). Lord Brandon in Rhesa Shipping Co SA vs Edmunds remarked: -

> *"No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."*

Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in Britestone Pte Ltd vs Smith & Associates Far East Ltd :-

> *"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"*

With the above observation in mind, the starting point is that whoever desires any court to give judgement as to any legal right or liability, dependent on the existence of fact which he asserts, must prove that those facts exist. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall be on any particular person."

19. 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. **Sections 107(1), (2) and 109 of the Evidence Act** are on the burden of proof. They state as follows:

107(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2)When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

109.Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

20. According to the Appellants, the standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities. In the case of **Miller vs Minister of Pensions, Lord Denning** said the following about the standard of proof in civil cases:-

> **'The standard of proof is well settled. It must carry a reasonable degree of probability…..if the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not.'**

21. The Appellant submits that since it is the Respondent alleging that the Appellant participated in the meetings and the discussions referred to in the emails, to hold that the negative must be proved by the Appellant would be to impose an unnecessary burden on it. For this, the Appellant relies on the Uganda Case of **J K Patel versus Spear Motors Ltd SCCA No.4 of1991** where **Seaton, JSC** held that:

> *"The proving of a negative task is always difficult and often impossible, and would be a most exceptional burden to impose upon a litigant. The burden of proof in any particular case depends on circumstances in which the claim arises.*
>
> *In general, the rule which applies is ei qui affirmat not ei qui negat incumbit probatio. It is an ancient rule founded on considerations of good sense and it should not be departed from without strong reasons*

22. Additionally, the Appellants states that **Section 3(4) of the Evidence Act** provides as follows-

"A fact is not proved when it is neither proved nor disproved".

23. The Appellant relied on Section 3(4) of the Evidence Act, to the effect that even assuming that it bore the burden of proving its non-participation in the meetings and/or discussions alluded to, despite being merely copied in the emails, the Appellant's "failure" to discharge this burden does not conclusively establish the fact of its participation. Consequently, it leaves the matter in a state where neither proof nor disproof has been established. Therefore, the issue concerning the Appellant's purported participation remains unproven.
24. In light of the above, the Appellant submits that amidst allegations of anti-competitive behavior predicated on email correspondences, it has expressly and sufficiently refuted any involvement in the purported activities, asserting its innocence with sufficient arguments and evidence. According to the Appellant, the burden of proof rested squarely on the Respondent, who failed to establish, on a balance of probabilities, the Appellant's participation in the alleged activities.
25. In the end, the Appellant is of the view that the Respondent's case does not meet the evidentiary threshold to sustain a finding that the Appellant was guilty of price fixing and exchange of commercially sensitive information.

D RESPONDENT'S CASE.

26. In response, the Respondent stated that sometime in August 2020, it initiated investigations in the steel manufacturing and distribution industry in Kenya based on market intelligence.[18]
27. The Respondent's states that according to Section 31 and 32 of the Act as read with sections 118 and 118A of the Criminal Procedure Code Cap 75 Laws of Kenya simultaneously conducted a search and seizure exercise at the premises of Doshi Group (Doshi), Devki Steel Mills Limited (Devki), Tarmal Wire Products Limited (Tarmal), Mabati Rolling Mills Limited (MRM), Tononoka Rolling Mills (Tononoka), Abyssinia Group Industries (Abyssinia) ,Apex Steel Limited (Apex) on 15th December, 2021 and Insteel Limited (Insteel) on 21st December, 2021.[19]

[18] Supra note 4, paragraph 4.
[19] Supra note 4, paragraph 4.

28. The Respondent averse that after initial analysis of the information obtained during the search, an additional six (6) companies namely: Blue Nile Wire Products Limited (Blue Nile), Accurate Steel Mills Limited (Accurate), Jumbo Steel Mills Limited (Jumbo), Nail and Steel Products Limited, Corrugated Sheets Limited (Corrugated) and Brollo Kenya Limited (Brollo) were also subjects of interest in the investigation.[20]

29. Based on the preliminary review of the material obtained from the search and seizure, the Respondent consequently sent out a Notice of Investigation and Summons for Appearance to the Appellant on 11th March, 2022. In honoring the summons, the Respondent stated that, Mr Avraj Bhachu and Mr. Davinder Bhachu appeared on behalf of the Appellant for the interview on 24th March, 2022 whose main aim was to confirm the veracity of the information obtained during the search.

30. The Respondents stated that upon consideration of the pieces of evidence and the explanations given during the interview, it issued a Notice of Proposed Decision (NOPD) to the Appellant on 4th May, 2022 pursuant to Section 34 of the Act and also supplied the Appellant with the bundle of evidence it relied upon to come up with the NOPD and granted the Appellant 21 days to make written representations.

31. The Respondent's further avers that based on the evidence, it made a preliminary finding that the Appellant, together with thirteen (13) steel manufacturers and distributors had engaged in price fixing contrary to sections 21(1) of the Act as read together with section 21(3)(a) of the Act and that the Appellant together with twelve (12) steel manufacturers and distributors had engaged in output restriction contrary to sections 21(1) of the Act as read together with section 21(3)(e) of the Act.

32. In accordance with the obligation under Article 47 of the Constitution, the Respondent pursuant to section 35 of the Act as read together with section 4 of the Fair Administrative Action Act, 2015 convened a hearing conference with the Appellant on 13th June, 2022.

