REPUBLIC OF KENYA

IN THE COMPETITION TRIBUNAL AT NAIROBI

CASE NO. CT/008 OF 2023

BETWEEN

NAIL AND STEEL PRODUCTS LIMITED .....APPELLANT

AND

COMPETITION AUTHORITY OF KENYA.....RESPONDENT

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

JUDGEMENT

A. BACKGROUNDs

1. This appeal emanates from the decision issued by the Respondent on the 17th August,2023 against the Appellant and 13 Other Manufacturers and Distributors of steel Products in Kenya.[1] The Appellant states that is a corporate entity duly incorporated under the laws of Kenya.

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.[2]

3. The Respondent states that in August 2020, it initiated investigations in the steel manufacturing and distribution sector in Kenya. This was based on market intelligence that manufacturers and distributors were engaging in coordinated conduct prohibited under Section 21 of the Act.[3]

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[1] Record of appeal dated 1/09/2023 page 15-53.

[2] The Competition Act, No. 12 of 2010

[3] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023 paragraph 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* on 21st December 2021.[4]

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.[5] 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.[6]

6. In the said Notice the Respondent invited the Appellant for an interview on 25th March 2022.[7] The Respondent confirms in its affidavit that the meeting took place on 25th March 2022.[8]In the said meeting, the Appellant's representatives Neelkamal Shah recorded written statements. The said statements inter alia addressed **Evidence 1, 2,5,6,7, and 34**.[9]

7. 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.[10] 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.[11]

8. Consequently, the Appellant submitted its written representation dated 6th July, 2022 in response to the NOPD.[12] The Respondent states that on 1st August, 2022, it convened a Hearing

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[4] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, paragraph 5
[5] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, paragraph 6
[6] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, paragraph 7
[7] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, paragraph 7
[8] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, paragraph 8
[9] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, (Annexures page 3 to 8.)
[10] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, page 9 to 30 (Exhibit GM-3.
[11] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, Paragraph 9.
[12] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, page 31to 35. (Exhibit GM-4(a)

Conference pursuant to section 35 of the Act and from the minutes Mr. Neelkamal shah and Rosemary King'ori were in attendance on behalf of the Appellant.[13]

9. After the said Hearing Conference, the Respondent made their final decision on 17th August 2023 pursuant to section 36 of the Act.[14] The Respondent in its decision held:

   i. The Authority holds that the conduct of Nail and Steel together with Apex, Brollo, Tononoka, Insteel, Jumbo, MRM, Devki, Doshi, Abyssinia, 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 Authority restrains Nail and Steel 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 Authority restrains Nails and Steel from engaging in future violations of the Act.
   iv. The Authority directs Nail and Steel 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 Nail and Steel 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 Nail and Steel's 2021 gross annual turnover in Kenya amounting to Kes. 22,816,546.01 (as computed in Annex1).

B. DOCUMENTS AND EVIDENCE

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

Record of Appeal containing: -

a) The Notice of Appeal dated 1st September, 2023
b) The Memorandum of Appeal dated 1st September 2023.
c) Statement of facts dated 14th September 2023.

[13] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, page 37-41. (Exhibit GM-4(b)
[14] Record of appeal dated 1/09/2023, page 15-53

d) Supporting Affidavit sworn by Neelkamal Shah on 1st September 2023.

e) Documents appearing in the index of record of appeal dated 1st September 2023.

f) Appellant's written Submissions dated 30th November, 2023 and Supplementary submissions date 5th March, 2024 together with the list and bundle of authorities attached thereto.

11. The Respondent filed the following documents:

a) Replying Affidavit sworn by Gideon Mokaya on 18h day of September 2023 and the annexures thereto.

b) Respondent's written Submissions dated 5th day of February 2024 together with the list and bundle of authorities attached thereto.

c) Respondent's List and Bundles of Authorities dated 5th of February 2024.

12. The matter came up for hearing on 31st October, 2024 when the parties' advocates highlighted their respective submissions.

C. APPELLANT'S CASE

13. 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, That:

i. **The Respondent erred in law and in fact when it held that the technical rules of evidence do not strictly apply to investigations carried out by the Respondent.**

ii. **The Respondent erred in law and in fact when it held that it discharged its mandate and that the administrative process was reasonable, procedurally fair and no prejudice was occasioned to the Appellant, which was not the case.**

iii. **The Respondent erred in law and in fact when it held that the Appellant was culpable of engaging in price fixing agreements in contravention of section 21(1) of the Act as read together with section 21(3)(a) of the Act.**

iv. **The Respondent erred in law and in fact in finding that the meeting attended by the Appellant as per Evidence 45 amounted to price fixing and involvement in output restrictions contrary to Article 36(1) of the Constitution**

v. **The Respondent erred in law and in fact when it held that the Appellant was involved in output restriction within the steel sector contrary to section 21(1) as read together with section 21(3)(e) of the Act**

vi. **The Respondent erred in law and in fact when it convicted and penalized the Appellant under sections 21(1) as read together with sections 21(3)(a) and (21(3)(e) of the Act and section 36 of the Act respectively when the burden of proof was not discharged to the required standard**

vii. **The Respondent erred in law and in fact in imposing a financial penalty against the Appellant without conducting a hearing conference on mitigating factors before sentencing as required by section 36 of the Act**

viii. **The Respondent erred in law and in fact in imposing a financial penalty against the Appellant based on a 0.5% of the Appellant's 2021 gross annual turnover whilst the decision was rendered in 2023 contrary to section 36 of the Act**

ix. **The Respondent erred in law and in fact in imposing a financial penalty against the Appellant based on a 0.5% of the Appellant's 2021 gross annual turnover of the Appellant's entire business as opposed to the gross annual turnover of the sub-sector the Appellant operates in, that is, the wire products converters**

14. **First,** The Appellant submitted that the Respondent erred when it held that the technical rules of evidence do not strictly apply to investigations carried out by the Respondent. According to the Applicant, such a holding is contrary to section 106B (4) of the Evidence Act which makes it a mandatory requirement and therefore it cannot be disregarded by the mere fact that the Respondent's processes are regarded as administrative in nature. [15]

15. Moreover, the Applicant avers that, failure by the Respondent to provide a Certificate of Electronic Records which identifies: the electronic records and production process; the particulars of the production device and signed by the responsible person, violates the Appellant's right to fair hearing as provided for under Article 50 (2)(k), 50(3) & 50(4) of the Constitution.

16. The Appellant argues that failure by the Respondent to provide a certificate, there is no confirmation that any of the evidence relied upon by the Authority was not manipulated. Thus, the failure to provide a Certificate of Electronic Records, renders the Evidence labelled 1, 2, 6,

[15] Appellant's Written Submissions dated 30th November, 2024, page 2.

8, 19, 21, 23, 26, 28, 31, 34, 35, 36, 38, 39, 40a, 41A, 45, 50, 52, 56 and 57 and relied upon in the NOPD and the above-noted Decision inadmissible, and contrary to the law and in particular section 33(1) of the Act.

17. The Appellant relied on the case of **Republic v Public Procurement Administrative Review Board & 2 others ex parte International Research and Development Actions Ltd [2017] eKLR,**[16] where the court held that:

> "84. In my view, the Respondent was enjoined to ensure that the decision of the tender evaluation committee complied with the Constitution, the Act and the tender document. My view is reinforced by the decision in **PPRB vs. KRA Misc. Civil Application No. 540 of 2008, [2008] eKLR,** the Court held that:
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> **"To my mind, failure by the Respondents to have regard to mandatory provisions of the Act ...violated the purpose of the Act which is clearly stated ...I find that any breach of a mandatory statutory provision does prejudice in some way the Section 2 objectives...Adherence to the applicable law is the only guarantee of fairness and in the case of procurement law the only guarantee of the attainment of fair competition, integrity, transparency, accountability and public confidence. There cannot be greater prejudice to the applicant than failure by the decision maker to comply with positive law. Failure to adhere to the applicable law, gives rise to a presumption of bias and prejudice contrary to the argument put forward by the Respondent's counsel. The job in my view was not complete or done by just coming up with the mathematically lowest tenderer on top of the pile. The integrity of reaching there is equally important to this court. In many cases it is procedural propriety which is the stamp of fairness."**
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> 88. **...As recognised hereinabove, the Court may intervene where the decision is found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or**

[16] Appellant's Written Submissions dated 30th November, 2024, page,3

through some *misconstruction of the terms of the statutory provision which the decision maker is required to apply*."

18. The applicant posits that the Respondent through its Replying Affidavit still failed to offer any guarantees that the evidence relied upon was not manipulated. Instead, the Respondent offered an Inventory Sheet after the fact, rather than provide the same as soon as the Preliminary Objection dated 7th July, 2022 was filed. Thus, the Respondent's actions do not point to fairness but rather mischief and a means of sanitizing the irregularity in the process conducted.[17] Therefore, the appellant submitted that non adhere by the Respondent to the law renders the process flawed and any decision arising therefrom is null and void for lack of fairness, transparency and integrity.

19. **Second**, the Appellant submits that the Respondent erred by holding that it discharged its mandate and that the administrative process was reasonable, procedurally fair and that no prejudice was occasioned to the Appellant. The Appellant avers that the Respondent rendered its Notice of Proposed Decision (NOPD) with a penalty implication after holding an informal hearing conference as per section 35 of the Act and contrary to Article 50 of the Constitution. According to the Appellant, it is trite law that when a financial penalty is a possibility in a determination, the offence accused of automatically rises to the nature of a criminal offence and the constitutional rights of an accused person apply to the proceedings.[18]

20. To augment this point, the Appellant referred to the following cases:[19] **Schindler Holding Ltd and Others v European Commission and Others (18th April, 2013)**, the court held that:

> *" It is recognised that competition law is similar to criminal law, but is not part of the core area of criminal law."*

The Appellant also relied on the case of **Napp Pharmaceutical Holdings Limited and Subsidiaries and Director General of Fair Trading (Case No. 1001/1/1/01,**

[17] Appellant's Written Submissions dated 30th November, 2024, page,3
[18] Appellant's Written Submissions dated 30th November, 2024, page,4
[19] See the Appellant's Written Submissions dated 30th November, 2024, page,4

Competition Commission Appeal Tribunal (15th January, 2002)), where it was held that:

"As we have already stated in our interim judgment of 8 August 2001, we agree that these proceedings are "criminal" ... That is particularly so since penalties under the Act are intended to be severe and to have a deterrent effect: see the Director's statutory Guidance as to the appropriate amount of the penalty, (OFT 423, March 2000) issued under section 38(1) of the Act.

99. The fact that these proceedings may be classified as "criminal" ... gives Napp the protection of Article 6, and in particular the right to "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" (Article 6(1)), to the presumption of innocence (Article 6(2)), and to the minimum rights envisaged by Article 6(3) including the right "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him" (Article 6(3)(d))."

21. To this end, the Appellant argued that it had a right to cross-examine the investigator and/or the investigative team but did not have the opportunity to do so as it neither had knowledge of the names of the investigator and/or investigative team nor did it have any witness statement and/or document signed by the investigator and/or investigative team for reference and/or challenge. Therefore, it rendered the Respondent's action and process before it flawed for being in breach of section 4(4) of the Fair Administrative Action Act.

22. Furthermore, the Appellant submits that the panel and or the team that rendered the above-noted Decision remains unknown to the Appellant and therefore it may be inferred that the team before who the Appellant's representative appeared on 1st August, 2022 for the oral representation, may have been the same team rendering the above-noted Decision. Accordingly, the Appellants noted that the Appellant's constitutional rights to know its accuser and the deciding body was violated necessitating the appeal.

23. **Third,** the Appellant avers that the Respondent erred when it held that the Appellant was culpable of engaging in price fixing agreements in contravention of section 21(1) of the Act as

read together with section 21(3)(a) of the Act. The Appellant stated that the Respondent relied on Evidence 45 and further failed to discharge its burden of proof before arriving at its decision, particularly on the aspect that the standards discussed vide Evidence 1 and 2 materialized, were applied and resulted in an increase in profit margins.[20]

24. According to the Appellant, the Respondent ought to have considered that the revision of price lists is based on market trends and a coincidence in change of prices does not necessarily implicate the Appellant to any agreement on price fixing.

