REPUBLIC OF KENYA

IN THE COMPETITION TRIBUNAL AT NAIROBI

CASE NO. 009 OF 2023

BETWEEN

JUMBO STEEL MILLS LIMITED.....APPELLANT AND

COMPETITION AUTHORITY OF KENYA.....RESPONDENT

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

JUDGEMENT

A. BACKGROUND

1. This Appeal arises from the decision of the Respondent rendered on 17th August 2023. [1]The Appellant states that it is a corporate entity and a steel manufacturing Company duly incorporated under the laws of Kenya.[2]
2. The Respondent is a State Corporation established under the Competition Act No 12 (hereinafter referred to as ("The Act") of Kenya. It has a wide mandate on matters competition law and policy under the Act. For purposes of this appeal, we shall focus on the Respondent's mandate to regulate market conduct in relation to restrictive trade practices of price fixing and output restriction under Section 21 of the Act.[3]
3. The Respondent states that sometime in August 2020, it initiated investigations in the steel manufacturing and distribution sector in Kenya. This was precipitated by market intelligence that market players in the sector were engaged in coordinated conduct contrary to Section 21 of the Act.[4]
4. The Respondent states that on or about 15th December 2021, the Respondent in accordance with Sections 31 and 32 of the Act as read with sections 118 and 118A of the Criminal Procedure Code (CAP 75) Laws of Kenya, conducted a search and seizure exercise. The exercise was simultaneously conducted in the premises of Doshi Group, Devki Steel Mills Limited, Tarmal

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

Wire Products Limited, Mabati Rolling Mills Limited, Tononoka Rolling Mills, Abyssinia Group Industries, Apex Steel Limited and Insteel Limited.[5]

5. After analysis of the documentation seized, the Respondent established that another 8 companies, including the Appellant, were also subjects of interest in the investigation.[6] Based on a preliminary review of the material before it, the Respondent issued a Notice of Investigation (NOI) and summons for appearance dated 11th of March 2022 to the Appellant.[7]
6. In the said Notice the Respondent invited the Appellants Mr. Harish Patel and Rakesh Patel for an interview on 24th March 2022 at 2:00pm to explain information found in the seized gadgets inclusive but not limited to chats, emails communication ,documents and conducts relating to the steel sector.[8]
7. The Respondent confirms in its affidavit that the meeting took place on 24th March 2022.[9] In the said meeting, the Appellant's representatives Mr. Harish Patel and Rakesh Patel recorded written statements.[10]The said statements inter alia addressed Evidence 1, 2, 3, 5, 12, 22 46 and 52.[11]
8. The Respondent states that it considered the evidence and the Appellant's explanation and, on that basis, issued the Appellant through its Advocates CM Advocates LLP, (the "**Appellants Counsel**") with a Notice of Proposed Decision (NOPD) dated 4th May 2022.[12]The Appellant was also supplied with the evidence upon which the NOPD was issued and granted 21 days to make its written representations on the same.[13]
9. On 25th May 2022, the Appellant submitted its written submissions in response to the NOPD.[14]The Respondent states that on 8th June 2022, it convened a Hearing Conference pursuant to section 35 of the Act and Section 4 of the Fair Administrative Action Act.[15] From

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[5] Supra note 4, paragraph 5.
[6] Supra note 4, paragraph 6.
[7] Supra note 4, paragraph 1.
[8] Ibid.
[9] Supra note 4, paragraph 8.
[10] Supra note 4, page 3 to 12.
[11] Ibid.
[12] Supra note 4, page 13 to 34 (Exhibit GM-3).
[13] Supra note 4, paragraph 9.
[14] Supra note 4, page 35 to 40.
[15] Supra note 4, page 44 to 47.

the minutes Victorine Rotich and George Manyara and Amos Kisilu were in attendance on behalf of the Appellant.[16]

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

I. That the conduct of the Appellant together with 13 manufacturers and distributors of steel products in Kenya constitutes an infringement of section 21(1) of the Act as read together with section 21(3)(a) of the Act.