33. Upon hearing the presentation by the Appellant the Respondent made the following decision pursuant to Section 36 of the Act:

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

[20] Supra note 4, paragraph 5.

ii. The Respondent restrained the Appellant from engaging in conduct that violates section 21(1) of the Act as read together with section 21(3)(a) of the Act.

iii. The Respondent restrained the Appellant from engaging in future violations of the Act. iv. The Respondent directed the Appellant to develop and furnish the Respondent with a competition compliance programme within 6 months from the date of the Determination for approval.

iv. The Respondent directed the Appellant to implement the approved competition compliance programme within 12 months from the date of its approval whose implementation would be subjected to a compliance check by the Respondent.

v. The Respondent imposed a financial penalty of 0.5% of the Appellant's 2021 gross annual turnover in Kenya amounting to KES. 26,826,344.31.

34. The Respondent stated that it communicated its final decisions giving reasons of the same to the Appellant via email on 21st August, 2023 and hard copies served on 23rd August 2023.

35. The Respondent in prosecuting its case identified two issues for determination by the Tribunal.

a.WhethertheAppellantengagedinconductthatconstitutedaninfringemento fsection 21(1) of the Act as read together with section 21(3)(a) of the Act (price fixing); and

b. Whether the Respondent discharged the burden and standard of proof required.

36. First, in response as whether the Appellant engaged in conduct that constituted an infringement of section 21(1) of the Act as read together with section 21(3)(a) of the Act (price fixing); the Respondent argued that Section 21(1) of the Act as read together with section 21(3)(a) of the Act states as follows:

Section 21

(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.

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;

37. The Respondent's avers that the import of the said provision 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 it is exempted by the Act. The Respondent relied on the Federal Trade Commission definition of price fixing as an agreement (written, verbal, or inferred from conduct) among competitors that raises, lowers, or stabilizes prices or competitive terms. To buttress its case the Respondent has relied on Clauses 12,27, 28, 29,30, 41 and 54 among others of the Consolidated Guidelines on Restrictive Trade Practices under the Competition Act ("Consolidated Guidelines ")that describes hard-core restrictive agreements.
38. In the Consolidated Guidelines in clause 28 Hardcore Restrictions refer to ***'Hardcore restrictive agreements are those that are by their very nature injurious to the proper functioning of competition and have no redeeming value whatsoever. Hardcore restrictions can be perpetrated through agreements by undertaking including trade associations.'***
39. The Respondent also relied **on clause 30** of the Consolidated Guidelines which considers price fixing as: fixing the price itself; or fixing an element of the price such as fixing a discount, setting percentage price increase; setting the permitted range of prices between competitors; setting the price transport charges (such as fuel charges), credit interest rate terms and an agreement or arrangement to indirectly restrict price competition in some way such as recommended pricing. In addition, in clause 31 price fixing includes ***'Agreeing to share pricelists before price 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.'***

40. The Respondent's further argued that Price fixing can take various forms and cannot be limited to the outright forms of what encompass price fixing. They made reference to the **Competition Law, (7th Edition) book at page 523**, which states that "It is also important to appreciate that prices can be fixed in numerous different ways, and that a 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 behavior whose object is to limit price competition." Therefore, the Respondent submitted that it was a concerted practice as defined under section 2 of the Act is a co-operative or coordinated conduct between firms, achieved through direct or indirect contact, that replaced their independent action, but did not amount to an agreement[21]

41. The Respondent relied on Clause 12 of the Consolidated Guidelines which provides that a concerted practice can include any type of coordinated activity between undertakings which substitute practical co-operation between them for the risks presented by effective competition, and includes any practice which involves direct or indirect contact or communication between undertakings. On The issues of concerted practice, the Respondents relied on the case of: **Commission v Anic Partecipazioni, C-49/92 P, EU:C:1999:356** a concerted practice was defined as follows:

> *"Thirdly, it must be borne in mind that a concerted practice, within the meaning of Article 85(1) of the Treaty,* ***refers to a form of coordination between undertakings which, without having been taken to a stage where an agreement properly so called has been concluded, knowingly substitutes for the risks of competition practical cooperation between them......"***

42. The Respondent submits that the price fixing conduct engaged in by the Appellant was a concerted practice as it was coordinated activity between the steel manufacturing and distribution companies which substituted practical co-operation between them for the risks presented by effective competition. Further, the Respondent submits that there was direct contact. The Respondent relied on the case of **Case C-105/04 P Nederlandse Federatieve Vereniging voor de Groothandelop Elektrotechnisch Gebiedv Commission [2006] ECR I- 8725**, where at paragraph 125 of the Judgement, the Court held that:

21. Respondents Submissions dated 10th June 2024 at , paragraph 22

22 As a co-operative or coordinated conduct between firms, achieved through direct or indirect contact, that replaced their independent action, but which did not amount to an agreement.

> *"That paragraph of the judgment under appeal reveals no error of law on the part of the Court of First Instance, since, for the purposes of applying Article 81(1) EC, there is no need to take account of the actual effects of an agreement once it appears that its object is to prevent, restrict or distort competition within the common market….."*

43. The Respondent further submits that Appellant's silence to the emails and/ or alleged non-action on the contents of the email does not amount to dissociating itself from the conduct as the only acceptable dissociation to cartel conduct is by public distancing by writing to the author of the email and the other competitors to distance itself from the conduct as stated in the case of **Case T-303/02 Westfalen GassenNederland v Commission [2006] ECR I-4567** wherein it was held that:

> *103 It must be pointed out in this regard that the notion of public distancing as a means of excluding liability must be interpreted narrowly. If the applicant had in fact wanted to disassociate itself from the collusive discussions, it could easily have written to its competitors and to the secretary of the VFIG after the meeting of 14 October 1994 to say that it did not in any way want to be considered to be a member of the cartel or to participate in meetings of a professional association which served as a cover for unlawful concerted actions (see, tothat effect, Case T-61/99 Adriatica di Navigazione v Commission [2003] ECR II-5349, paragraph 138).*
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> *124. 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, according to case-law, 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 (see, to that effect, Aalborg Portland and Others v Commission, paragraph 76 above, paragraph 84).*