25. Furthermore, Appellant argued that the Respondent ignored the fact that the Appellant had no knowledge of and was not mentioned in the correspondence as per Evidence 8, 23 and 36 and as such, the Evidence exculpates the Appellant. The Appellant relied on the case **Aranda Textile Mills (Pty) Ltd and Another v The Competition Commission of South Africa (190/CAC/DEC20) [2021] ZACAC 1; 2023 (2) SA 182 (CAC); [2023] 1 CPLR 3 (CAC) (17 December 2021),[21] the Competition Appeal Court of South Africa held that:**

> "[49] In this case neither of the two witnesses called by the Commission had personal knowledge of an agreement or collusive conduct between Aranda and Mzansi. The Commission's witnesses were Ms Van Niekerk an employee of the Treasury who evaluated the bids on the Tender, and Mr Vilikazi who had first raised his suspicion. Their speculation was based on the pricing. As submitted by Aranda, the witnesses could do little more than read the contents of their witness statements into the record and offer their opinion that there had been unfairness because Aranda had treated Mzansi differently from the other bidders. The Commission produced no evidence pointing to an agreement on pricing. Their evidence was intuitive, speculative and based on a facial analysis of what was contained in the documents. [50] Moreover, the Commission's witnesses could not support core averments in the Referral that: "[i]n terms of the agreement, Aranda *would provide Mzansi with its tender documents including pricing schedule* which Mzansi *will use to prepare its own tender including pricing*." and that the agreement further entailed that Mzansi will add 7.25% "on

[20] Appellant's Written Submissions dated 30th November, 2024, page,5
[21] Appellant's Written Submissions dated 30th November, 2024, page,6

Aranda's prices of the blankets to be submitted to National Treasury when bidding for this tender." There was no evidence supporting the terms of the Referral save for the reference to the 7.5% pricing methodology which Mzansi added on to the prices Aranda gave it.[51] No evidence could be gleaned from the testimony of Mr Magni and Ms Paruk to support the basis of the contravention as pleaded in the Referral. [52] In addition, Mr Magni was adamant that he had no agreement with Mzansi relating to pricing and nor had he colluded with Mzansi. It was clear from his evidence that he favoured Mzansi, trusted its payment commitments and did not regard it as a payment risk. These views were justifiably held, based on their long business relationship and the previous relationship with Ms Paruk's father-in-law, the owner of Africhoice. [53] Mr Magni, under cross examination, confirmed the manufacturer and distributor relationship between Aranda and Mzansi when he said that Aranda would not contact customers including Mzansi, but it is the customer that contacts Aranda. **[54] It is a flawed approach to square communication between manufacturer and distributor into a horizontalist net without rigorous analysis. Commerce is robust in our modern era and many discussions would routinely take place between manufacturer and distributor and even where they are competitors such as in this tender. Caution must be exercised when drawing inferences from communication that take place simply because one is a manufacturer and the other a distributor of the product. [55] In light of the lack of evidence, that is of proven facts, the Tribunal had no basis to draw the inferences it did in concluding that Aranda and Mzansi directly or indirectly fixed a price for the tender or agreed any other trading condition or that there were collusive dealings on a balance of probabilities between Aranda and Mzansi.**

26. To this end, the Appellant posits that those questioned about Evidence No.1 responded that the discussion related to standards and not necessarily pricing of items. As a result, there is no proof of an agreement and therefore, an inference made, based on communication, on price fixing is improper for lack of sufficient evidence and satisfying the required standard of proof by the Respondent.

27. Furthermore, the Appellant submitted that the Respondent failed to prove presence and or existence of a collusive agreement which includes the Appellant's involvement or the sharing of the Appellant's price list before it has been effected. That there was no mention of the Appellant's name in relation to collusion on pricelists instead, the Respondent relied on evidence that does not relate to the Appellant to find it culpable of price fixing contrary to the provisions of the Act and the Consolidated Guidelines.

28. According to the Appellant, the Respondent had the onus of demonstrating that a collusive agreement actually existed and involved the Appellant, for culpability to arise. In this instance, the Respondent has not proved the Appellant's involvement.

29. **Fourth,** the Appellant avers that the Respondent erred in finding that the meeting attended by the Appellant as per Evidence 45 amounted to price fixing and involvement in output restrictions contrary to Article 36(1) of the Constitution. According to the Appellant, the KAM Secretariate were not present during the meeting and thus no minutes were taken. Therefore, the informality of the meeting illustrated that the members present were simply exercising their constitutional right to freedom of association with no intention of engaging in any formal meeting. And in any event, the Respondent did not adduce any evidence to show that the Appellant increased its prices after 15th September, 2021 as alleged by Evidence 45.[22]

30. The Appellant therefore submitted that in collusive agreements, there must be proof that a collusive agreement actually existed and involved the Appellant, for culpability to arise. In this instance, the Respondent has not proved that Evidence 45 culminated in a price fixing agreement. The Appellant urged the Tribunal to be persuaded by the findings in the case **Aranda Textile Mills (Pty) Ltd and Another v The Competition Commission of South Africa, cited above.**[23]

[22] Appellant's Written Submissions dated 30th November, 2024, page,7
[23] Appellant's Written Submissions dated 30th November, 2024, page,6

31. **Fifth,** The Appellant contended that the Respondent erred when it held that the Appellant was involved in output restriction within the steel sector contrary to section 21(1) as read together with section 21(3)(e) of the Act. According to the Appellant, the Respondent in arriving at its finding, the Respondent did not discharge its burden of proof before arriving at its decision, particularly on the aspect that the Appellant together with others restricted output in order to create artificial shortage with the ultimate aim of increasing prices.[24]

32. The Appellant further argued that the Respondent's relied on exculpatory evidence i.e Evidence 45 which relates to a meeting held in September, 2021; Evidence 3 which are Minutes of a Meeting held on 13th November, 2019 and to which the Appellant was not present or represented; Evidence 28 which relates to correspondence done in October, 2016 and to which the Appellant was not part of; Evidence 31 which relates to correspondence done in November, 2018 and to which the Appellant was not part of; Evidence 39 which relates to correspondence done in November, 2018 and to which the Appellant was not part of; and Evidence 50 which relates to internal correspondence done in May, 2021.

33. The Appellant has urged the Tribunal to set aside the Respondent's Decision for failure to, not only meet the required standard of proof as per the Consolidated Guidelines, but also failed to demonstrate presence or existence of a collusive agreement which includes the Appellant's involvement. Instead, the Respondent relied relies on evidence that does not point to the Appellant's culpability.

34. **Sixth,** the Appellant contends that the Respondent erred when it convicted and penalized the Appellant under sections 21(1) as read together with sections 21(3)(a)(e) of the Act and section 36 of the Act respectively when the burden of proof was not discharged to the required standard. [25]

35. The Appellant argued that since the offences investigated are of a criminal nature by virtue of section 21 of the Act, any evidence placed against an undertaking, must be proved on a standard higher than a balance of probability and there must not be any reasonable doubt in favour of the

[24] Appellant's Written Submissions dated 30th November, 2024, page,8
[25] Appellant's Written Submissions dated 30th November, 2024, page,9

accused undertaking in meting out a financial penalty against an undertaking. The Appellant made reference to **United Nations Conference on Trade and Development in its paper, 'Enhancing legal certainty in the relationship between competition authorities and judiciaries' TD/B/C.I/CLP/37 (Intergovernmental Group of Experts on Competition Law and Policy Fifteenth session Geneva, 19–21 October 2016)** which held that:

> "The legal burden differs **in administrative proceedings (to review the legality of determinations made by administrative authorities), quasi-criminal proceedings (to decide on penalties imposed on antitrust violators)** and civil proceedings (to deal with damage claims based on competition law grounds, for example by the victims of a cartel)."

36. Therefore, according to the Appellant, it was not sufficient for the Respondent to argue that proceedings before it are administrative in nature only when there is a risk of a penalty. The Appellant submits that as soon as a finding of culpability attaches, the proceedings shift to be one of quasi-criminal and the standard of proof rises to be one higher than a balance of probability and there must not be any reasonable doubt in favour of the accused undertaking in meting out a financial penalty against an undertaking.

37. The Appellant in support of its case relied on the case of **Napp Pharmaceutical Holdings Limited and Subsidiaries and Director General of Fair Trading.**[26] Where it it was held that:

> **"Since cases under the Act involving penalties are serious matters, it follows from Re H that strong and convincing evidence will be required before infringements of the Chapter I and Chapter II prohibitions can be found to be proved, even to the civil standard. Indeed, whether we are, in technical terms, applying a civil standard on the basis of strong and convincing evidence, or a criminal standard of beyond reasonable doubt, we think in practice the result is likely to be the same. We find it difficult to imagine, for example, this Tribunal upholding a penalty if there were a reasonable doubt in our minds, or if we were anything less than sure that the Decision was soundly based."**

[26] Appellant's Written Submissions dated 30th November, 2024, page,9

38. The appellant posits that, in view of the existence of exculpatory evidence and more so, reliance of evidence that do not point to its involvement, it is certain that the decision to penalize the Appellant was flawed as the same was not based on evidence persuasive enough to attach culpability and warrant a penalty.

39. The Appellant further submitted that, Evidence 5 and 7 would have potentially exculpated the Appellant from any culpability but the same was not provided for consideration by the Appellant's Advocates. The Appellant posits that the same was merely shown to the Appellant's representative for comment before the issuance of the NOPD and not provided later to enable the Appellant properly defend itself contrary to Article 25(c) and 50(2) of the Constitution and section 4 of the Fair Administrative Action Act.

40. **Seventh,** the appellant submitted that the Respondent erred in imposing a financial penalty against the Appellant without conducting a hearing conference on mitigating factors before sentencing as required by section 36 of the Act. The appellant stated it is therefore trite law that before a penalty is imposed, a hearing conference for mitigation before sentencing must be held pursuant to Article 50(2) of the Constitution since Article 50 applies to any dispute, criminal, civil and/or administrative disputes. Of importance to note is that Article 50 of the Constitution is on fair hearing which cements the non-derogable right to fair trial provided for under Article 25(c) of the Constitution and therefore applies to all disputes to be resolved through the application of the law.[27]

41. Further, the Respondent's exercise of discretion to impose a 0.5% penalty on the gross annual turnover, was not based on a predetermined matrix, published and known to the Appellant prior to the Decision and therefore the basis of 0.5% is unknown, unfair and unjustified. Therefore, for such exercise of discretion to be judicious, the same must be based on mitigating factors adduced by the Appellant through a formal hearing conference, particularly so since the

[27] Appellant's Written Submissions dated 30th November, 2024, page,11

Decision notes that there were exculpatory evidence in favour of the Appellant in respect of some of the charges raised against manufacturers and distributors in the steel sector.

42. The Appellant relied on the case of **Francis Karioko Muruatetu & another v Republic [2017] eKLR**[28] The Supreme Court held that:

> *"46] We are of the view that mitigation is an important congruent element of fair trial. The fact that mitigation is not expressly mentioned as a right in the Constitution does not deprive it of its necessity and essence in the fair trial process. In any case, the rights pertaining to fair trial of an accused pursuant to Article 50(2) of the Constitution are not exhaustive.*
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> [47] **Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the same vein Article 25(c) of the Constitution elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.**
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> [48] **...Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right."**

43. According to the Appellant, the Respondent relied on the Competition Administrative Penalties and Settlement Guidelines, 2020 ("**the Guidelines**") as its justification for imposing the penalty at 0.5% and yet paragraph 31 of the Guidelines, the Respondent is mandated to consider other mitigating factors provided by a party, an opportunity that according to the Appellant was never accorded to them.

[28] Appellant's Written Submissions dated 30th November, 2024, page,11

44. The Appellant submits that the financial penalty imposed on it was harsh, unjust and unfair for failure to consider mitigating factors which could have been adduced by the Appellant, had there been a hearing conference on mitigation.

45. **Eighth,** the applicant states that the Respondent erred in imposing a financial penalty against the Appellant based on a 0.5% of the Appellant's 2021 gross annual turnover whilst the decision was rendered in 2023 contrary to section 36 of the Act.[29]

Section 36(d) of the Act provides that

> **"After consideration of any written representations and of any matters raised at a conference, the Authority may take the following measures—**
> **(d) impose a financial penalty of up to ten percent of the immediately preceding year's gross annual turnover in Kenya of the undertaking or undertakings in question"**

46. On this premises, the Applicant states the Respondents assertions that investigations were commenced in 2020 and finalized in August, 2022 and the subsequent months up to the issuance of the determination in August, 2023 were spent in seeking relevant approvals. However, the appellant refutes this position as the averments by the Respondent remain unsubstantiated as a result of lack of proof.

47. The Appellant states that the above-noted Decision was rendered on 21st August, 2023 and a Press Release issued on Wednesday, 23rd August, 2023 and thus, the Respondent ought to have sought and relied upon the 2022 gross annual turnover.

48. **Ninth,** the Appellant submits that The Respondent erred in imposing a financial penalty against the Appellant based on a 0.5% of the Appellant's 2021 gross annual turnover of the Appellant's entire business as opposed to the gross annual turnover of the sub-sector the Appellant operates in, that is, the wire products converters. [30]

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[29] Appellant's Written Submissions dated 30th November, 2024, page,11
[30] Appellant's Written Submissions dated 30th November, 2024, page,11

49. According to the Appellant, The NOPD was issued to the Appellant based on Mr. NeelKamal Shah's chairmanship of the Wire Products Converters sub-sector on behalf of the Kenya Bureau of Standards (KEBS). This is proved through the evidence produced against the Appellant which is based on correspondence based on the Wire Products Converters sub-sector and not the entire business of the Appellant. The appellant argues that, a person may only be convicted or penalized for an offence made known to it and a penalty must be proportionate to the offence committed.

50. The Appellant argues that a penalty based on the entire balance sheet of the Appellant's business is not proportionate to the alleged offence committed nor does it amount to fairness and reasonableness given the evidence relied upon by the Respondent which is based on the Wire Products Converters sub-sector and not the entire business of the Appellant.

51. As a consequence, therefore, the Appellant urges the Tribunal for an order that the part above-named Decision of the Authority appealed against be set-aside, reversed or vacated in whole with costs to the Appellant or in the alternative, the penalty amount noted in the above-named Decision be varied and reduced to the extent that this Tribunal deems fit and the costs of this Appeal be awarded to the Appellant in any event.

D. RESPONDENT'S CASE.

52. 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.[31]

53. The Respondent's pursuant 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

[31] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, paragraph 4.

Rolling Mills (Tononoka), Abyssinia Group Industries (Abyssinia) ,Apex Steel Limited (Apex) on 15th December, 2021 and Insteel Limited (Insteel) on 21st December, 2021.