II. The conduct of the Appellant together with 12 manufacturers and distributors of steel products in Kenya constitutes an infringement of section 21(1) of the Act as read together with section 21(3)(a) of the Act and restrained the Appellant from engaging in conduct that violates section 21(3) (a) of the Act as read together with section 21(3)(e) of the Act.

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

IV. The Respondent directed the Appellant to implement the approved competition compliance programme within 12 months from the date of its determination.

V. The Authority imposes a financial penalty of 0.5% of the Appellants 2021 gross annual turnover in Kenya amounting to Ksh. 33,140,459.40.

B. DOCUMENTS AND EVIDENCE

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

Record of Appeal containing: -

a. The Notice of Appeal dated 5th September 2023.
b. The Memorandum of Appeal dated 20th September2023.
c. Supporting Affidavit sworn by Harsh Patel on 20th September 2023
d. Notice of Motion dated 20th September 2023, brought under Certificate of Urgency of the same date seeking to stay the Respondents' decision dated 17th August 2023

[16] Ibid.
[17] Supra note 1.

e. Documents appearing as item 3, 7 and 8 in the index of record of appeal dated 20th September 2022.

f. Appellant's case digest dated 27th September 2024.

g. Appellant's written Submissions dated 25th May 2022 and further submissions date 27th June 2022, together with the list and bundle of authorities attached thereto.

12. The Respondent filed the following documents:

a. Notice of Appointment of Advocate dated 6th September 2023.

b. Replying Affidavit sworn by Gideon Mokaya on 25th day of October 2023 and the annexures thereto.

c. Further Affidavit sworn by Benson Nyagol on 27th day of March 2024 and the annexures thereto.

d. Respondent's case digest dated 3rd February 2025.

e. Respondent's written Submissions dated 12th day of November 2024 together with the list and bundle of authorities attached thereto.

f. Respondent's Case digest 3rd February 2025.

13. The matter came up for hearing on 30th July 2025 when the parties' advocates highlighted their respective submissions.

C. APPELLANT'S CASE

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

i. The Respondent erred in law and in fact and misdirected itself by, whilst on one hand acknowledging at Paragraph 149 of its decision that the Appellant was not adversely mentioned for engaging in price fixing having reviewed Evidence 1 and 2 and further in paragraph 154 of the decision that the Minutes in Evidence 45E were not signed or legally binding, the Respondent proceeded to make an erroneous finding that since the Appellant was mentioned in the said meetings as being present in the said meeting, the Appellant is capable of having engaged in price fixing contrary to Section 21(1) as read with Section 21(3)(a) of the Act.[18]

[18] Appellant's written submissions dated 27th September, 2024 page 3 paragraph 14

ii. The Respondent erred in law and in fact and critically misdirected itself as on the evidence and consequently arrived at the wrong finding in paragraph 174 of its decision that the Appellant is culpable for having participated in output restriction agreements with other steel manufacturers and distributors contrary to Section 21 (1) as read with Section 21 (3) (e) of the Act due to the mere mention of the Appellant in the said emails and messages as captured in Evidence 45E.[19]

iii. The Respondent erred in law and fact in finding that the meetings by the players in the steel industry wherein the Appellant was alleged to have participated in, had the object or effect of prevention, distortion or lessening of competition in trade of any goods or services in Kenya.

iv. The Respondent's decision dated 17th August 2023 is erroneous in law and fact, contrary to equity, and a gross miscarriage of justice.

15. The Appellant accordingly prayed that its Appeal be allowed, the decision of the Respondent dated 17th August 2023 be set aside and it be quashed in its entirety and that it be awarded the cost of this Appeal.