44. Similarly, the Respondent relied on the **case of C-699/19 P Quanta Storage Inc vs European Commission**, the Court (Fourth Chamber) which found that the General Court was correct in upholding the Commission's reliance on emails in which the Appellant was copied to characterize its passive contribution to the conduct in question and that its participation was not dependent on the Appellant having had direct discussions with-its competitors. It was held as follows:

> *123. By the second part of its fourth ground of appeal, the appellant criticizes the General Court for holding that the Commission had rightly considered, in the decision at issue, that the appellant's contribution, through its own conduct, to the infringement at issue was established by the fact that it had not publicly distanced itself from the unlawful conduct, whereas its participation consisted solely in being copied in internal Sony Optiarc emails referring to unlawful exchanges of information between competitors.*
>
> *124. In that regard, it should be borne in mind that, according to settled case-law, in order to establish that an undertaking has participated in a single and continuous infringement, the Commission must prove that the undertaking intended, through its own conduct, to contribute to the common objectives pursued by all the participants and that it was aware of the substantive conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and was prepared to take the risk (see, to that effect, judgment of 24 September 2020, Prysmian and Prysmian Cavi e Sistemi v Commission, C-601/18 P, EU:C:2020:751, paragraph 130 and the case-law cited).*
>
> *125. From that perspective, a party which tacitly approves of an unlawful initiative, without publicly distancing itself from the content of that initiative 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 capable of rendering the undertaking concerned liable (judgment of 6 December 2012, Commission v Verhuizingen Coppens, C-441/11 P,EU:C:2012:778, paragraph 73).*

128. Therefore, in the light of the case-law referred to in paragraphs 124 and 125 above, the General Court correctly held that the Commission was entitled to rely on emails in which the appellant was copied in order to characterise its contribution to that infringement, since the characterization of the appellant's passive participation in that infringement is not subject to the condition that it participated in direct discussions with its competitors.

45. Respondent also relied on the case of **Toshiba Corp. vs European Commission Case T-519/09 2014**where the court held that an undertaking will be found culpable of participating in an anti-competitive conduct even if it did not participate actively in meetings of anti- competitive nature and did not publicly distance itself from what occurred.
46. The Respondent also relied on the case of **Polypropylene OJ [1986] L 230/1, [1988] 4 CMLR 347** which illustrated that a firm's single participation in multiple occurrences still amounts to its participation in the anti-competitive conduct.

83. 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 involvement of each producer is not therefore fixed according to the period for which its pricing instructions happened to be available but for the whole of the period during which it adhered to the common enterprise.

This consideration applies also to ANIC and to Rhone-Poulenc which left the polypropylene sector before the date of the Commission's investigations. No pricing instructions to sales offices were available at all from either of these two undertakings. Their attendance at meetings and their participation in the volume target and quota schemes can however be established from the documentary evidence. The agreement must be viewed as a whole and their involvement is established even if no price instructions from them were found.

47. On the issue of standard of proof the Respondent relied on clause 54 of the Consolidated Guidelines which states that:

"For per se/ hardcore restrictions; the Authority bears the burden of proving the existence an agreement whose object is the prevention, distortion or lessening of competition."

48. The Respondent in an attempt to define standard of proof, relied on the Black's Law Dictionary, (9th Edition, 2009) at page 1535 which defines the standard as proof as *'[t]he degree or level of proof demanded in a specific case in order for a party to succeed.'*

49. The Respondent averse that the required the standard of proof in civil matters is on the balance of probability as **was held in NappPharmaceutical Holdings Limited v Director General of Fair Trading[2002] CAT 1 4** where it was stated that:

> *109. In those circumstances the conclusion we reach is that, formally speaking, the standard of proof in proceedings under the Act involving penalties is the civil standard of proof, but that standard is to be applied bearing in mind that infringements of the Act are serious matters attracting severe financial penalties. It is for the Director to satisfy us in each case, on the basis of strong and compelling evidence, taking account of the seriousness of what is alleged, that the infringement is duly proved, the undertaking being entitled to the presumption of innocence, and to any reasonable doubt there may be.*

50. Furthermore, the Respondent' argued that in discharging the burden of proof, certain inferences or presumptions would be made from a certain set of facts in the absence of contradicting evidence. In **Napp Pharmaceutical** case above, the court held:

> *110. That approach does not in our view preclude the Director, in discharging the burden of proof, from relying, in certain circumstances, from inferences or presumptions that would, in the absence of any countervailing indications, normally flow from a given set of facts, for example that dominance may be inferred from very high market shares (Case 85/76 Hoffman-La Roche v Commission [1979] ECR 461, paragraph 41); that sales below average variable costs may, in the absence of rebuttal, be presumed to be predatory (see the opinion of Advocate General Fennelly in Cases C-395/96P and 396/96P Compagnie Maritime Belge v Commission [2000] ECR I-1442 at paragraph 127); or that an undertaking's presence at a meeting with a manifestly anti-competitive purpose implies, in the absence of explanation, participation in the*

cartel alleged: Montecatini v Commission, cited above, at paragraphs 177 to 181.