54. 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.[32]

55. 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 honouring the summons, the Respondent stated that, Mr. Neelkamal Shah appeared on behalf of the Appellant for the interview on 25th March, 2022 to respond to the issues contained in the Notice of Investigation.[33]

56. 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

[32] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, paragraph 6
[33] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, paragraph 8. See also Exhibit GM-2.

(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.[34]

57. In response to the NOPD, the Appellant submitted their written representations dated 6th July, 2022 and upon request by the Appellant, the Respondent convened a hearing conference with the Appellant on 1st August, 2022 pursuant to section 35 of the Act.[35]

58. 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 contravened section 21(1) as read together with section 21(3)(a) of the Act that prohibits any agreement, decision or concerted practice which directly or indirectly fixes purchase or selling prices or any other trading condition; and that the Appellant together with twelve (12) other manufacturers and distributors of steel contravened section 21(1) as read together with section 21(3)(a) of the Act that prohibits any agreement, decision or concerted practice which limits or controls production, market outlets or access, technical development or investment.

59. Upon hearing the presentation by the Appellant, the Respondent made the following Decision pursuant to Section 36 of the Act, That the conduct of the Apellant:[36]

    i. together with Apex, Brollo, Tononoka, Insteel, Jumbo, MRM, Devki, Doshi, Abyssinia, 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; and
    ii. together with Apex, Doshi, MRM, Insteel, Devki, Jumbo, Corrugated, Abyssinia, Blue Nile, Brollo and Tononoka constituted an infringement of section 21(1) as read together with section21(3)(e) of the Act.
    iii. the Respondent restrained the Appellant from engaging in conduct that violates section 21(1) of the Act as read together section21(3)(e) of the Act.
    iv. the Respondent restrained the Appellant from future violations of the Act.

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[34] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, paragraph,9
[35] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, paragraph 10
[36] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, (Exhibit GM 5(a) page 42-77)

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

vi. the Respondent directed 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 Respondent imposes a financial penalty of 0.5% of Appellant's 2021 gross annual turnover in Kenya amounting to Kes. 22,816,546.01

60. The Respondent stated that it communicated its final determination dated 17th August, 2023 as well as statement of reasons of the same to the Appellant via email on 21st August, 2023 and hard copies served on 23rd August 2023.[37]

61. The Respondents in prosecuting its case identified several issues for determination by the Tribunal.[38]

i. **Whether the technical rules of evidence strictly applied to investigations carried out by the Respondent;**

ii. **Whether the Respondent discharged its mandate of conducting the investigations, analyzing the evidence and making a decision in an expeditious, efficient, lawful, reasonable and procedurally fair manner;**

iii. **Whether Appellant was culpable of engaging in price fixing agreements in contravention of section 21(1) of the Act as read together with section 21(3)(a) of the Act;**

iv. **Whether Appellant was culpable of engaging in output restriction agreements in contravention of section 21(1) of the Act as read together with section 21(3)(e) of the Act;**

v. **Whether the Respondent discharged its burden of proof to the required standard in arriving at its determination against the Appellant;**

[37] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, paragraph 12

[38] Respondent's written submissions dated 5th, February, 2024, at page 5

vi. **Whether the Respondent is mandated to hold a hearing conference on mitigating factors before imposing a financial penalty under section 36(d) of the Act;**

vii. **Whether the Respondent complied with the law in imposing a financial penalty against the Appellant's 2021 gross annual turnover; and**

viii. **Whether the Respondent complied with the law in imposing a financial penalty against the Appellant's 2021 gross annual turnover *vis a vis* the gross annual turnover derived from its wire products converters subsector.**

62. **First,** in response to as whether the technical rules of evidence strictly applied to investigations carried out by the Respondent, the Respondent's submitted that the proceedings before it were administrative in nature and therefore the strict rules of evidence did not apply.

63. The Respondent relied on the case ***Joseph Mbalu Mutava v Attorney General & another [2014] eKLR***,[39] where the court held that *"It is also not necessary that strict rules of evidence be applied in such inquiry."* In this stated case, 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 further observed that:

> ***"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..."***

64. Furthermore, the Respondent submitted that its investigation process, are guided by Article 47 of the Constitution of Kenya, 2010 and sections 31 – 40 of the Competition Act as read together with section 4 of the Fair Administrative Action Act No. 4 of 2015.(FAAA) According to the Respondents, the stated laws prescribe the approach to be followed in an administrative process and therefore the Appellant's assertion that the certificate of electronic record is required under section 106B (4) of the Evidence Act in an administrative process lacks basis in law.[40]

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[39] Respondent's written submissions dated 5th, February, 202, at page 6

[40] The Respondent's written Submissions dated 5th February 2024

65. The Respondent further submitted that its obligation in sourcing the electronic evidence from the devices under investigation was to ensure that the process, custody and delivery of the said electronic evidence was reasonable and procedurally fair to any party under investigation as envisaged under the Constitution, Competition Act and FAAA and not the Evidence Act. The Respondent further that the extracted information from the electronic devices and issued an inventory list of the said evidence and all the digital and documentary information extracted to the Appellant.[41]

66. According to the Respondent's, sections 32(4) as read together with section 9(m) and 13(2) of the Competition Act give the Respondent powers to seek the assistance of police officers and other law enforcement agencies in its execution of the mandate including liaising with regulatory bodies and other public bodies in all matters relating to competition and consumer protection. Consequently, the Respondent sought the assistance of Ethics and Anti-Corruption Commission's (EACC) forensic laboratory in the extraction of information from mobile phones and laptops which assistance they sought including the help of consultants.[42]

67. The Respondent posits that after the extraction of information, the Respondent invited the owners of the devices, who appeared before the Respondent and were accorded an opportunity to verify the extracted information, which according to the Respondent-they confirmed.[43]

68. The Respondent contended that it discharged its obligation to ensure that the process, custody and delivery of the said electronic evidence was reasonable and procedurally fair to the parties under investigation as envisaged under Article 47 of the Constitution, the Competition Act and FAAA.

69. **Second,** as to whether the Respondent discharged its mandate of conducting the investigations, analyzing the evidence and making a decision in an expeditious, efficient, lawful, reasonable and procedurally fair manner. The Respondent's submitted that it discharged its mandate of

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[41] The Respondent's written Submissions dated 5th February 2024, page 7
[42] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, paragraph 19
[43] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, paragraph 23

conducting the investigations, analyzing the evidence and making a decision in an expeditious, efficient, lawful, reasonable and procedurally fair manner.[44]

70. The Respondent's argues that, contrary to the assertions by the Appellant that imposition of a penalty under section 36 of the Competition Act raises the matter to the threshold of a criminal offence warranting compliance with Article 50 of the Constitution, the Respondent posits that what determines whether a matter is civil or criminal is the remedy provided for in the Statute.[45]

71. The Respondent states that in respect to price fixing, the Competition Act under section 21 provides for both administrative and criminal remedies pursuant to sections 36 and 1(9) of the Act respectively. Accordingly, the criminal remedies can only be imposed on conviction following prosecution by the Office of the Director of Public Prosecution (ODPP) which is not the case herein.

72. Accordingly, the Respondent submits that despite there being a financial penalty imposed under the Competition Act, the penalty was an administrative financial penalty and the proceedings maintained their administrative nature. In support of their position, the Respondent relied on the case ***Miscellaneous Civil Application 220 of 2019*** **Aly** ***Khan Satchu v Capital Markets Authority [2019] eKLR.***[46] where the court held:

    a. ***"that proceedings before CMA do not lie within the criminal sphere and cannot be classified as being criminal in nature. Accordingly, when CMA undertakes administrative and regulatory proceedings and imposes administrative penalties, the decision remains administrative in nature and falls within the four corners of the areas assigned to it by the legislature. It follows that the argument that CMA has no regulatory mandate over the applicant in allegations relating to Insider Trading just because they disclose a criminal offence fails."***

73. The court further held that:

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[44] The Respondent's written Submissions dated 5th February 2024, page 8
[45] The Respondent's written Submissions dated 5th February 2024, page 9
[46] The Respondent's written Submissions dated 5th February 2024, page 9

a. ***"In addition, it is my finding that the applicant was not charged and tried for the "criminal offence" of Insider Trading. On the contrary the Respondent was exercising its regulatory mandate under the Act."***

74. In response to the Appellant's assertion on their right to cross examine the investigator and investigative team, the Respondent submitted that, pursuant section 31(1) of the Competition Act, it initiated investigations into the steel sector *suo moto* and independently gathered information, analyzed it and examined it leading to the NOPD issued to the Appellant in accordance with section 34 of the Act and thus, there were no witnesses to be cross-examined.[47]

75. In addition, Respondent submitted that cross examination occurs in the instance that there are witnesses giving adverse evidence against a party under investigation. In this instance, the Respondent argued that in the course of the investigation there were no witnesses who gave adverse evidence against the Appellant and it therefore did not rely on statements of witnesses who had given adverse evidence against the Appellant who then would otherwise qualify to be the Respondent's witnesses, on the basis of which examination in chief and a corresponding right to cross-examination would arise in favour of the Appellant. Therefore, the Respondent posits that the right to cross-examine witnesses did not arise.[48]

76. In response the issue of separation of roles and the Appellant's assertion that the panel or team that rendered the decision is the same that carried out the investigations and conducted oral hearings, the Respondent submitted that the administrative process envisaged under section 31 to 40 of the Competition Act has created sufficient safeguards to ensure a procedurally fair process for parties under investigation with clear notice of the allegations against them. The Respondent added that an aggrieved had an opportunity to rebut the allegations before them and a right to be supplied with a decision of the Respondent together with the reasons of the decision with a further opportunity to appeal before an independent Competition Tribunal.[49]

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[47] The Respondent's written Submissions dated 5th February 2024, page 10
[48] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, paragraph 33
[49] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, paragraph 35

77. The Respondent relied on the case of ***Schindler Holding Ltd and Others v European Commission and Others (18th April, 2013).***[50] in which the court confirmed that the roles of an investigator, prosecutor and enforcer in competition law can be concentrated in the hands of the European Commission. This concentration of powers can occur *without any compromise of the fundamental rights that might otherwise be seen to stem from the conflict of interest arising from an institution exercising such potentially conflicting powers*. The Respondent highlighted paragraph 34 of the Court's decision which stated as follows:

> ***"...entrusting the prosecution and punishment of breaches of the competition rules to administrative authorities is not inconsistent with the ECHR in so far as the person concerned has an opportunity to challenge any decision made against him before a tribunal that offers the guarantees provided for in Article 6 of the ECHR".***

78. The Respondent also relied on the Supreme Court case in ***Alnashir Popat & 7 others v Capital Markets Authority [2020] eKLR.***[51] which according to the Respondent's recognized that multiplicity of roles by the Authority is not prima facie unfair or unconstitutional and held the following in paragraph 41:

> ***"...In most common law jurisdictions, for instance Australia; Uganda; Tanzania, Nigeria; and Ghana, the regulatory and enforcement frameworks are statutory with the relevant statutes also creating the regulatory authorities and spelling out their functions. Though there is no uniform regulatory and enforcement scheme, to achieve the objective of their statutes, most jurisdictions, [including Kenya], expressly authorize an overlap of functions which in normal judicial proceedings would be kept separate...".***

79. In response to the issue of the overlapping of roles by the Authority and that offends the principle of *nemo judex in causa sua esse* (that no man can be judge in their own cause), the Respondent further relied in the Supreme Court case referred to above ***Alnashir Popat & 7 others v Capital Markets Authority*** cited above and specifically paragraph 49 which held that:

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[50] The Respondent's written Submissions dated 5th February 2024, page 10
[51] The Respondent's written Submissions dated 5th February 2024, page 11

"...An important exception to the nemo judex in causa sua esse principle raised in this case is where the overlap of functions is a creature of statute and as long as the constitutionality of the statute is not in issue..."

80. **Third,** in response to whether Appellant was culpable of engaging in price fixing agreements in contravention of section 21(1) of the Act as read together with section 21(3)(a) of the Act, the respondent highlighted Section 21(1) of the Act as read together with section 21(3)(a) of the Act and section 21(3)(e) 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;***
b. ***(e) limits or controls production, market outlets or access, technical development or investment;***

81. The Respondent argued that the provisions prohibit 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. Moreover, the Respondent argues the Act provides a non-exhaustive list of the prohibited agreements, decisions or concerted practices and in present case, they were price fixing and output restriction.[52]

[52] The Respondent's written Submissions dated 5th February 2024, page 13

82. In response to the Appellant's submission that the Respondent had failed to prove culpability on the part of the Appellant for pricing fixing and that there has been failure to adduce evidence, the Respondent submitted that in assessing hard-core restrictions, it is guided by clause 41 of the Consolidated Guidelines on Restrictive Trade Practices which states that it considers that horizontal collusive agreements are subject to "**object**" assessment, that is, strict or per se scrutiny for which no defenses can be asserted and that it will only consider the content and nature of the agreement and not the effect of the agreement.