16. With respect to **Evidence 1 and 2** the Appellant submitted as follows: **First**, the Appellant states that on 15th May 2018 Mr. Neelkamal Shah of Nail and Steel sent an email to Mr. Niral Savla of Tononoka and copied Brollo Kenya, Doshi, MRM/Sala group, Tarmal Corrugated Athi Steel Devki Apex, Accurate. The subject of the email was price fixing. In the 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. Mr. Niral Savla was tasked to look into it as they were all pushing huge tonnage but with no profit margin.[20] **The Appellant argued that the Appellant was not mentioned in this Evidence.**

17. With respect to **Evidence 2**, the Appellant states that on Monday 24th September 2018 at 2.24pm, Mr. Nilesh Doshi of Doshi, sent email to Mr. Niral Savla of Tononoka and also a chairman of the Pipes and Tubes Subsector in KAM. In copy were of Apex Group, and also Chair of Hot Rolling Sub–sector, Insteel, Salaf group, Nail & Steel, Corrugated, Athi steel,

[19] Supra.

[20] Appellant's written submissions dated 27th September, 2024 page 4 paragraph 18.

Brollo, Abyssinia, Devki, Tarmal, Accurate, Devki, Steel Makers.[21] **The Appellant was not mentioned in this evidence.**

18. The Appellant also stated that the above position, where the Appellant was not mentioned was repeated in Evidence 3, 8,21, 23, 26, 31, 34 ,35, 36 ,38, 45A, 45B and 45C, 45 D, 50, 53C, 57
19. Therefore, the fact that the Appellant was not mentioned in Evidence 1 and 2 did not amount to the Appellant participating in **price fixing practices** contrary to Section 21 (1) as read together with Section 21 (3) (a) of the Act.
20. To buttress its arguments, the Appellant argued that the Respondent erred in law and in fact and misdirected itself by, whilst on one hand acknowledging at **149 of its decision that the Appellant was not adversely mentioned for engaging in price fixing having reviewed evidence 1 and 2**, it went ahead and found the Appellant culpable for having engaged in price fixing contrary to section 21(1) as read together with section 21 (3) (a) of the Act.
21. Paragraph 149 of the Respondents decision states that " ***The Authority having reviewed Jumbos responses in Evidence 1 and 2 is of the opinion that Jumbo was not adversely mentioned for engaging in price fixing in these instances''.***
22. On the issue of Output restriction, the Appellant argued that the Respondent made a finding that the Appellant together with Apex, Doshi, MRM, Insteel, Devki, Nail & Steel, Corrugated, Brollo, Abyssinia, Blue Nile and Tononoka engaged in output restriction contrary to Section 21(1) of the Act, No. 12 of 2010 as read with Section 21(3)(e) of the Act.[22]
23. The Appellant argued that the Respondent relied on the following evidence in making a finding that the Appellant had engaged in output restriction;

❖ **Evidence 3:**

24. Email communications of 13th November 2019 from Jane Ndugo of Safal Group sent to Niral Saval 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.[23]

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[21] Appellant's written submissions dated 27th September, 2024 page 4 paragraph 19.
[22] Appellant's written submissions dated 27th September, 2024 page 14 paragraph 74.
[23] Appellant's written submissions dated 27th September, 2024 page 14 paragraph 76.

25. In this evidence, the Respondent observed that MRM, Devki, Doshi, Corrugated and Tononoka 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 is mention of the Chinese importers holding stocks of 15,000 pieces and above with more than 500 pieces expected per month which they mention is significantly hurting the local manufacturers.[24]
26. In response to Evidence 3, Mr. Niral Savla of Tononoka indicated that the company does not discuss the stocks of other companies or of the Chinese companies in this context and that he does not know the names of the Chinese importers. However, information retrieved from Sarth's (Tononoka Director) computer, provided a comprehensive analysis of imports by all companies including the source of import. (Evidence 55A -Excel sheets of imports December 21 and 55B – Excel sheets of Kenya imports for the period January 18th to June 21. A similar document was retrieved from Mr. Salim's computer of MRM (Evidence 55C).[25]
27. The Appellant drew the attention of the Tribunal to the following facts;
    i) The meeting held on 13th November 2019 was a meeting between the members of the Tubes Sub-sector. The Appellant is not a member of this sub-sector and only attended this meeting on invitation as a consumer of tubes in the market as the meeting's main agenda was sensitization of consumers;[26]
    ii) The decision of the association, though informative to the extent that its aim was to sensitize consumers, was not binding on the Appellant. This is illustrated by the fact that the Appellant has at all times unanimously decided on the sizes it imports as guided by the demand of its consumers. Notably, the Appellant trades in 0.9 mm and affords all sizes to its consumers;[27]
    iii) Evidence 3 as presented are draft minutes which have not been confirmed by any of the parties who attended the said meeting and cannot therefore be said to be accurate and confirmed records of the discussions at the meeting. The agenda of the meeting was to discuss the sub-standard tubes and misrepresentation by some players in the industry who were passing off 0.9 mm as 1.0 mm and this was dangerous and was