51. The Respondent submits that the requirement for 'strong and compelling evidence' does not require evidence that is beyond reasonable doubt and that the number of evidences is not a relevant factor provided the evidence meets the required legal standard and has probative value. In support of its argument the Respondent relied on the case of **JJB Sports plc v. Office of Fair Trading [2004] CAT 17** where it was held:

> *204. It also follows that* ***the reference by the Tribunal to "strong and compelling" evidence at [109] of Napp should not be interpreted as meaning that something akin to the criminal standard is applicable to these proceedings. The standard remains the civil standard.*** *The evidence must however be sufficient to convince the Tribunal in the circumstances of the particular case, and to overcome the presumption of innocence to which the undertaking concerned is entitled.*
>
> *205. What evidence is likely to be sufficiently convincing to prove the infringement will depend on the circumstances and the facts. In Claymore Dairies v. OFT [2003] CAT 18 the Tribunal was concerned that Napp might be interpreted by the OFT or other regulators in an unduly cautious way, inhibiting the enforcement of the Act. A similar issue arises in certain Chapter II cases currently pending before the Tribunal.*
>
> *206.* ***As regards price fixing cases under the Chapter I prohibition, the Tribunal pointed out in Claymore Dairies that cartels are by their nature hidden and secret; little nothing may be committed to writing. In our view even a single item of evidence, or wholly circumstantial evidence, depending on the particular context and the particular circumstances, may be sufficient to meet the required standard:*** *see Claymore Dairies at [3] to [10]. See also, for example, the opinion of Judge Vesterdorf, acting as Advocate General, in Rhône-Poulencv Commission[1991]ECR-IIatp.867;andCimenteries, cited above ,at paragraphs 1838 to 1839. As the Court of Justice said in Cases 204/00P etc. Aalborg Portland v Commission, judgment of 17 January 2004, not yet reported, at paragraphs 55 to 57:*

"55. Since the prohibition on participating in anti-competitive agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret, most frequently in a non-member country, and for the associated documentation to be reduced to a minimum.

56. Even if the Commission discovers evidence explicitly showing unlawful conduct between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction.

57. 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."

52. In response to the Appellants' assertions that it did not make any adjustments to its pricing structure consequent to discussions purportedly held, the Respondent submits that adherence to and/or taking action by the concerned parties to the discussions is not required for a finding of infringement of section 21(1) of the Act as read together with section 21(3)(a) of the Act. The Respondents relied on **Case T- 377/06Comap SA vs Commission [2011] ECR II-000, [2011] 4 CMLR 1576**: where it was held:

98. As regards the last point, suffice it to note ***that non-compliance with a cartel does not in any way alter the fact of its existence****. In the present case, it cannot be concluded therefore that the applicant ended its participation in the infringement during the period at issue, merely because the applicant used the cartel for its own benefit, while failing to adhere fully to the prices that had been agreed.*

99. Cartel members remain competitors, each of whom can be tempted, at any time, to profit from the discipline of the others in relation to the prices agreed by the cartel by lowering its own prices with the aim of increasing its market share, while maintaining a general level of pricing that is relatively high. In any event, the fact that the applicant did not entirely implement the agreed prices *does not mean that, in so doing, it applied the prices that it would have charged in the absence of the cartel (see, to that effect, judgment of 15 June 2005 in Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 Tokai Carbon and Others v Commission, not published in the ECR, paragraphs 74 and 75)*

E. ISSUES FOR CONSIDERATION

Having carefully examined the pleadings of the parties, the evidence presented before the Tribunal as well as their written submissions, the following main issue emerges;

i. Whether the Appellant engaged in conduct that constituted an infringement of section 21(1) of the Act as read together with section 21(3)(a) of the Act.
ii. Whether the Respondent discharged the burden of Proof and the standard required.
iii. Who bears the cost of this Appeal.

F. ANALYSIS AND DETERMINATION

I. Whether the Appellant engaged in conduct that constituted an infringement of section 21(1) of the Act as read together with section 21(3)(a) of the Act.

53. In answering the first issue the Tribunal will seek to answer the following questions:
    a. Whether the Appellant acting in concert engaged in the conduct of price fixing contrary to Section 21 (1) as read together with Section 21(3)(a).
    b. Whether the Appellant acting in concert participated in restricting output contrary to Section 21 (1) as read together with Section 21(3)(e).
    c. Whether the Appellant acting in concert participated in sharing commercially sensitive information which ultimately aided in coordination among the companies which has limited, prevented or distorted competition among the companies contrary to Section 21(3)(i).
54. The Appellants case is that the Respondent in merely relying on emails copied to the Appellant by third parties did not discharge the burden of proving contravention of the Act. Further, the Appellant denies that it saw or read the said emails in any event. There is no evidence that the Appellant responded or acted on the said emails. The Appellant submitted that had there been direct discussion between its agents and the senders of emails in question the emails would be sent to personal email addresses of the Appellant representatives and not to the general email accessible to the general public on the

company's' website. They further argued that the general email would typically receive wide array of communications. They further stated as at the date of the Respondents investigation the volume of unread emails stood at over 44,500.

55. On the other hand, the Respondent maintains that the Appellants being copied in the emails is sufficient proof to establish that it was a participant. In supporting the argument, the Respondent relied on the case of **Case C-105/04 P Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission [2006] ECR I- 8725**, where at paragraph 125 of the Judgement, the Court held that:

> *"That paragraph of the judgment under appeal reveals no error of law on the part of the Court of First Instance, since, for the purposes of applying Article 81(1) EC, there is no need to take account of the actual effects of an agreement once it appears that its object is to prevent, restrict or distort competition within the common market….."*

56. 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**. 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.

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;

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.

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;**

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.

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.**

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.

57. 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.