83. To augment this position, the Respondent's relied on the case of ***T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit (C-8/08)***[53], under paragraph 31 wherein it was held that:

> ***"...Once an agreement has been classified as a restriction by object it is presumed to have negative effects and the actual effects of the agreement are not analyzed or assessed. Whether such anti-competitive effects in fact occur is only of relevance for determining the amount of any fine and assessing any claim for damages..."***

84. Consequently, the Respondent submitted that it discharged its burden of proof provided for under clause 54 of the Consolidated Guidelines in making a finding of culpability on the part of the Appellant of engaging in price fixing agreements in contravention of section 21 (1) of the Competition Act as read together with section 21(3)(a) of the Competition Act based on an analysis of evidence 1 together with evidences 2, 19, 23, 31, 36, 34, 40A, 35, 41, 38, 45A, 45B, 45C, 45E, 45F, 50, 51A, 48 and 56, relating to pricing and pricing decisions.

85. The Respondent, proceeded to enumerated in details the evidences listed above and as stated under paragraph 119 to 156 of the Statement of reasons as follows:

86. ***Evidence 1:*** *is an email of 15th May, 2018, sent by Mr. Neelkamal Shah of* ***Nail & Steel Limited*** *(Appellant) to Mr. Niral Salva of Tononoka and copied Brollo Kenya, Mr. Nilesh Doshi of Doshi, Prakash of MRM/Safal group, Mr. Murtaza of Tarmal, Mr. Suraj of Corrugated, Mr.*

[53] The Respondent's written Submissions dated 5th February 2024, page 13

Kunal Gupta of Athi Steel, Mr. Devang of Devki Steel, Mr. Neil Nathwani of Apex and Prabu of MRM and Mr. Amarjit Singh of Accurate. The subject of the email was pricing. In the said email, Mr. Neelkamal Shah indicated that they had spoken the previous week and many ***sizes*** *on the* ***tube pricelist*** *needed to be revised as their* ***gross profit margin*** *was low and, in some cases,* ***negative*** *for the 20*20*1, 25*25*1 40*40*1.2 and 30*30*1.2. The email further indicated that for the 20*20*1 they were all left with KES 12 to KES 13* ***gross profit*** *and on 25*25*1 about KES 15 per length of 6 metres. Mr. Niral Salva was tasked to look into it as they were* ***all*** *pushing huge tonnages but with* ***no margin.*** [54]

87. The Respondent's relied on paragraph 7.1 of the Appellant's response to NOPD dated 6th July, 2022, where Mr. Neelkamal Shah (the Appellant's director) admitted to sending the email (Evidence 1), but stated that it related to standards in the tube sector and that naturally, the discussion would have an implication on pricing. The Appellant stated it was important that sector players have discussions on specifications including weight and thickness which inform pricing and they relied on section 21(6) of the Competition Act.[55]

88. The Respondent also highlighted paragraph 6.1 of the Appellant's response to NOPD dated 6th July, 2022, where the Appellant denied that discussions on pricing, discounts or product specification were done with the intention of protecting commercial interest by preventing, distorting or limiting competition but that the discussions were solely based on enhancing competition among industry players. Furthermore, in paragraph 6.4 of the Appellant's response to NOPD dated 6th July, 2022, according to the Respondent the Appellant admitted that there had been several meetings during which they discussed prices, margin profits and/or product specifications such as weight and thickness but that the discussions were not of the nature prohibited by regulation or whose object was to fix prices, margins or other terms of trade.[56]

89. According to the Respondent', there was an unequivocal admission by the Appellant that steel manufacturers and distributors had meetings in which they discussed pricing, margin profits

[54] The Respondent's written Submissions dated 5th February 2024, page 14
[55] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, Exhibit GM (4) (a) at page 34
[56] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, Exhibit GM (4) (a) at page 33

and product specifications which had a bearing on pricing of products in contravention of section 21(1) of the Competition Act as read together with section 21(3)(a) of the Competition Act. According to the Respondent's, the argument that the object was not to fix prices was untenable since the Competition Act categorically prohibits any agreement, decision or concerted practice that directly or indirectly fixes purchase or selling prices or any other trading conditions.

90. The Respondent also relied on Clause 28 of the Consolidated Guidelines on Restrictive Trade Practices *(hereinafter referred to as 'Consolidated Guidelines')* which describe hardcore restrictive agreements as those that are by their very nature are injurious to the proper functioning of competition and have no redeeming value whatsoever. Additionally, Clause 29 of the Consolidated Guidelines lists price fixing as a hard-core restriction and in particular Clause 30(iv) describes an agreement or arrangement to indirectly restrict price competition in some way as an example of such a restriction.[57]

91. The Respondent further relied on Clause 41 of the Consolidated Guidelines in assessing hard-core restrictions, which provides that it considers that horizontal collusive agreements are subject to "object" assessment, that is, strict or per se scrutiny for which no defenses can be asserted and that it will only consider the content and nature of the agreement and not the effect of the agreement. And that, the Appellant together with other companies in the industry met and discussed a way forward with regard to mitigating the negative effects of the decreasing profit margin. The Respondent therefore concluded that the discussion was aimed at the protection of the margins of the Appellant and 13 other manufacturers and distributors of steel products, which was an indirect price fixing arrangement. [58]

92. The Respondent submitted that section 21(6) of the Competition Act as read together with section 21(5) reveals that the Competition Act does not apply to violations under section 21(5) in instances where an agreement or a concerted practice is deemed to exist between undertakings where one has a significant interest in the other or have at least one director or one

[57] The Respondent's written Submissions dated 5th February 2024, page 15
[58] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, paragraph 37.6 &7

substantial shareholder in common and the undertakings engage in practices that are otherwise prohibited but only within themselves.

93. The Respondent therefore submitted that the Appellant's reliance of section 21(6) was erroneous since there was no agreement of the nature envisaged under section 21(5) of the Competition Act and therefore the rebuttable presumption envisaged under section 21(6) did not arise.[59]

94. Moreover, the Respondent further submitted that the subject of the email, **'Pricing',** buttressed the purpose of the discussion was not on standards but the revision of sizes with the aim of standardizing pricing and increasing their gross profit and margins therefore amounting to a contravention of section 21(1) of the Competition Act as read together with section 21(3) (a) of the Competition Act.[60]

95. With respect **to Evidence 2:** which is an email sent on 24th September 2018, at 2.24 pm by Nilesh Doshi of Doshi, to Niral Savla, of Tononoka and also Chairman of the Pipes and Tubes sub-sector in KAM. In copy were Neil Nathwani of Apex Group and also Chair of Hot Rolling sub-sector, Kishore Gangadharan of Insteel, Prakash Chauhan of Safal Group, Neelkamal Shah of Nail & Steel Limited, Suraj of Corrugated, Kunal Gupta of Athi Steel, Ketan Doshi of Brollo, Jateen Patel of Abyssinia, Kaushik Pandit of Devki, Murtaza Tarmal of Tarmal Wire Products Limited, Davinda Bhachu of Accurate, Devang of Devki and Bobby Johnson of Steel Makers Limited.[61]

96. The Respondent posits that the Appellant's response with respect to Evidence 2 in paragraph 8 of their response stated that the discussions related to proposed standards to be set in the industry and that the discussions did not relate to price fixing or distortion of competition but on standards so as to improve the market. According to the Respondent, the acknowledgement by the Appellant in paragraph 7.1 of their response, their discussions on standards had an

[59] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, paragraph 37.9
[60] The Respondent's written Submissions dated 5th February 2024, page 16
[61] The Respondent's written Submissions dated 5th February 2024, page 17

implication on pricing given the high competition in the sector and also informed pricing of products. Additionally, the Respondent posits that paragraph 6.1 of the Appellant's response stated the purpose of the discussions was to enhance competition among industry players.[62]

97. The Respondent avers that the Appellant's submission that their discussions were intended to enhance competition is no defence since agreements on pricing are per se prohibited and therefore it was the Respondent's view that it had demonstrated the existence of the prohibited practices and that the email was an invitation to the said companies to agree on importing similar sizes/thickness in order to have similar pricing strategies with the view of limiting competition. [63]

98. On Evidences **23, 36, 53A, B, C & D and 8**, the Respondent considered to establish simultaneous price revisions between the Appellant and 13 other manufacturers and distributors of steel in Kenya. The Respondent highlighted that **Evidence 23**, is a WhatsApp communication of 20th August 2020 between Mr. Kush Nathwani of Apex and Mr. Neil Nathwani of Apex where Mr Neil was reporting that he had talked to Mr. Kaushik Pandit of Devki and in their discussion, there was a confirmation that there would be new prices for rebars from Monday 24th August 2020 and new prices for tubes effective 1st September 2020.[64]
99. **Evidence 36** is a WhatsApp communication from Mr. Kush Nathwani of Apex to Mr Neil Nathwani of Apex indicating that another meeting for the steel sector was held on 21st November 2020 at Zen Gardens Restaurant whose agenda was discussions on pricing. According to the Respondent's The evidence confirmed that among those in attendance were Apex, Devki and Tononoka. In addition, **Evidence 53 A, B, C & D** are copies of price lists of the Appellant and other steel manufacturers and distributors.
100. The Respondent avers that upon analysis of the Evidence **23, 36, 53A, B, C & D** and in particular **Evidences 23** and **36,** the steel companies were sharing prices with their competitors and that the prices which were shared were future prices and not current. Additionally, the Respondent argues that from an interrogation of **Evidence 53A, B, C and D,** there was

[62] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, paragraph 37.12
[63] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, paragraph 37.13,14&15
[64] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, paragraph 37.18

coordinated release of pricelists by timing, which was within days of each other with some manufacturers and distributors implementing price revisions on the same day. The Respondent illustrated the price revisions by making comparison of steel sector players.[65]

i. **Tubes Price Revision Dates**

Year	Name of Company	Effective Dates
2019	Doshi Group of Companies	18th February, 2019
	Insteel Limited	20th February, 2019
	Brollo	14th February, 2019
2020	Insteel	2nd September, 2020
	Nail & Steel Limited	1st September, 2020
	Apex Steel Limited	1st September, 2020
	Brollo	1st September, 2020
	Devki Steel Mills	31st August, 2020
	Doshi Group	28th August, 2020
2020	Apex Steel Limited	16th December, 2020
	Insteel Limited	21st December, 2020
	Tononoka Steel Limited	17th December, 2020
	Devki Steel Limited	17th December, 2020
	Doshi Group	16th December, 2020
	Brollo	18th December, 2020
	Tarmal Steel	January, 2021
	Mabati Rolling Mills	January, 2021

[65] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, paragraph 37.20

2021	Doshi Group	30th April, 2021
	Apex Steel	3rd May, 2021
	Brollo	3rd May, 2021
	Devki	1st May, 2021

101. Respondent submitted that it established that the ex-factory tube pricelists issued by Doshi on 28th August, 2020, Devki 31st August, 2020, **Nail & Steel Limited on 1st September, 2020** Brollo on 1st September, 2020, Apex on 1st September 2020 and Insteel on 2nd September 2020, indicated a high degree of uniformity on the timing and release of the price revisions and the pricing for the various range of tube products. These pricelists were issued after the communication between Kush Nathwani and Neil Nathwani of Apex on Tube Pricelists.[66]

102. According to the Respondent's, there exist other evidences corroborating pricing and price fixing for example, **Evidence 19**, a WhatsApp of 11th December 2019 showing that Neil Nathwani was meeting NeelKamal Shah and Tarmal to discuss tubes prices. In addition, **Evidence 23**, a communication between Mr. Kush Nathwani of Apex and Mr. Neil Nathwani of Apex where Mr. Neil was reporting that he had talked to Mr. Kaushik Pandit of Devki and in their discussion, there was a confirmation that there will be new prices for rebars from Monday 24th August 2020 and new prices for tubes effective 1st September 2020.[67]

103. Furthermore, the Respondent stated that on 22nd November 2018, there was a tube sub-sector manufacturers meeting convened at Tononoka offices at 10:00 am in Westlands confirmed by Neil Nathwani of Apex. The evidence indicated that the agenda of the meeting was to discuss prices and reduction of stock levels between manufacturers to ensure price stability. Similarly, on 21st November 2020 there was also a steel sector meeting convened at Zen Gardens to discuss pricing.

[66] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, paragraph 37.22
[67] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, paragraph 37.23 (a-d)

104. The Respondent further submitted that **Evidence 34** and **40A** shows that there was a tubes meeting held on 7th July 2018 at Artcaffe in Westgate and one on Hot Rolling mills at Zen Gardens held on 5th July 2013 respectively. Furthermore, there were other instances of meetings i.e. a Tubes Sub sector meeting scheduled for 10th May 2020 which was restricted to Apex, Doshi, Brollo and Insteel - Apex's team meeting of 6th October 2018, where one of the issues discussed was "*Tubes manufacturer's meeting on Monday. New Prices and discounts to be shared*". Also, **Evidence 38** a WhatsApp message of 4th July 2014, indicating a meeting was held at Athi Steel offices on the subject matter of pricing of deformed bars.[68]

105. The Respondent also highlighted **Evidence 45A, 45B, 45C, 45E, and 45F** which according to the Respondent points to a metal sector price meeting held at Zen Gardens. On 14th September, 2021, where upon, there was an informal meeting held at Zen Gardens Restaurant, Lower Kabete at 3.00pm. The evidence established that the meeting was attended by the following steel manufacturers: Brollo; Tononoka; Jubilee Jumbo; Abyssinia; **Nail & Steel Limited;** Blue Nile; MRM, Insteel; Devki and Apex. The evidence further indicated that the main agenda of the meeting was discussions on metal sector pricing. [69] Other evidences that the Respondent relied upon include:

i. **Evidence 50,** an internal MRM report indicating new prices effective 1st May, 2021. In the report, Mr. Sylvans Okeyo, the Regional Sales Manager of MRM reports that Apex, Tarmal and Abyssinia were undercutting on pricing according to the market situation.

ii. **Evidence 51A**, points to an extract from Insteel Management Report for the 1st Quarter ended 31st March 2017 on assessment of the competition in the local market which reads that there was cut throat competition with most manufacturers struggling to survive hence not maintaining the agreed pricing/discount. According to the Respondent the evidence was corroborated by a sales report by MRM where it indicated that the three big

[68] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, paragraph 37.23 (e&f)
[69] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, paragraph 37.12(g)

manufacturers namely Devki, Abyssinia and Tarmal were still operating with old price lists giving 32% discount.

iii. **Evidence 56**, an extract of a daily sales report dated 10th November, 2020 from Devki, points to the existence of price agreements between Tononoka, Abyssinia, Blue Nile, Tarmal and Jumbo. The Respondent posits that evidence showed Devki complaining that competitors were not increasing their prices after agreements to do so.

iv. **Evidence 57**, which is an email from Mr. Abhijeet Gupta sent to Mr. Manish Mehra (both of MRM) on 3rd September 2021, wherein Mr. Abhijeet stated that MRM had spoken to a few manufacturers and that none planned to move prices that month and that all had had a slow August, and that any increase would impact sales. Mr. Abhijeet therefore advised that MRM goes slow on any raise and once everyone got materials for the month of October, they would then be at ease to throw in the market.