[24] Appellant's written submissions dated 27th September, 2024 page 15 paragraph 77.
[25] Appellant's written submissions dated 27th September, 2024 page 15 paragraph 78.
[26] Appellant's written submissions dated 27th September, 2024 page 15 paragraph 79.
[27] Supra

contributing to the collapse of buildings. The meeting was aimed at sensitizing members of the public as well as consumers of tubes on the consumer welfare issued facing the industry.[28]

❖ **Evidence 28:**

28. The communication of 22nd October 2016 from Mr. Pankaj Nathwani to the Apex Board's WhatsApp group has discussions to skip the January 2017 shipment by tubes subsector players to bring sanity in the tube market with respect to discounts. On 24th October 2016, Mr. Neil Nathwani stated in the WhatsApp Group that Doshi was acting contrary to prior agreed shipment quantities and Brollo was having huge stocks. The Appellant argued it is not a member of the tubes sub-sector and does not engage in the manufacture of tubes, this evidence does not relate to the Appellant and does not implicate the Appellant in any bid to restrict output within the steel sector.[29]

❖ **Evidence 31:**

29. Communication on 22nd November 2018 from Mr. Kush Nathwani to the Apex Board WhatsApp Group referring to a meeting at Tononoka Offices in Westlands at 10:00 am to discuss price and how to reduce stock between manufacturers to ensure price stability. The said meeting was confirmed by Mr. Neil Nathwani.[30]

30. From the aforementioned discussions, the Respondent noted that there were discussions among **some** of the tubes subsector players on modalities to limit production in order to stabilize the market which quintessential of coordinated output restriction. Unfortunately, the Respondent did not indicate the exact names of the tubes subsector players who were allegedly involved in coordinated output restriction.[31]

❖ **Evidence 39:**

31. The communication of 24th November 2018 from Mr. Pankaj Nathwani which pointed the intention of the industry players to control the price and material to stabilize the market due to excess material in the country. The Appellant is not mentioned in this evidence.[32]

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[28] Appellant's written submissions dated 27th September, 2024 page 15 paragraph 79.
[29] Appellant's written submissions dated 27th September, 2024 page 15 paragraph 80.
[30] Appellant's written submissions dated 27th September, 2024 page 16 paragraph 81.
[31] Appellant's written submissions dated 27th September, 2024 page 16 paragraph 82.
[32] Appellant's written submissions dated 27th September, 2024 page 16 paragraph 83.

❖ **Evidence 45E:**

32. The Respondent observed that an email dated 15th September 2021 from Mr. Manish Mehra of MRM to Mr. Neelash Shah of Safal Group mentioned that Brollo, Tononoka, Jubilee Jumbo, Nail & 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 among other things;[33]

    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 December 21 which had the material for various manufacturers including Brollo, Nail & Steel, which would mean around 25,000 to 30,000 MT; and
    iv) Submissions alluding that Abyssinia/Prime has overstocked and had over 5,000 of 1 mm.