58. **Evidence 1**[22] is an email dated 15th May, 2018 from Neelkamal Shah to Niral savla. The subject of the email is **'pricing' copied to Amarjit Singh of the Appellant amongst others**

The email reads:

> **"Dear Niral,**
>
> **We spoke last week.**
>
> **Many sizes on Tube Price List needs to be revised.**
>
> **For example 20 x 20x1, 25 x 25x 1, 40 x 25 x 1.2, 30 x 30 x 1.2 are some of the sizes where I am seeing that the gross profit is very low and in some case it goes negative. There could be more sizes as well which can be addressed by other members. With the current market situation whether good or bad, for example 20x 20 x 1 we are all left with about 12/- to 13 /-gross profit and on 25 x 25 x 1 with a gross profit of about 15/- per length of 6 metres.**
>
> **Also the weights for many of the 1 mm items need to be revised. Those weights were based on coils of 1.05 mm as Amsa was the only supplier in those days. Now they have also improved in line with Rhizao on the thicknesses.**
>
> **I spoke to Mr. Raju Patel of Doshi over the weekend for which he had the same sentiments.**
>
> **Please look into it as we are all pushing huge tonnages, but with no margin."**

---

[22] Record of Appeal dated 21st September, 2023 at page 35.

59. **Evidence 2**[23] are emails exchanged between 24th and 27th September ,2018 by Nilesh (Doshi), Niral savla (Tononoka), Prakash Chauhan (Safal group), Murtaza (Tarmla steel). The subject of the email is **'proposed Thickness for Tubes & plates ' copied to the Appellant via the email:** **accurate@bhachuind.co.ke**

The email reads:

Email 1: 24th September 2018.

From Nilesh (doshi) to Niral Salva.copied

Subject: **proposed Thickness for Tubes & plates**

"Dear Niral

We agreed during the meeting at KAM this morning that we all send our proposal to Niral who will coordinate the responses so that we can reach a consensus on what thickness of coils will be imported by all of us so that we comply to the standard and create a level playing field in the country.

I have attached my proposals for discussion.

Please note that the weight tolerance for KS104 is +/-5% (not 7.5%) and for KS 259 is +/- 7.5 %(not 10%) – the proposed thickness I have suggested are based on these standards.

Kind regards

Nilesh Doshi"

Email 2: 25th September 2018.

From: Niral to Nilesh via email: accurate

Subject: **proposed Thickness for Tubes & plates**

"Dear All,

Kindly give your views/ comments by latest C.O.B 26th September. We shall then start working on a standard for plates once the thicknesses/ tolerances are agreed.

I have gone through the attachment and agree with the same.

---

[23] Ibid, page 37.

Kindly note that we intend to inform our suppliers on the standards that we agree.

Best Regards,

Niral Savia"

Email 3: 26th September 2018.

From: Prakash Chauhan to Niral

Subject: <u>proposed Thickness for Tubes & plates</u>

"Dear Niral

The mentioned thickness are in order and can be adopted for plates and tubes.

Regards Prakash Chauhan"

Email 4: 27th September 2018.

From: Murtaza Tarmal to Niral

Subject: <u>proposed Thickness for Tubes & plates</u>

"Dear All

I am not in for the above restrictions on sizes to be imposed on the manufacturer.

First we had agreed at the Naivasha venue that we shall not go for the above as we had placed all the controls to insure that we have a label playing field.

Secondly this new development we were not consulted and only a few manufacturer set for this meeting and decided to propose the above.

We feel that the above will not serve in all the manufacturers favour, but will have a negative effect on fair competition.

Thanks

Regards to all,

Murtaza"

1. According to the Respondent the Appellant engaged in conduct that constituted the violation of Section 21 of the Act on price fixing. In illustrating its case, the Respondents argued that the

object of the said provision of the Act is inter alia to prevent concerted practices by undertakings.

2.The Respondents relied on Clause 30 and 31 of the Consolidated Guidelines which defines price fixing to include fixing the price itself of fixing an element of price such as fixing discount setting percentage price increase setting permitted range of prices between competitors and setting the price of transport charges e.g. fuel charges. To buttress the argument, the Respondents submitted before the Tribunal an excerpt from Competition Law (7th Edition) book at page 523 which illustrates that ***'prices can be fixed in numerous different ways and that a fully affective 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 behavior whose object is to limit price competition.'***

60. This Tribunal has considered in detail the rival submissions made by the Appellant and the Respondent. The Appellant denied knowledge of the circumstances leading to the emails being copied to them; it argued that did not request, nor sanction the sending of the emails; nor did it respond to any of the emails; and that there was no evidence, that the Appellant had adjusted any of its prices after receipts of the emails. Therefore, the mere fact that the Appellant was copied in an email does not by itself amount to the Appellant participating in price fixing practices contrary to Section 21 (1) as read together with Section 21 (3) (a) of the Act.

61. ***The Tribunal has considered the case law and decisions on similar issues. The Tribunal is persuaded by the position taken in the case of Aalborg Portland v Commission, judgment of 17 January 2004, not yet reported, at paragraphs 55 to 57:***

> *"55. Since the prohibition on participating in anti-competitive agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret, most frequently in a non-member country, and for the associated documentation to be reduced to a minimum.*
>
> *56. Even if the Commission discovers evidence explicitly showing unlawful conduct between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction.*
>
> *57. 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."

62. The Tribunal has noted with approval the decision of **Toshiba Corp. vs European Commission Case T-519/09 2014** where the court held that an undertaking will be found culpable of participating in an anti-competitive conduct even if it did not participate actively in meetings of anti- competitive nature and did not publicly distance itself from what Occurred.