106. With regard to **Evidence 45**, it is the Respondent's submitted that there was an informal meeting held at Zen Gardens Restaurant, Lower Kabete wherein the main agenda of the meeting was discussions on metal sector pricing. According to the Respondent the evidence confirms that the meeting was attended by: Brollo; Tononoka; Jubilee Jumbo; Abyssinia; **Nail & Steel Limited**; Blue Nile; MRM, Insteel; Devki and Apex. Moreover, in the said **Evidence 45E**, the Respondent contends that Mr. Manish stated that, *"Abyssinia seems to be the main player which does not want to increase prices."* According to the Respondent is a clear indication that there was a discussion in the meeting on steel pricing and additionally, that there was an agreement to increase prices but Abyssinia seemed reluctant.

107. Further to this, **Evidence 45F**, an email from Mr. Abhijeet (MRM) in response to Mr. Manish's (MRM) email (Evidence 45E) he stated, *"all will have high priced RM (raw materials)* ***hence everybody decided to increase on price by going slowly as 30% market downsize was also to be taken care off***". The Respondent's conclusion of this statement was

that, due to all meeting attendees having high priced raw materials, a decision was made by them to increase prices slowly to cater for the 30% market downsize.[70]

108. The Respondent further submitted that prior to the meeting of 14th September, 2021, there was evidence of an email dated 11th September 2021, from Mr. Abhijeet to Mr. Sundaresa Prabhu of MRM wherein Mr. Abhijeet requested for preparation of discounts in preparation for a metal sector meeting scheduled for Monday 14th September 2021. On 13th September 2021, Mr. Sundaresa Prabhu responded by forwarding the current discounts for plate pricing together with proposed discounts for the meeting. In addition to this Mr. Sundaresa, stated that, *'Therefore, best is just* ***be 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.'* The Respondent posits that in both emails, the subject matter was the metal sector price meeting of 3.00 pm Monday at Zen Gardens**. (Evidence 45A, 45B and 45C**).[71]

109. The Respondent further submitted that from the subject of the emails, 'metal sector pricing meeting' and the request for proposed discounts in preparation for the meeting to be held on 14th September, 2021, the agenda of the meeting was to discuss steel prices. These discussions were common practice as stated by Mr. Sundaresa in his email and further there were price agreements but some parties would undercut.

110. According to the Respondent, and based on the subject of the email, '*Metal sector pricing*' and the foregoing analysis of the discussions that took place prior to and at the meeting, the Respondent found that the Appellant together with other steel manufacturers and distributors had been having discussions to agree on steel prices and the meeting agreed to increase steel prices and therefore the Appellant participated in price fixing discussions contrary to the Act.

111. Additionally, it is the Respondent's submission that Article 36(1) of the Constitution provides for the freedom of association which is not an absolute right and the constitutional safeguard does not extend to gatherings in furtherance of prohibited conduct. The Respondent argues that the Appellant cannot rely on the defence of the right to freedom of association to engage in a

[70] The Respondent's written Submissions dated 5th February 2024, page 24
[71] The Respondent's written Submissions dated 5th February 2024, page 24

violation of the Competition Act. The Respondent relied on the European Union case of ***Competition Authority vs Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd Case C-209/07 (2008) ECR 2008 I-08637***[72] which the court disputed the use of legitimate objectives as a defense to engaging in restrictive trade practices and held in *paragraph 64* as follows:

> ***"...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) ..."***

112. The Respondent's avers that the sharing of a company's pricing intentions with competitors is anticompetitive as established in ***Case T-19/0 Chiquita Brands International, Inc. and Others v Commission of the European Communities***.[73] where the Commission found that banana importers Chiquita, Dole and Weichert participated in a cartel between 2000 and 2002 in violation of the EC Treaty's ban on cartels and restrictive practices (Article 81). During the relevant period the importers of leading brands of bananas into the eight EU Member States principally served by North European ports set and then announced every Thursday morning their reference price (their "quotation price") for the following week. On numerous occasions over the three-year period there were bilateral phone calls among the companies, usually the day before they set their price. During these calls the companies discussed or disclosed their pricing intentions: how they saw the price evolving or whether they intended to maintain, increase or decrease the quotation price. The Commission's decision was upheld by the European Court of Justice (ECJ).

113. The Respondent further stated that in the ***Chiquita Brands*** case, The ECJ observed that information had been exchanged and that the information could be relevant to infer "signals, trends or indications", that accordingly the exchange of information created abnormal

[72] The Respondent's written Submissions dated 5th February 2024, page 25
[73] The Respondent's written Submissions dated 5th February 2024, page 26

conditions of competition, and that a given practice may have an anti-competitive object even if it does not have a direct link with consumer prices.[74]

114. In conclusion, the Respondent submitted that it had proved the existence of price fixing agreements and therefore the Appellant was culpable together with the 13 other steel manufacturers and distributors of engaging in price fixing agreements in contravention of section 21(1) of the Competition Act as read together with section 21(3)(a) of the Competition Act.

115. **Fourth,** as to whether Appellant was culpable of engaging in output restriction agreements in contravention of section 21(1) of the Competition Act as read together with section 21(3)(e) of the Competition Act, the Respondent submits that the Appellant was found culpable of engaging in output restriction contrary to section 21(1) of the Competition Act as read together with 21(3)(e) of the Competition Act based on the analysis **of Evidences 3, 28, 31, 39, 45E and 50.**

A) an email dated 15th September 2021 (**Evidence 45E**)[75] from Mr. Manish Mehra of MRM to Mr. Neelesh Shah of Safal Group, mentioned that Brollo, Tononoka, Jubilee Jumbo, **Nail and Steel**, Blue Nile, Devki, Abyssinia and Apex met at Zen Gardens restaurant on 14th September 2021 to discuss the Kenya Re-bars market and in which they discussed *inter alia:*

i. *Availability of 1 mm by some manufacturers, mainly with Abyssinia;*
ii. *Discussion on how to prevent the < 1 mm 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; and*
iv. *Submissions alluding that Abyssinia/Prime had overstocked and had over 5k of 1mm.*

116. The Respondent submitted that the knowledge of shipment demonstrated monitoring by players on quantities of raw material imported, stocks of raw materials in the market, and

[74] The Respondent's written Submissions dated 5th February 2024, page 26
[75] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, paragraph 48.4

monitoring of the stock levels as well as restriction on the importation of raw materials. According to the Respondent, the detailed discussion on capacities which is commercially sensitive information created transparency among the players which diminished competition. Furthermore, the Respondent submits that the subsequent decision by those present in the meeting on 14th September, 2021 to go slow on importation of raw materials amounted to output restriction.

117. The Respondent further submitted that output restriction was established in **Evidence 3** which was an email communication dated 13th November 2019 from Jane Ndugo of Safal Group sent to Niral Savla of Tononoka, Sagar Patel of Abyssinia, Abhijeet Gupta of MRM, Harsh Patel of Jumbo, Harish Patel of Corrugated, Nilesh Doshi of Doshi, and Kaushik Pandit of Devki, contained minutes of the Tubes Subsector Committee Meeting held on 13th November 2019 at 8.30 am at KAM Boardroom 2. In the evidence, the Respondent observed that steel manufacturers and distributors met and consequently agreed to unanimously restrict the importation of the **0.9 mm** coils and plates thereby foreclosing the market for Chinese companies which had affected their margins. Additionally, there was mention of the Chinese importers holding stocks of 15000 pieces and above with more than 500 pieces expected per month which they mention was significantly hurting the local manufacturers.[76]

118. According to the Respondent, the agreed action points of the meeting were that Kenyan manufacturers were to alert their suppliers that they would not import 0.9 mm coils and plates and that all members of the Tubes subsector were not to import 0.9 mm coils and plates. This is despite the fact that there was no existing standard for plates as captured in the same minutes. By limiting the importation of these particular plates and coil sizes had an effect of creating an artificial shortage of the less than 1mm finished plates.[77]

119. The Respondent further submitted that the Appellant was in attendance in the Zen Gardens meeting, held on 14th September, 2021 ***(Evidence 45E)*** and it observed that the subsequent decision by those present in the said meeting to go slow on the importation of the raw materials

[76] The Respondent's written Submissions dated 5th February 2024, page 29
[77] The Respondent's written Submissions dated 5th February 2024, page 29

demonstrates output restriction. According to the Respondent, above observation was supported by **Evidence 31** on the Tononoka meeting which was meant for manufacturers to discuss price and how to reduce stock to ensure price stability and **Evidence 39** on the discussion that there was excess material in the country and there was need to control price, material and stabilize the market. The Respondent posits that these pieces of evidence are corroborated by **Evidence 3, Evidence 28** and **Evidence 50.**[78]

120. It is the Respondent's submission that the Competition Act in section 21(3)(e) prohibits any agreements which limit or control production, market outlets or access, technical development or investment. Additionally, clause 28 of the Consolidated Guidelines provides that hardcore restrictive agreements are those that are by their very nature injurious to the proper functioning of competition and have no redeeming value whatsoever. Some of the hardcore agreements which are prohibited by object include contracts or agreements or decisions or concerted practices among competitors to limit their output.

121. Furthermore, the Respondent avers that it discharged its burden of proof and established that the discussions by the Appellant together with 12 other manufacturers and distributors of steel products to restrict output was a blatant restraint to create artificial shortage with the ultimate aim of increasing prices contrary to section 21(1) of the Competition Act as read together with 21 (3) (e) of the Competition Act.

122. **Fifth,** as to whether the Respondent discharged its burden of proof to the required standard in arriving at its determination against the Appellant, the Respondent avers that the evidence analyzed in paragraphs 119 to 150 of the Statement of Reasons, the Respondent proved the existence of price fixing and output restriction agreements and therefore discharged the standard and burden of proof as required by section 21(1) of the Competition Act and clause 41 of the Consolidated Guidelines. This was a per se prohibition and the Respondent was not required to demonstrate the effect of these concerted practices. [79]

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[78] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, paragraph 48.6

[79] The Respondent's written Submissions dated 5th February 2024, page 30

123. With respect to the issue of burden of proof, the Respondent submits that it had the burden of proof as stated under clause 54 of the Consolidated Guidelines and that it met the same as illustrated in the analysis in paragraphs 119 to 150 of the Statement of Reasons. The Respondent relied on Civil Appeal 156 of 2018 **Ahmed Mohammed Noor v Abdi Aziz Osman [2019] EKLR**[80] where the court held that:

> ***"The foregone 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 evidence adduced by the Claimant."***

124. The Respondent, while defining the standard of proof, it relied on the definition under the Black's Law Dictionary, (9th Edition, 2009) at page 1535 which defines 'the standard of proof' as:

> **'[t]he degree or level of proof demanded in a specific case in order for a party to succeed.'**
>
> **The *standard of proof in civil cases is proof on the balance of probability. In criminal cases the standard of proof is proof beyond any reasonable doubt."***

125. The Respondent submitted that contrary to the Appellant's assertions, it has satisfied the standard of proof required for restrictive trade practices as set out under section 21(1) of the Competition Act since the conduct in question is by its very nature per se injurious to the proper functioning of competition.