33. In this regard, the Respondent observed that the subsequent decision by those present in the meeting on 14th September 2021 to go slow demonstrates output restriction. In support of this, the Respondent came across an excel sheet from Apex depicting different stock levels of competitors (Evidence 44) and an email from MRM dated 3rd May 2021 discussing stock material as at 1st April 2021 of various industry players (Evidence 50).[34]

❖ **Evidence 3:**

34. Email communications of 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.[35]

35. In this evidence, the Respondent observed that MRM, Devki, Doshi, Corrugated and Tononoka 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.[36]

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[33] Appellant's written submissions dated 27th September, 2024 page 16 paragraph 84.
[34] Appellant's written submissions dated 27th September, 2024 page 17 paragraph 85.
[35] Appellant's written submissions dated 27th September, 2024 page 14 paragraph 76.
[36] Appellant's written submissions dated 27th September, 2024 page 15 paragraph 77.

36. Additionally, there is mention of the Chinese importers holding stocks of 15,000 pieces and above with more than 500 pieces expected per month which they mention is significantly hurting the local manufacturers.[37]

37. In response to Evidence 3, Mr. Niral Savla of Tononoka indicated that the company does not discuss the stocks of other companies or of the Chinese companies in this context and that he does not know the names of the Chinese importers. However, information retrieved from Sarth's (Tononoka Director) computer, provided a comprehensive analysis of imports by all companies including the source of import. (Evidence 55A -Excel sheets of imports December 21 and 55B – Excel sheets of Kenya imports for the period January 18th to June 21. A similar document was retrieved from Mr. Salim's computer of MRM (Evidence 55C).[38]

38. **Third,** the Appellant argued that the Evidence relied on by the Respondent does not meet the requirement of admissibility in a court of Law. **The Appellant relied on section 33 (1) of the Act which states that "The Authority may receive in evidence any statement, document, information or nature that may in its opinion assist to deal effectively with an investigation conducted by it, but a statement document, information or matter shall not be received in evidence unless it meets the requirements for admissibility in a court of Law".**

39. The Appellant argued that the Respondent has failed to meet the requisite threshold as the impugned emails, WhatsApp conversations, and photographic images relied upon have not been accompanied with an **Electronic Certificate** as envisaged under the provisions of **Section 106B** of the Evidence Act, Cap. 80.[39]

40. The Appellant relied on the Court of Appeal decision in **Speaker County Assembly of Kisumu & 2 Others versus Clerk, Kisumu County Assembly Service Board & 6 Others (2015) eKLR** where the Court observed as follows;[40]

> *65. **Section 106B** of the Evidence Act states that electronic evidence of a computer recording or output is admissible in evidence as an original document "if the conditions mentioned in this section are satisfied in relation to the information and computer."*

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[37] Supra.
[38] Appellant's written submissions dated 27th September, 2024 page 15 paragraph 78.
[39] Appellant's written submissions dated 27th September, 2024 page 18 paragraph 94.
[40] Appellant's written submissions dated 27th September, 2024 page 18 paragraph 95.

66. In our view, this is a mandatory requirement that was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106B(2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced. For ease of reference, we wish to reproduce Section 106B of the Evidence Act in its entirety:

"106B (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.

24. Furthermore, the importance of the Electronic Certificate was also underscored by the Court in the case of **Samwel Kazungu Kambi versus Nelly Ilongo the Returning Officer, Kilifi County & 2 Others (2017) eKLR** where the Honorable Court observed as follows;[41]

"***21. Sub-section (4) of Section 106B requires a certificate confirming the authenticity of the electronic record. Such a certificate should describe the manner of the production of the record or the particulars of the device. The certificate could also have the signature of the person in charge of the relevant device or the management of the relevant activities.***

22. The source of the photocopies of the photographs annexed to the affidavit sworn by the Petitioner in support of the Petition was not disclosed. The device used to capture the images was unknown. The person who took the photographs was not named. The person who processed the images was not named. The Petitioner was not an eyewitness to the incident and he could not therefore tell the court that the photographs were a true reflection of the incident he witnessed"

[41] Appellant's written submissions dated 27th September, 2024 page 19 paragraph 96.