63. Similarly it is well settled by case law that a party's silence to the emails and/ or alleged non-actiononthecontentsoftheemaildoesnotamounttodissociatingitselffromtheconduct as the only acceptable dissociation to cartel conduct is by public distancing by writing to the author of the email and the other competitors to distance itself from the conduct as stated in the case of **Case T-303/02 Westfalen GassenNederland v Commission [2006] ECR I-4567** wherein it was held that:

103 It must be pointed out in this regard that the notion of public distancing as a means of excluding liability must be interpreted narrowly. If the applicant had in fact wanted to disassociate itself from the collusive discussions, it could easily have written to its competitors and to the secretary of the VFIG after the meeting of 14 October 1994 to say that it did not in any way want to be considered to be a member of the cartel or to participate in meetings of a professional association which served as a cover for unlawful concerted actions (see, tothat effect, Case T-61/99 Adriatica di Navigazione v Commission [2003] ECR II-5349, paragraph 138).

124. Silence by an operator in a meeting during which the parties colluded unlawfully on a precise question of pricing policy is tantamount to an expression of firm and unambiguous disapproval. On the other hand, according to case-law, 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 thein fringement which is therefore capable of rendering the undertaking liable (see, to that effect, Aalborg Portland and Others v Commission, paragraph 76 above, paragraph 84).

64. This position was also held in the case of **C-699/19 P Quanta Storage Inc vs European Commission,** the Court (Fourth Chamber) which found that the General Court was correct

in upholding the Commission's reliance on emails in which the Appellant was copied to characterize its passive contribution to the conduct in question and that its participation was not dependent on the Appellant having had direct discussions with its competitors. It was held as follows:

123. By the second part of its fourth ground of appeal, the appellant criticises the General Court for holdingthatthe Commission had rightly considered, in the decision at issue, that the appellant's contribution, through its own conduct, to the infringement at issue was established by the fact that it had not publicly distanced itself from the unlawful conduct, whereas its participation consisted solely in being copied in internal Sony Optiarc emails referring to unlawful exchanges of information between competitors.

124. In that regard, it should be borne in mind that, according to settled case-law, in order to establish that an undertaking has participated in a single and continuous infringement, the Commission must prove that the undertaking intended, through its own conduct, to contribute to the common objectives pursued by all the participants and that it was aware of the substantive conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and was prepared to take the risk (see, to that effect, judgment of 24 September 2020, Prysmian and Prysmian Cavi e Sistemi v Commission, C-601/18 P, EU:C:2020:751, paragraph 130 and the case-law cited).

125. From that perspective, a party that tacitly approves of an unlawful initiative, without publicly distancing itself from the content of that initiative 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 capable of rendering the undertaking concerned liable (judgment of 6 December 2012, Commission v Verhuizingen Coppens, C-441/11 P, EU:C:2012:778, paragraph 73).

128. Therefore, in the light of the case-law referred to in paragraphs 124 and 125 above, the General Court correctly held that the Commission was entitled to rely one mails in which the appellant was copied in order to characterise its contribution to that infringement, since the characterisation of the appellant's passive participation in that *infringement is not subject to the condition that it participated in direct discussions with its competitors.*

65. The Appellant in its defense submitted that had there been direct discussion between its agents and the senders of emails in question the emails would be sent to personal email addresses of the Appellant representatives and not to the general email accessible to the general public on the company's' website. They further argued that the general email would typically receive wide array of communications. They further stated as at the date of the Respondents investigation the volume of unread emails stood at over 44,500.
66. Contrary to the Appellants arguments, the Tribunal notes that **Evidence 1** is an email dated 15th May, 2018 from Neelkamal Shah to Niral savla. The subject of the email is **'pricing' copied to Amarjit Singh and Evidence 2** are emails exchanged between 24th and 27th September ,2018 by Nilesh (Doshi), Niral savla (Tononoka), Prakash Chauhan (Safal group), Murtaza (Tarmla steel). The subject of the email is **'proposed Thickness for Tubes & plates ' copied to the Appellant via the email: accurate@bhachuind.co.ke**
67. This tribunal makes a finding that Appellant was culpable of the offences brought against it by the Respondent by its passive conduct, and failing to publicly distance itself from the emails. It merely denied knowledge of the circumstances leading to the emails being copied to them; it argued that did not request, nor sanction the sending of the emails; nor did it respond to any of the emails; and that there was no evidence that the Appellant had adjusted any of its prices after receipt of the emails. This Defence therefore fails and we answer the first question in the affirmative.

II. Whether the Respondent discharged the burden and standard of proof required

68. The Appellants relied on <u>**Sections 107(1), (2) and 109 of the Evidence Act**</u> on the burden of proof. The provision state as follows:

107(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2)When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

109. <u>Proof of particular fact</u>

The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

69. On the issue of burden and standard of proof the appellant posit that the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision. The Appellant relied on the case of **Lewis Karungu Waruiro Vs Moses Muriuki Muchiri**, where the Court held that:-

All cases are decided on the legal burden of proof being discharged (or not). Lord Brandon in Rhesa Shipping Co SA vs Edmunds remarked:-

"No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."

Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in Britestone Pte Ltd vs Smith & Associates Far East Ltd :-

"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"

70. The Appellant posits that the standard determines the degree of certainty with which a fact must be proved to satisfy the court. In civil cases the standard of proof is in the balance of probabilities. In the case of **Miller vs Minister of Pensions, Lord Denning** as is then was, said the following about the standard of proof in civil cases:-

'The ...{standard of proof}...is well settled. It must carry a reasonable degree of probability.....if the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not.'

71. In response, the Respondent submitted that it discharged the burden of proof under clause 41 and 54 of the Consolidated Guide lines and section 21(1) of the Act. Therefore according to the Respondents it was required to demonstrate the effect of these concerted practices as they are hard-core restrictions pursuant to clause 29 of the Consolidated Guidelines.