126. According to the Respondent, the issue of standard of proof and the probative value of evidence was addressed in the case of ***FSL Holdings & 2 Others vs European Commission Case T-655/11***[81] where it was held that notes prepared after a meeting had probative value because it was prepared by a person who attended the meeting. The Court stated as that:

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[80] The Respondent's written Submissions dated 5th February 2024, page 31
[81] The Respondent's written Submissions dated 5th February 2024, page 31

Lastly, as regards the probative value which should be attached to the various pieces of evidence, it must be emphasised that the sole criterion relevant for evaluating freely adduced evidence is the reliability of that evidence. ***According to the general rules relating to evidence, the reliability and, thus, the probative value, of a document depends on the person from whom it originates, the circumstances in which it came into being, the person to whom it was addressed and whether it appears sound and reliable. It is necessary, in particular, to attach great importance to the fact that documents were drawn up in close connection with the events or by a direct witness of those events.***

127. Therefore, the Respondent thus submits that it has met the standard of proof required to warrant a finding of violation of section 21 (3) (a) of the Competition Act. The Respondent further reiterated that the proceedings before it is administrative in nature and governed by Article 47 of the Constitution, the Competition Act and the FAAA. Therefore, the Appellant's submission that the Respondent's investigations were of a criminal nature and that the standard of proof required was higher than a balance of probability is, according to the Respondent, erroneous.[82]

128. **Sixth,** as to whether the Respondent is mandated to hold a hearing conference on mitigating factors before imposing a financial penalty under section 36(d) of the Competition Act, the Respondent submitted that in conducting its investigations, and before making of the final determination, it followed the procedure under the Competition Act and the FAAA :

129. The Respondent stated that upon conclusion of the investigation it issued a NOPD to the Appellant dated 4th May 2022 in accordance with section 34 of the Competition Act stating the reasons for the proposed decision and setting out the reliefs that it intended to impose. The Respondent gave an opportunity to the Appellant to submit written submissions as well as invited the Appellant to indicate whether it wished to make oral representations.

[82] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, paragraph 60

130. The Respondent avers that the Appellant thereafter submitted its written representations on 6th July 2022 and in accordance with Section 35 of the Competition Act and appeared before the Respondent on 1st August 2022 for the hearing conference.[83] And that upon consideration of the written representations and matters raised in the hearing conference, the Respondent found the Appellant culpable, and proceeded to make a Decision and Statement of Reasons dated 17th August, 2023 under Section 36 of the Competition Act.[84]

131. The Respondent's submitted that contrary to the Appellant's assertion, it is not mandatory to convene a hearing conference on mitigating factors with an undertaking under investigation before invoking section 36 of the Competition Act. Furthermore, the Respondent submitted that it is an administrative body and proceedings before it are administrative in nature and governed by Article 47 of the Constitution and not Article 50 of the Constitution that governs judicial proceedings. As such, the proceedings were not of a criminal nature and the financial penalty imposed under the Competition Act was an administrative financial penalty.[85]

132. The Respondent relied on the case of **Miscellaneous Civil Application 220 of 2019 Aly Khan Satchu v Capital Markets Authority [2019] eKLR**[86] where the court held:

> ***"that proceedings before CMA do not lie within the criminal sphere and cannot be classified as being criminal in nature. Accordingly, when CMA undertakes administrative and regulatory proceedings and imposes administrative penalties, the decision remains administrative in nature and falls within the four corners of the areas assigned to it by the legislature. It follows that the argument that CMA has no regulatory mandate over the applicant in allegations relating to Insider Trading just because they disclose a criminal offence fails."*** The court further held that ***"In addition, it is my finding that the applicant was not charged and tried for***

[83] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, paragraph 61.2
[84] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, paragraph 61.3
[85] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, paragraph 62 and 63
[86] The Respondent's written Submissions dated 5th February 2024, page 34

the "criminal offence" of Insider Trading. On the contrary the Respondent was exercising its regulatory mandate under the Act."

133. The Respondent posits that above position was buttressed in ***Guindon v Canada*** *where it was held that*

> ***"A proceeding is criminal by its very nature when it is aimed at promoting public order and welfare within a public sphere of activity. Proceedings of an administrative nature, on the other hand, are primarily intended to maintain compliance or to regulate conduct within a limited sphere of activity."*** [87]

134. The Respondent submitted that the financial penalty imposed was guided by section 36(d) of the Competition Act, the Competition (General) Rules, 2019 and the Competition Administrative Penalties and Settlement Guidelines, 2020 (Guidelines) that provide the aggravating and mitigating factors that the Respondent considers in arriving at a penalty. According to the Respondent, the 0.5% penalty imposed on the Appellant is well below the maximum recommended penalty of 10% as per section 36(d) of the Competition Act and the General Rules and Guidelines which make provision for aggravating and mitigating factors. The Respondent avers that the imposition of the financial penalty was arrived at in a lawful, reasonable and procedurally and fair manner. [88]

135. **Seventh,** as to whether the Respondent complied with the law in imposing a financial penalty against the Appellant's 2021 gross annual turnover, the Respondent submitted that it commenced investigations in 2020 and finalised the same in August, 2022 therefore the preceding year for purposes of imposition of the financial penalty herein is 2021. The subsequent months up to the issuance of the determination in August, 2023 were spent in seeking relevant internal approvals. As such, the preceding year for purposes of the imposition of the financial penalty was 2021.[89]

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[87] The Respondent's written Submissions dated 5th February 2024, page 34
[88] The Respondent's written Submissions dated 5th February 2024, page 35
[89] The Respondent's written Submissions dated 5th February 2024, page 35

136. **Eighth**, as whether the Respondent complied with the law in imposing a financial penalty against the Appellant's 2021 gross annual turnover *vis a vis* the gross annual turnover derived from its wire products converters subsector, the Respondent submitted that it is the entire gross annual turnover of the undertaking that is considered in arriving at the financial penalty as elaborated in section 36(d) of the Competition Act. [90]

137. **In conclusion,** the Respondent avers that it has illustrated that 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) and section 21(1) of the Act as read together 21(3)(e) of the Act (output restriction) and that the Appellant was accorded a fair hearing. Therefore, the Respondent urges the Tribunal to:

i. Dismisses the Appeal; and
ii. Costs be awarded to the Respondent.

[90] The Respondent's written Submissions dated 5th February 2024, page 35

E. ISSUES FOR DETERMINATION.

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 technical rules of evidence apply to the investigations carried out by the Respondent.**

ii. **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)&(e) of the Act.**

iii. **Whether the Respondent discharged its burden of proof to the required standard in arriving at its determination against the Appellant**

iv. **Whether the Respondent complied with the law in imposing a financial penalty against the Appellant**

v. **Who bears the cost of this Appeal.**

F. ANALYSIS AND DETERMINATION

I. <u>Whether technical rules of evidence apply to the investigations carried out by the Respondent.</u>

138. On this ground, the Appellant submitted that the Respondent erred when it held that the technical rules of evidence do not strictly apply maintaining that such position is contrary to section 106B (4) of the Evidence Act. The Appellant stated that the said provision of the law was fashioned in mandatory terms and thus cannot be disregarded for the mare fact that the processes is regarded as administrative in nature.

139. It is the Appellant case that the Respondent failed to provide a Certificate of Electronic Records which identifies: the electronic records; production process; the particulars of the production device and the responsible person. Such failure was a clear violation of the Appellant's right to fair hearing as provided for under Article 50 (2)(k), 50(3) & 50(4) of the Constitution. That the Respondent's failure to provide a certificate, it was difficult to ascertain that any of the evidence relied upon was not manipulated.

140. As a result, therefore, the Appellant posits that the Evidence labelled **1, 2, 6, 8, 19, 21, 23, 26, 28, 31, 34, 35, 36, 38, 39, 40a, 41A, 45, 50, 52, 56** and **57** that the Respondent relied upon in the NOPD and its subsequent decision are inadmissible.

141. The Appellant relied on the case of **Republic v Public Procurement Administrative Review Board & 2 others ex parte International Research and Development Actions Ltd [2017] eKLR**, where the court stated that adherence to the applicable law is the only guarantee of fairness. The court held that:

> "84. In my view, the Respondent was enjoined to ensure that the decision of the tender evaluation committee complied with the Constitution, the Act and the tender document. My view is reinforced by the decision in **PPRB vs. KRA Misc. Civil Application No. 540 of 2008, [2008] eKLR,** the Court held that:
>
> **"To my mind, failure by the Respondents to have regard to mandatory provisions of the Act ...violated the purpose of the Act which is clearly stated ...I find that any breach of a mandatory statutory provision does prejudice in some way the Section 2 objectives...Adherence to the applicable law is the only guarantee of fairness and in the case of procurement law the only guarantee of the attainment of fair competition, integrity, transparency, accountability and public confidence. There cannot be greater prejudice to the applicant than failure by the decision maker to comply with positive law. Failure to adhere to the applicable law, gives rise to a presumption of bias and prejudice contrary to the argument put forward by the Respondent's counsel. The job in my view was not complete or done by just coming up with the mathematically lowest tenderer on top of the pile. The integrity of reaching there is equally important to this court. In many cases it is procedural propriety which is the stamp of fairness."**
>
> 88. **...As recognised hereinabove, the Court may intervene where the decision is found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant**

matter, or through some *misconstruction of the terms of the statutory provision which the decision maker is required to apply*."

142. The Appellant states that even though the proceedings may be administrative in nature, the same are subject to the Constitution of Kenya. The Appellants relied on Article 2(4) of the Constitution provides that:

> **"Any law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid."**
>
> And
>
> Section 4(3)(g) of the FAAA provides that:
>
> "Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision–
>
> (g) **information, materials and evidence to be relied upon** in making the decision or taking the administrative action"

143. The Appellant further submitted that non-adhere by the Respondent to the law renders the process flawed and consequently any decision arising therefrom is null and void for lack of fairness, transparency and integrity. The Appellant urged the tribunal to annul the Respondent's decision for non-adherence to the law.

144. In response to the Appellant's claims, the Respondent maintained that its investigation process are guided by Article 47 of the Constitution of Kenya, 2010 and sections 31 – 40 of the Competition Act as read together with section 4 of the Fair Administrative Action Act No. 4 of 2015. (FAAA). These laws prescribe the approach to be followed in an administrative process and therefore the Appellant's claim that the certificate of electronic record mandatory in administrative process lacks basis in law.

145. The Respondent maintains that its obligation in sourcing the electronic evidence from the devices under investigation was to ensure that the process, custody and delivery of the said electronic evidence was reasonable and procedurally fair to any party pursuant to the Constitution, Competition Act and FAAA and not the Evidence Act. Furthermore, the Respondent sought the assistance of Ethics and Anti-Corruption Commission's (EACC) forensic laboratory in the extraction of information from mobile phones and laptops pursuant to sections 32(4) as read together with section 9(m) and13(2) of the Competition Act.

146. The Respondent states that the owners of the devices were invited and accorded the opportunity to verify the extracted information and therefore it discharged its obligation by ensuring that the process, custody and delivery of the said electronic evidence was reasonable and procedurally fair to the parties pursuant to Article 47 of the Constitution, FAAA and the Competition Act.

147. The Respondent relied on the case ***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..."

148. On this issue, we agree with the Respondent's that strict rules of evidence do not apply, however as aptly held in the ***Joseph Mbalu Mutava v Attorney General & another [2014] eKLR,*** (cited above), the aggrieved party should be accorded an opportunity to comment on the evidence relied upon by the administrative body. From the evidence on record, we note that the Appellant was accorded the opportunity to comment on the evidence.

II. 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)&(e) of the Act.

149. The Respondent in its decision found the Appellant culpable of engaging in price fixing agreements and output restriction in contravention of section 21(1) of the Act as read together with section 21(3)(a)(e) of the Act.

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;

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

150. The Respondent stated that section 21(1) of the Act as read together with section 21(3)(a)(e) of the Act prohibit 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. It is the Respondent's case that the Appellant in the present case engaged in price fixing and output restriction.

151. The Respondent relied on **clause 41** of the Consolidated Guidelines which provides that in assessing hard-core restrictions, it considers horizontal collusive agreements are subject to **"object"** assessment, that is, strict or per se scrutiny for which no defenses can be asserted and therefore it only considers the content and nature of the agreement and not the effect of the agreement. The Respondent relied on ***T-Mobile Netherlands BV, KPN Mobile NV,***

Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit (C-8/08), under paragraph 31 wherein it was held that:

> ***"...Once an agreement has been classified as a restriction by object it is presumed to have negative effects and the actual effects of the agreement are not analyzed or assessed. Whether such anti-competitive effects in fact occur is only of relevance for determining the amount of any fine and assessing any claim for damages..."***

152. The Respondent in establishing culpability on the part of the Appellant adduced evidences before the Tribunal for consideration, namely: **Evidences 1, 2, 19, 23, 31, 36, 34, 40A, 35, 41, 38, 45A, 45B, 45C, 45E, 45F, 50, 51A, 48 and 56,** relating to pricing and pricing decisions which we shall be analysing hereunder.

153. ***Evidence 1:***

- *is an email of 15th May, 2018, sent by Mr. Neelkamal Shah of the Appellant to Mr. Niral Salva of Tononoka and copied Brollo Kenya, Mr. Nilesh Doshi of Doshi, Prakash of MRM/Safal group, Mr. Murtaza of Tarmal, Mr. Suraj of Corrugated, Mr. Kunal Gupta of Athi Steel, Mr. Devang of Devki Steel, Mr. Neil Nathwani of Apex and Prabu of MRM and Mr. Amarjit Singh of Accurate.*
- *We note that the subject of the email was **pricing**. In the said email, Mr. Neelkamal Shah indicated that they had spoken the previous week and many **sizes** on the **tube pricelist** needed to be revised as their **gross profit margin** was low and, in some cases, **negative** for the 20*20*1, 25*25*1 40*40*1.2 and 30*30*1.2.*
- *The email further states that for the 20*20*1 they were all left with KES 12 to KES 13 **gross profit** and on 25*25*1 about KES 15 per length of 6 metres. Mr. Niral Salva was tasked to look into it as they were **all** pushing huge tonnages but with **no margin.***

154. We were invited to look at paragraph 7.1 of the Appellant's response to NOPD dated 6th July, 2022, where Mr. Neelkamal Shah admitted to sending the email marked as **Evidence 1.** We also note of the **A**ppellant's explanation, that it was important that sector players have discussions on specifications including weight and thickness which inform pricing and relied

on section 21(6) of the Competition Act with an aim of protecting commercial interest by enhancing competition among industry players.