72. Clause 54 of the Respondents Consolidated Guidelines states that: "For per se/ hardcore restrictions; the Authority bears the burden of proving the existence an agreement whose object is the prevention, distortion or lessening of competition.

73. This position was upheld in the case **of Ahmed Mohamed Noor Vs. Abdul Aziz Osman (2019) eklr** Court held that *" the foregoing analysis therefore settles the issue of burden of proof. For clarity, the legal burden of proof in a case is always static and rests on the claimant throughout the trial. It is only the evidential burden of proof which may shift to the Defendant depending on the nature and effect of the evidence adduced by the Claimant."*

74. On the Standard of Proof the **Blacks Law Dictionary (9th Edition) at Page 1535** defines the standard of proof as *" the degree or level of proof demanded in a specific case in order for a party to succeed".*

75. The Appellant denied knowledge of the circumstances leading to the emails being copied to them; it argued that did not request, nor sanction the sending of the emails; nor did it respond to any of the emails; and that there was no evidence that the Appellant had adjusted any of its prices after receipt of the emails. **Therefore, the mere fact that the Appellant was copied in an email does not by itself amount to the Appellant participating in price fixing practices** contrary to Section 21 (1) as read together with Section 21 (3) (a) of the Act.

76. The Respondent in its NOPD dated determined that the Appellant together with other companies met shared commercially sensitive information. The Respondent maintains that the Appellants being copied in the emails is sufficient proof to establish that it was a participant. In supporting the argument, the Respondent relied on the case of **Case C-105/04 P Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission [2006] ECR I- 8725,** where at paragraph 125 of the Judgement, the Court held that:

"That paragraph of the judgment under appeal reveals no error of law on the part of the Court of First Instance, since, for the purposes of applying Article 81(1) EC, there is no need to take account of the actual effects of an agreement once it appears that its object is to prevent, restrict or distort competition within the common market.

77. In the case of **Dyestuff (cases 48,49 and 51 -57/59 ICI Vs. Commission (Dystuff EU – "change its proC" 1972 ;70** the court of justice stressed the importance of price competition between competitors.. *"The function of price competition is to keep prices*

down to the lowest possible level. Although every producer is free to change its prices, taking into account in so doing the present of forcible conduct of his competitors , nevertheless it is contrary to the rules on Competition contained in the Treaty to co-operate with his competitors, in any way, whatsoever , in order to determine a coordinated course of action relating to a price increase and to ensure its success by prior elimination of all uncertainty as to each others conduct regarding the assessed elements of that action ,such as the amount, subject matter date and place of the increase".

78. Similarly, in the case of **Carton board (OJ) 1994 L 243/1**. the Commission fined 19 producers of carbon board for over a long period of time, planning and implementing uniform and regular, price increases within the European union, planning and co-ordination price indications in advance, freezing market shares , controlling output and organizing the exchange of confidential information."

79. The Tribunal has carefully considered the particular facts of this case, and the passive nature of the Appellants' participation in the matter. The Tribunal is persuaded that the case law cited by the Respondent In **Napp Pharmaceutical** case above, in the Respondents' argued that in discharging the burden of proof, certain inferences or presumptions would be made from a certain set of facts in the absence of contradicting evidence. In **NappPharmaceutical** case above, the court held:

> *110. That approach does not in our view preclude the Director, in discharging the burden of proof, from relying, in certain circumstances, from inferences or presumptions that would, in the absence of any countervailing indications, normally flow from a given set of facts, for example that dominance may be inferred from very high market shares (Case 85/76 Hoffman-La Roche v Commission [1979] ECR 461, paragraph 41); that sales below average variable costs may, in the absence of rebuttal, be presumed to be predatory (see the opinion of Advocate General Fennelly in Cases C-395/96P and 396/96P Compagnie Maritime Belge v Commission [2000] ECR I-1442 at paragraph 127); or that an undertaking's presence at a meeting with a manifestly anti-competitive purpose implies, in the absence of explanation, participation in the cartel alleged: Montecatini v Commission, cited above, at paragraphs 177 to 181.*

80. The Respondent submits that the requirement for 'strong and compelling evidence' does not require evidence that is beyond reasonable doubt and that the number of evidences is not a relevant factor provided the evidence meets the required legal standard and has

probative value. In support of its argument the Respondent relied on the case of **JJB Sports plc v. Office of Fair Trading [2004] CAT 17** where it was held:

> 204. It also follows that **the reference by the Tribunal to "strong and compelling" evidence at [109] of Napp should not be interpreted as meaning that *something akin to the criminal standard is applicable to these proceedings. The standard remains the civil standard*.** *The evidence must however be sufficient to convince the Tribunal in the circumstances of the particular case, and to overcome the presumption of innocence to which the undertaking concerned is entitled.*
>
> *205. What evidence is likely to be sufficiently convincing to prove the infringement will depend on the circumstances and the facts. In Claymore Dairies v. OFT [2003] CAT 18 the Tribunal was concerned that Napp might be interpreted by the OFT or other regulators in an unduly cautious way, inhibiting the enforcement of the Act. A similar issue arises in certain Chapter II cases currently pending before the Tribunal.*
>
> ***206. As regards price fixing cases under the Chapter I prohibition, the Tribunal pointed out in Claymore Dairies that cartels are by their nature hidden and secret; little o***
>
> *By the second part of its fourth ground of appeal, the appellant criticizes the General Court for holding that the Commission had rightly considered, in the decision at issue, that the appellant's contribution, through its own conduct, to the infringement at issue was established by the fact that it had not publicly distanced itself from the unlawful conduct, whereas its participation consisted solely in being copied in internal Sony Optiarc emails referring to unlawful exchanges of information between competitors.*
>
> *124. In that regard, it should be borne in mind that, according to settled case-law, in order to establish that an undertaking has participated in a single and continuous infringement, the Commission must prove that the undertaking intended, through its own conduct, to contribute to the common objectives pursued by all the participants and that it was aware of the substantive conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and was prepared to take the risk*

(see, to that effect, judgment of 24 September 2020, Prysmian and Prysmian Cavi e Sistemi v Commission, C-601/18 P, EU:C:2020:751, paragraph 130 and the case-law cited).