155. According the Respondent, the explanation given by the Appellant was an unequivocal admission that steel manufacturers and distributors had meetings in which they discussed pricing, margin profits and product specifications which had a bearing on pricing of products in contravention of the Act which categorically prohibits any agreement, decision or concerted practice that directly or indirectly fixes purchase or selling prices or any other trading conditions.

156. Moreover, the Respondent urged the Tribunal to consider **clause 28, 29 and 30(iv)** of the Consolidated Guidelines which categorizes and describe hardcore restrictive agreements as those that are by their very nature, injurious to the proper functioning of competition and have no redeeming value whatsoever.

157. Similarly, we have looked at **clause 41** of the Consolidated Guidelines in assessing hard-core restrictions which provides that 'horizontal collusive agreements are subject to "object" assessment, that is, strict or per se scrutiny for which no defenses can be asserted and that it will only consider the content and nature of the agreement and not the effect of the agreement.'

158. From Evidence 1 and by virtue of the Appellant's admission, there is an indication of existence of meetings amongst companies in the steel industry. According to the Appellant's, the aim of the meetings is to protect commercial interest by enhancing competition among industry players.

159. 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. 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 presume that they are engaging in a concerted practice. Consequently, the

burden is placed on the entities to demonstrate that they are not engaging in a concerted practice. Section 21(6) simply provides a basis upon which entities may rebut this presumption that is imposed by statute. In the premises we find that the provisions of section 21(5) and (6) were not relevant in this matter.

160. **Evidence 2:**

- *is an email sent on 24th September 2018, at 2.24 pm by Nilesh Doshi of Doshi, to Niral Savla, of Tononoka and also Chairman of the Pipes and Tubes sub-sector in KAM.*
- *the email was copied to: Neil Nathwani of Apex Group and also Chair of Hot Rolling sub-sector, Kishore Gangadharan of Insteel, Prakash Chauhan of Safal Group,* ***Neelkamal Shah of the Appellant****, Suraj of Corrugated, Kunal Gupta of Athi Steel, Ketan Doshi of Brollo, Jateen Patel of Abyssinia, Kaushik Pandit of Devki, Murtaza Tarmal of Tarmal Wire Products Limited, Davinda Bhachu of Accurate, Devang of Devki and Bobby Johnson of Steel Makers Limited.*

161. We have looked at the Appellant's response with respect to **Evidence 2 in paragraph 8** of the Appellant's response which stated that the discussions related to proposed standards to be set in the industry and that the discussions did not relate to price fixing or distortion of competition but on standards so as to improve the market. According to the Respondent, the admission by the Appellant in paragraph 7.1 and 6.1 of their response had an implication on pricing.

162. The Tribunal was also invited to consider Evidences **23, 36, 53A, B, C & D and 8**, which the Respondent relied upon to establish simultaneous price revisions between the Appellant and 13 other manufacturers and distributors of steel in Kenya:

i) **Evidence 23**; *a WhatsApp communication of 20th August 2020 between Mr. Kush Nathwani of Apex and Mr. Neil Nathwani of Apex where Mr Neil was reporting that he had talked to Mr. Kaushik Pandit of Devki and in their discussion, there was a confirmation that there* would be new prices for rebars from Monday 24th August 2020 and new prices for tubes effective 1st September 2020.

ii) ***Evidence 36*** *is a WhatsApp communication from Mr. Kush Nathwani of Apex to Mr Neil Nathwani of Apex indicating that another meeting for the steel sector was held on 21st November 2020 at Zen Gardens Restaurant whose agenda was discussions on pricing. According to the Respondent's The evidence confirmed that among those in attendance were Apex, Devki and Tononoka. In addition,* ***Evidence 53 A, B, C & D*** *are copies of price lists of the Appellant and other steel manufacturers and distributors.*

163. The Respondent submitted before the Tribunal that upon analysis of the Evidence **23, 36, 53A, B, C & D** and in particular **Evidences 23** and **36,** the steel companies were sharing prices with their competitors and that the prices which were shared were future prices and not current. Additionally, the Respondent stated that from an interrogation of **Evidence 53A, B, C and D,** there was coordinated release of pricelists by timing, which was within days of each other with some manufacturers and distributors implementing price revisions on the same day.

164. The Respondent proceeded to furnish the Tribunal with a table showing the name of the undertaking and the price revision effective dates as shown below: [91]

i. **Tubes Price Revision Dates**

Year	Name of Company	Effective Dates
2019	Doshi Group of Companies	18th February, 2019
	Insteel Limited	20th February, 2019
	Brollo	14th February, 2019
2020	**Insteel**	**2nd September, 2020**
	Nail & Steel Limited	**1st September, 2020**
	Apex Steel Limited	**1st September, 2020**
	Brollo	**1st September, 2020**
	Devki Steel Mills	**31st August, 2020**

[91] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, paragraph 37.20

	Doshi Group	28th August, 2020
2020	Apex Steel Limited	16th December, 2020
	Insteel Limited	21st December, 2020
	Tononoka Steel Limited	17th December, 2020
	Devki Steel Limited	17th December, 2020
	Doshi Group	16th December, 2020
	Brollo	18th December, 2020
	Tarmal Steel	January, 2021
	Mabati Rolling Mills	January, 2021
2021	Doshi Group	30th April, 2021
	Apex Steel	3rd May, 2021
	Brollo	3rd May, 2021
	Devki	1st May, 2021

165. From the evidences, we have established that the ex-factory tube pricelists issued by the Applicant was on **1st September, 2020** and other companies for example, Doshi on 28th August, 2020, Devki 31st August, 2020, Brollo on 1st September, 2020, Apex on 1st September 2020 and Insteel on 2nd September 2020. The Respondent maintains that the trend indicated a high degree of uniformity on the timing and release of the price revisions and the pricing for the various range of tube products. According to the Respondent, the revision of pricelist was triggered after communication between Kush Nathwani and Neil Nathwani of Apex (**Evidence 23**)[92]

[92] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, paragraph 37.21

166. The explanation given by the Appellant's that the revision of price lists was based on market trends and that it was just by coincidence does not satisfactorily disprove the claims made by the Respondent. At the very least the Appellant's ought to have adduced further evidence to counter the Respondent's findings.

167. Other evidences that were presented before the Tribunal and we have had the opportunity to analyse include:[93]

i. **Evidence 19**, a WhatsApp of 11th December 2019 showing that Neil Nathwani was meeting NeelKamal Shah (Appelant's Director) and Tarmal to discuss tubes prices;

ii. **Evidence 23**, a communication between Mr. Kush Nathwani of Apex and Mr. Neil Nathwani of Apex where Mr. Neil was reporting that he had talked to Mr. Kaushik Pandit of Devki and in their discussion, there was a confirmation that there will be new prices for rebars from Monday 24th August 2020 and new prices for tubes effective 1st September 2020;

iii. A tube sub-sector manufacturers meeting convened at Tononoka offices at 10:00 am 22nd November 2018 in Westlands as confirmed by Neil Nathwani of Apex. We note that the evidence indicated that the agenda of the meeting was to discuss prices and reduction of stock levels between manufacturers to ensure price stability. We also note from the evidence presented that there was a steel sector meeting convened at Zen Gardens to discuss pricing held on 21st November 2020.

iv. **Evidence 34** and **40A** shows that there was a tubes meeting held on 7th July 2018 at Artcaffe in Westgate and one on Hot Rolling mills at Zen Gardens held on 5th July 2013 respectively.

v. Furthermore, there were other instances of meetings i.e. a Tubes Sub sector meeting scheduled for 10th May 2020 which was restricted to Apex, Doshi, Brollo and Insteel. Also, Apex's team meeting of 6th October 2018, where one of the issues discussed was "*Tubes manufacturer's meeting on Monday. New Prices and discounts to be shared*".

[93] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, paragraph 37.23

vi. **Evidence 38** a WhatsApp message of 4th July 2014, indicating a meeting was held at Athi Steel offices and the subject matter was pricing of deformed bars.

vii. **Evidence 45A, 45B, 45C, 45E, and 45F** a metal sector price meeting held at Zen Gardens Restaurant on 14th September, 2021, in Lower Kabete at 3.00pm. The evidence established that the meeting was attended by a representative of the **Appellant;** Brollo; Tononoka; Jubilee Jumbo; Abyssinia; Blue Nile; MRM, Insteel; Devki and Apex and from the evidence the agenda of the meeting was discussions on metal sector pricing.

viii. **Evidence 50,** an internal MRM report indicating new prices effective 1st May, 2021. We have looked at the report, particularly an observation by one Mr. Sylvans Okeyo, the Regional Sales Manager of MRM which seem to state companies like: Apex, Tarmal and Abyssinia were undercutting on pricing according to the market situation.

ix. **Evidence 51A**, which is an extract from Insteel Management Report for the 1st Quarter ended 31st March 2017 on assessment of the competition in the local market which reads that there was cut throat competition with most manufacturers struggling to survive hence not maintaining the agreed pricing/discount. On this evidence, the Respondent maintains that it is corroborated by **Evidence 50** above (report by MRM) where companies e.g Devki, Abyssinia and Tarmal were still operating with old price lists giving 32% discount.

x. **Evidence 56**, an extract of a daily sales report dated 10th November, 2020 from Devki where we note that Devki was complaining that competitors were not increasing their prices as agreed. The evidence makes reference to companies like: Tononoka, Abyssinia, Blue Nile, Tarmal and Jumbo who failed to comply.

xi. **Evidence 57**, an email from Mr. Abhijeet Gupta sent to Mr. Manish Mehra (both of MRM) on 3rd September 2021. We note that Mr. Abhijeet stated that MRM had spoken to a few manufacturers and that none planned to move prices that month and that all had experienced a slow August, and that any increase would impact sales. We also noted that Mr. Abhijeet advised MRM to go slow on any raise and once

everyone got materials for the month of October, they would then be at ease to throw in the market.

168. In **Evidence 45E**, where Mr. Manish states:

"Abyssinia seems to be the main player which does not want to increase prices." The evidence seems to suggest that there was a discussion on steel pricing whereby Abyssinia was reluctant to implement.

169. Also, **Evidence 45F**, is a email response from Mr. Abhijeet (MRM) in response to Mr. Manish's (MRM) with respect to (Evidence 45E) where he stated that:

"all will have high priced RM (raw materials) ***hence everybody decided to increase on price by going slowly as 30% market downsize was also to be taken care off***".

170. Furthermore, we also looked at an email dated 11th September 2021, from Mr. Abhijeet to Mr. Sundaresa Prabhu of MRM wherein Mr. Abhijeet requested for preparation of discounts in preparation for a metal sector meeting scheduled for Monday 14th September 2021. On 13th September 2021, Mr. Sundaresa Prabhu responded by forwarding the current discounts for plate pricing together with proposed discounts for the meeting. Subsequently, Mr. Sundaresa, stated that:

'Therefore, best is just ***be 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.'*

171. The Respondent stated that in both emails, the subject matter was the metal sector price meeting of 3.00 pm Monday at Zen Gardens Restaurant on 14th September, 2021. **(Evidence 45A, 45B and 45C above**) and therefore these practices by the appellant and other steel sector players amounted to price fixing discussions contrary to the Act.

172. In response the Appellant's asserted that the players were exercising their constitutional right of freedom of association as espoused under Article 36(1) of the Constitution. However, the Respondent contends that the right is not absolute. According to Respondent's,

constitutional safeguard does not extend to gatherings in furtherance of prohibited conduct in violation of the Competition Act.

173. The Respondent relied on the European Union case of ***Competition Authority vs Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd Case C-209/07 (2008) ECR 2008 I-08637*** which the court disputed the use of legitimate objectives as a defense to engaging in restrictive trade practices and held in *paragraph 64* as follows:

> ***"...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) ..."***

174. The Respondent's further argued that the sharing of a company's pricing intentions with competitors is anticompetitive as established in ***Case T-19/0 Chiquita Brands International, Inc. and Others v Commission of the European Communities*** Where the Commission's decision was upheld by the European Court of Justice (ECJ). The ECJ observed that information had been exchanged and that the information could be relevant to "*signals, trends or indications*", that accordingly the exchange of information created abnormal conditions of competition, and that a given practice may have an anti-competitive object even if it does not have a direct link with consumer prices.

175. We have looked the decisions relied upon by the Appellant particularly the case of **Aranda Textile Mills (Pty) Ltd and Another v The Competition Commission of South Africa (190/CAC/DEC20) [2021] ZACAC 1; 2023 (2) SA 182 (CAC); [2023] 1 CPLR 3 (CAC) (17 December 2021),** where the Competition Appeal Court of South Africa stated that it was flawed approach to square communication between manufacturer and distributor into a horizontalist net without rigorous analysis. The court held:

> "[49] In this case neither of the two witnesses called by the Commission had personal knowledge of an agreement or collusive conduct between Aranda and

Mzansi. The Commission's witnesses were Ms Van Niekerk an employee of the Treasury who evaluated the bids on the Tender, and Mr Vilikazi who had first raised his suspicion. Their speculation was based on the pricing. As submitted by Aranda, the witnesses could do little more than read the contents of their witness statements into the record and offer their opinion that there had been unfairness because Aranda had treated Mzansi differently from the other bidders. The Commission produced no evidence pointing to an agreement on pricing. Their evidence was intuitive, speculative and based on a facial analysis of what was contained in the documents. [50] Moreover, the Commission's witnesses could not support core averments in the Referral that: "[i]n terms of the agreement, Aranda *would provide Mzansi with its tender documents including pricing schedule* which Mzansi *will use to prepare its own tender including pricing*." and that the agreement further entailed that Mzansi will add 7.25% "on Aranda's prices of the blankets to be submitted to National Treasury when bidding for this tender." There was no evidence supporting the terms of the Referral save for the reference to the 7.5% pricing methodology which Mzansi added on to the prices Aranda gave it.[51] No evidence could be gleaned from the testimony of Mr Magni and Ms Paruk to support the basis of the contravention as pleaded in the Referral. [52] In addition, Mr Magni was adamant that he had no agreement with Mzansi relating to pricing and nor had he colluded with Mzansi. It was clear from his evidence that he favoured Mzansi, trusted its payment commitments and did not regard it as a payment risk. These views were justifiably held, based on their long business relationship and the previous relationship with Ms Paruk's father-in-law, the owner of Africhoice. [53] Mr Magni, under cross examination, confirmed the manufacturer and distributor relationship between Aranda and Mzansi when he said that Aranda would not contact customers including Mzansi, but it is the customer that contacts Aranda. **[54] It is a flawed approach to square communication between manufacturer and distributor into a horizontalist net without rigorous analysis. Commerce is robust in our modern era and many discussions would routinely take place between manufacturer and distributor and even where they are competitors such as in this tender. Caution must be**

exercised when drawing inferences from communication that take place simply because one is a manufacturer and the other a distributor of the product. [55] In light of the lack of evidence, that is of proven facts, the Tribunal had no basis to draw the inferences it did in concluding that Aranda and Mzansi directly or indirectly fixed a price for the tender or agreed any other trading condition or that there were collusive dealings on a balance of probabilities between Aranda and Mzansi.

176. It is the Respondent's case that pursuant to the evidences presented before the Tribunal, it had proved the existence of price fixing agreements and therefore the Appellant was culpable together with the 13 other steel manufacturers and distributors of engaging in price fixing agreements in contravention of section 21(1) of the Competition Act as read together with section 21(3)(a) of the Competition Act.

177. **On output restriction,** the Respondent urged the Tribunal to consider Sec 21(3)(e) of the Act and Clause 28 of the Consolidated Guidelines. Section 21(3)(e) prohibits any agreements which limit or control production, market outlets or access, technical development or investment. C**lause 28** of the Consolidated Guidelines provides that hardcore restrictive agreements are those that are by their very nature injurious to the proper functioning of competition and have no redeeming value whatsoever. Accordingly, some of the hardcore agreements which are prohibited by object include contracts or agreements or decisions or concerted practices among competitors to limit their output.

178. The Tribunal was invited to look at **Evidences 3, 28, 31, 39, 45E and 50** which according to the Respondent proves culpability on the part of the Appellant on engaging in output restriction contrary Act.

179. **Evidence 45** an email dated 15th September 2021 from Mr. Manish Mehra of MRM to Mr. Neelesh Shah of Safal Group, where captured in the email that Brollo, Tononoka, Jubilee Jumbo, **Appellant**, Blue Nile, Devki, Abyssinia and Apex met at Zen Gardens restaurant on 14th September 2021 to discuss the Kenya re-bars market and in which they discussed *inter alia:*

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

ii. *how to prevent the < 1 mm pipes and tubes coming from Uganda;*

iii. *Two shipments coming into the country in Dec '21 containing the material for various manufacturers including Brollo, Appellant, which would mean around 25000 to 30000 MT; and*

iv. *Statement alluding that Abyssinia/Prime had overstocked and had over 5k of 1mm.*

180. It is the Respondent's case that the knowledge of shipment demonstrated monitoring by players on quantities of raw material imported, stocks of raw materials in the market, and monitoring of the stock levels as well as restriction on the importation of raw materials. The Respondent's posits that the detailed discussion on capacities which is commercially sensitive information created transparency among the players which diminished competition. Furthermore, the Respondent urged the Tribunal to concur and find that the subsequent decisions by the players present in the meeting on 14th September, 2021 to go slow on importation of raw materials, amounted to output restriction.[94]

181. **Evidence 3** we have also looked at an email communication dated 13th November 2019 from Jane Ndugo of Safal Group sent to Niral Savla of Tononoka, Sagar Patel of Abyssinia, Abhijeet Gupta of MRM, Harsh Patel of Jumbo, Harish Patel of Corrugated, Nilesh Doshi of Doshi, and Kaushik Pandit of Devki, containing minutes of the Tubes Subsector Committee Meeting held on 13th November 2019 at 8.30 am at KAM Boardroom 2. In the evidence, we note that steel manufacturers and distributors met and consequently agreed to unanimously restrict the importation of the **0.9 mm** coils and plates thereby foreclosing the market for Chinese companies which had affected their margins. Additionally, there was also mention of the Chinese importers holding stocks of 15,000 pieces and above with more than 500 pieces expected per month which was stated to have a negative impact on the local manufacturers.

182. In the evidence, we establish that there was consensus not to import 0.9 mm coils and 0.9 mm coils and plates by Tubes sub-sector. The Respondent maintain that by limiting the

[94] Replying affidavit sworn by Gideon Mokaya on 18th September, 2023, paragraph 48.5

importation of these particular plates and coil sizes had an effect of creating an artificial shortage of the less than 1mm finished plates.

183. ***Evidence 45E*** demonstrates a position taken by attendees at Zen Gardens meeting to go slow on the importation of the raw materials which demonstrates output restriction. Similarly, **Evidence 31** on the Tononoka meeting where modalities on how to reduce stock to ensure price stability was also deliberated. **Evidence 39** suggested the need to control prices and material in order to stabilize the market. We have also had the opportunity to look at **Evidence 3, Evidence 28** and **Evidence 50.**

184. In view of the evidence placed before this Tribunal it is our considered opinion that 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 contrary to law.

III. Whether the Respondent discharged its burden of proof to the required standard in arriving at its determination against the Appellant

185. The Appellant maintained that since the offences being investigated are of a criminal nature by virtue of section 21 of the Act, any evidence placed against an undertaking, must be proved on a standard higher than a balance of probability and there must not be any reasonable doubt in favour of the accused undertaking in meting out a financial penalty against an undertaking.

186. The Appellant made reference to **United Nations Conference on Trade and Development paper, 'Enhancing legal certainty in the relationship between competition authorities and judiciaries' TD/B/C.I/CLP/37 (Intergovernmental Group of Experts on Competition Law and Policy Fifteenth session Geneva, 19–21 October 2016)** which stated that:

> "**The legal burden differs in administrative proceedings** (to review the legality of determinations made by administrative authorities), **quasi-criminal**

proceedings (to decide on penalties imposed on antitrust violators) **and civil proceedings** (to deal with damage claims based on competition law grounds, for example by the victims of a cartel)."

187. The Appellant posits that as soon as a finding of culpability attaches, the proceedings shift to be one of quasi-criminal and the standard of proof rises to be one higher than a balance of probability and there must not be any reasonable doubt in favour of the accused undertaking in meting out a financial penalty against an undertaking.

188. The Appellant relied on the case of **Napp Pharmaceutical Holdings Limited and Subsidiaries and Director General of Fair Trading.**[95] Where it was held that:

> **"Since cases under the Act involving penalties are serious matters, it follows from Re H that strong and convincing evidence will be required before infringements of the Chapter I and Chapter II prohibitions can be found to be proved, even to the civil standard. Indeed, whether we are, in technical terms, applying a civil standard on the basis of strong and convincing evidence, or a criminal standard of beyond reasonable doubt, we think in practice the result is likely to be the same. We find it difficult to imagine, for example, this Tribunal upholding a penalty if there were a reasonable doubt in our minds, or if we were anything less than sure that the Decision was soundly based."**

189. In response, the Respondent submitted that it had the burden of proof as stated under clause 54 of the Consolidated Guidelines and that it met the same. The Respondent relied on Civil Appeal 156 of 2018 **Ahmed Mohammed Noor v Abdi Aziz Osman [2019] EKLR**[96] where the court held that:

> ***"The foregone 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***

[95] Appellant's Written Submissions dated 30th November, 2024, page,9
[96] The Respondent's written Submissions dated 5th February 2024, page 31

Defendant depending on the nature and effect of evidence adduced by the Claimant."

190. The Respondent drew to the attention of the Tribunal the definition of standard of proof under the Black's Law Dictionary, (9th Edition, 2009) at page 1535 which defines 'the standard of proof' as:

'[t]he degree or level of proof demanded in a specific case in order for a party to succeed.'

The *standard of proof in civil cases is proof on the balance of probability. In criminal cases the standard of proof is proof beyond any reasonable doubt."*

191. The Respondent maintains that it has satisfied the standard of proof required for restrictive trade practices as set out under section 21(1) of the Competition Act. The Tribunal was referred to the case of ***FSL Holdings & 2 Others vs European Commission Case T-655/11***[97] where it was held that notes prepared after a meeting had probative value because it was prepared by a person who attended the meeting. The Court stated as that:

> *Lastly, as regards the probative value which should be attached to the various pieces of evidence, it must be emphasised that the sole criterion relevant for evaluating freely adduced evidence is the reliability of that evidence.* ***According to the general rules relating to evidence, the reliability and, thus, the probative value, of a document depends on the person from whom it originates, the circumstances in which it came into being, the person to whom it was addressed and whether it appears sound and reliable. It is necessary, in particular, to attach great importance to the fact that documents were drawn up in close connection with the events or by a direct witness of those events.***

192. The Respondent also relied on the case of **Miscellaneous Civil Application 220 of 2019 Aly Khan Satchu v Capital Markets Authority [2019] eKLR**[98] where the court held:

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[97] The Respondent's written Submissions dated 5th February 2024, page 31

[98] The Respondent's written Submissions dated 5th February 2024, page 34

"that proceedings before CMA do not lie within the criminal sphere and cannot be classified as being criminal in nature. Accordingly, when CMA undertakes administrative and regulatory proceedings and imposes administrative penalties, the decision remains administrative in nature and falls within the four corners of the areas assigned to it by the legislature. It follows that the argument that CMA has no regulatory mandate over the applicant in allegations relating to Insider Trading just because they disclose a criminal offence fails." The court further held that ***"In addition, it is my finding that the applicant was not charged and tried for the "criminal offence" of Insider Trading. On the contrary the Respondent was exercising its regulatory mandate under the Act."***

193. In an attempt to differentiate criminal and administrative proceedings, the Respondent relied on the case of ***Guindon v Canada*** *where it was held that*

"A proceeding is criminal by its very nature when it is aimed at promoting public order and welfare within a public sphere of activity. Proceedings of an administrative nature, on the other hand, are primarily intended to maintain compliance or to regulate conduct within a limited sphere of activity." [99]

194. In the present circumstances, we are satisfied that the Respondent discharged its burden of proof to the standard required in competition cases.

IV. Whether the Respondent complied with the law in imposing a financial penalty against the Appellant

195. It is the Applicant's case that the Respondent erred in imposing a financial penalty against the Appellant based on a 0.5% of the Appellant's 2021 gross annual turnover whilst the decision was rendered in 2023 contrary to section 36 of the Act.

Section 36 which provides that:

[99] The Respondent's written Submissions dated 5th February 2024, page 34

"After consideration of any written representations and of any matters raised at a conference, the Authority may take the following measures—
(d) impose a financial penalty of up to ten percent of the immediately preceding year's gross annual turnover in Kenya of the undertaking or undertakings in question"

196. The Respondent maintained that it commenced investigations in 2020 and finalized the same in August, 2022 therefore the preceding year for purposes of imposition of the financial penalty is 2021 and not 2022 as stated by the Appellant. The Respondent maintains that the subsequent months up to the issuance of the determination in August, 2023 were spent in seeking relevant internal approvals.

197. **Furthermore,** the Appellant contested the imposition of 0.5% penalty of the Appellant's 2021 gross annual turnover of the Appellant's entire business as opposed to wire products converters sub-sector where Mr. NeelKamal Shah's is the chairperson.

198. In response, the Respondent submitted that it is the entire gross annual turnover of the undertaking that is considered in arriving at the financial penalty as expressly provided under section 36(d) of the Competition Act.

199. We have looked at Section 36(d) of the Act which provides:
"d) impose a financial penalty of up to ten percent of the immediately preceding year's gross annual turnover in Kenya of the undertaking or undertakings in question."

200. An interpretation of Section 36(d) is specific on the imposition of financial penalty in that; the penalty shall be imposed on the undertaking or undertakings in question. The maker of the law was specific, and as such we shall say no more.

F. ORDERS

201. Having carefully considered the rival submissions advanced by the parties, scrutinized the evidence adduced before this Tribunal, and evaluated the same against the provisions of the Competition Act and the prevailing jurisprudence, we accordingly arrive at the inevitable conclusion that the Appellant by its conduct was culpable 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

ODONGO MARK OKEYO
MEMBER

KIPROP MARRIRMOI
MEMBER

RAYMOND NYAMWEYA
MEMBER

I certify that this is a true copy of the original

P. O. Box 30041-00100,
NAIROBI

.....

SECRETARY/CEO
COMPETITION TRIBUNAL