125. From that perspective, a party that tacitly approves of an unlawful initiative, without publicly distancing itself from the content of that initiative 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 capable of rendering the undertaking concerned liable (judgment of 6 December 2012, Commission v Verhuizingen Coppens, C-441/11 P, EU:C:2012:778, paragraph 73).

128. Therefore, in the light of the case-law referred to in paragraphs 124 and 125 above, the General Court correctly held that the Commission was entitled to rely on emails in which the appellant was copied in order to characterize its contribution to that infringement, since the characterization of the appellant's passive participation in that infringement is not subject to the condition that it participated in direct discussions with its competitors.

81. This Tribunal is persuaded that inferences can be made that the Appellant alongside its competitors in a horizontal relationship, were engaged in price discussions and was culpable of a concerted practice as defined in Consolidated Guidelines in Clause 28. Hardcore restrictions that are by their nature injurious to the proper functioning of competition and have no redeeming value whatsoever. Hardcore collusive restrictions are subject to "***object***" assessment *i.e.* strict or per se scrutiny for which no defenses can be raised. The Respondent was correct in considering the content and nature of the Agreement and not its effect

82. The Appellant did not discharge the burden or rebut the presumption of innocence it is entitled to by offering any reasonable explanation as to why its email address **accurate@bhachuind.co.ke** found itself on the mailing list of the cartel companies. During the highlighting of its submissions before the Tribunal, he Appellants Counsel indeed confirmed to the Tribunal, that this email address belonged to the Appellant. We are

satisfied that the Respondent discharged its burden of proof to the standard required in Competition cases.

We are not persuaded by the Appellants' Counsel's argument that the Respondent was required to meet the requirements under section 107 (1), 2 and 109 of the Evidence Act Cap 80 at the inquiry stage.

83. It is further the Tribunal's observation that the Respondent in carrying out an inquiry, as it did was carrying out an administrative function and it was strictly not bound by rules of evidence. In the decision of **David Macharia & 2 others Vs. Teachers Service Commission & Another [2018] eKLR** Azangalala J (as he then was) distinguished judicial proceedings from Administrative proceedings in stating that *"an internal disciplinary tribunal is not to be held to the same standards as a court of law.*

84. This Tribunal observes that the Respondent, being an administrative body, was therefore not bound by strict rules of evidence and was not required by law to comply with the provisions of the Evidence Act except as provided under Article 47 of the Constitution of Kenya, 2010, Section 4 of the Fair Administrative Action Act, Act Number 4 of 2015, and Section 35 of the Act by affording the Appellant with a fair hearing. This position was upheld in the case of **Joseph Mbalu Mutava v Attorney General & another [2014] eKLR**, where the court was invited to examine the question of whether procedural fairness was applied by an administrative body in exercise of its mandate. The court observed that: "It is also not necessary that strict rules of evidence be applied in such inquiry."…. *"While it is the position that the technical rules of evidence do not strictly apply to such situations it is imperative that any evidence relied upon by the Commission should have been availed to the Petitioner to comment upon…"*

85. The Appellant in this case did not in it grounds of Appeal challenge the procedural fairness of the proceedings nor claim that the Respondent did not afford it a fair hearing. In **Majid Al Futtaim Hypermarkets Limited v Competition Authority of Kenya & another [2021] eKLR** this Tribunal held:

> *"131. The said Notice duly notified the Appellant of the findings of the 1st Respondent and the orders it intended to make against the Appellant. The Notice called for evidence in rebuttal through written representations pursuant to section 34 (2) of the Act. The Appellant was also notified of its right to a hearing conference pursuant to section 35 of the Act.*

133. We have reviewed the procedure laid down at paragraph 34 and 35 of the Act, and we are of the opinion that the 1st Respondent acted according to the laid down procedure. The Appellant is only invited to bring evidence in rebuttal through written representations and conference hearing only upon issuance of a proposed decision.

134. We have, hereinabove, determined that the Appellant was supplied with all the documents that the 1st Respondent relied upon. We have also determined that the 1st Respondent followed the correct procedure as laid down in part E of the Act. We find that process does not require formal rules for it to achieve the threshold of natural justice. The Appellant was given adequate notice to rebut the evidence against it. The Appellant was also given an opportunity to be heard.

86. The Tribunal is satisfied that the Respondent followed due process as set out in the Act, and the rights of the Appellant to a fair hearing was not in issue in this case.

87. The upshot of this Appeal is that, the Tribunal answers both issues for determination in the affirmative in favor of the Respondent.

88. On the third issue of costs, since the Appellant has failed in this Appeal, the costs follow the cause

F. ORDERS

1. We accordingly arrive at the conclusion that this Appeal fails. We therefore order as follows:

    a. This Appeal be and is hereby dismissed.
    b. The Respondent's decision 17th August 2023 be and is hereby upheld.
    c. The Appellant to 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
P. O. Box 30041-00100,
NAIROBI

SECRETARY/CEO

COMPETITION TRIBUNAL