41. The Appellant argued that it is therefore clear beyond peradventure that where any electronic evidence is not accompanied by the requisite Electronic Certificate then the same are devoid and bereft of any legal or probative value; the impugned emails, WhatsApp conversations, and photographic images attract no legal weight or value which is essential in determining the issues in controversy before the Honourable Tribunal**, and that the following Evidence relied upon by the Respondent should be struck out from the record.**[42]

1) Evidence 1: Email dated 15th May 2018 from Neel Kamal Shah
2) Evidence 2: Email dated 27th September 2018 from Murtaza Tarmal
3) Email dated 11th December 2021 from Bobby;
4) Email dated 9th December 2021 from Neel Kamal Shah;
5) Evidence 8: Screenshots of WhatsApp conversations;
6) Evidence 19: Extract of message conversation from Neil Nathwani;
7) Evidence 21A: Extract of message conversation;
8) Evidence 21B: Extract of message conversation;
9) Evidence 23: Extract of message conversation;
10) Evidence 26: Extract of message conversation;
11) Evidence 28: Extract of message conversation;
12) Evidence 31: Extract of message conversation;
13) Evidence 34: Extract of message conversation;
14) Evidence 35: Extract of message conversation;
15) Evidence 36: Extract of message conversation;
16) Evidence 38: Extract of message conversation;
17) Evidence 39: Extract of message conversation;
18) Evidence 40A: Extract of message conversation;
19) Evidence 41: Email from Beatrice Ochiel dated 6th October 2018;
20) Evidence 45(a); (b); (c); (d); (e); (f); 45( )i; 45( )ii; 45( )iii; 45( )iv; being copies of emails
21) Evidence 50: Email from Sylvans Okeyo dated 3rd May 2021
22) Evidence 52: Samir's phone chat with Kush

[42] Appellant's written submissions dated 27th September, 2024 page 19 paragraph 97.

23) Evidence 54: Screenshots of WhatsApp conversation from Tononoka Group;
24) Evidence 56:
25) Evidence 57: Email from Abhijeet Gupta dated 3rd September 2021

42. The Appellant further argued that the Respondent erred by relying on evidence that does not meet the requirements for admissibility in a court of law, making the Decision by the Respondent dated 17th August 2023 erroneous in law and fact, contrary to equity and a gross miscarriage of justice.[43]
43. The Appellant in its submissions stated that as per the Consolidated Guidelines on Restrictive Trade Practices under the Act (hereinafter "**the Guidelines**"), the Respondent bears the burden of proving the existence of an agreement whose object is the prevention, distortion or lessening of competition.[44]
44. The Appellant urged this Tribunal to answer whether the Respondent established the fact that there was an Agreement between the Appellant and other manufacturers and distributors of steel products in Kenya thus violating the provisions of the Act, that is Section 21(3)(a) and Section 21(3)(e) of the Act. The Appellant submitted that the Respondent has failed to tender any evidence that the Appellant participated in informal discussions which culminated in simultaneous price revisions. On the contrary, the Respondent in Paragraph 149 of the Decision confirms that the Appellant was not adversely mentioned for engaging in price fixing but stills proceeded to find the Appellant culpable for engaging in price fixing contrary to Section 21(1) as read together with Section 21(3)(a) of the Act.[45]
45. The Appellant stated that the allegations the Appellant participated in the price fixing discussions together with other steel makers as they were merely mentioned in Evidence 45E is unconscionable and should not be countenanced by this Honorable Tribunal.[46]
46. The Appellant argued that Clause 28 of the Guidelines describes hardcore restrictive agreements as those that are by their very nature are injurious to the proper functioning of competition and have not redeeming value whatsoever. Additionally, Clause 29 of the Guidelines lists price fixing

[43] Appellant's written submissions dated 27th September, 2024 page 20 paragraph 98.
[44] Appellant's written submissions dated 27th September, 2024 page 20 paragraph 99.
[45] Appellant's written submissions dated 27th September, 2024 page 20 paragraph 100.
[46] Appellant's written submissions dated 27th September, 2024 page 21 paragraph 101.

as a hard-core restriction. Despite the aforementioned definitions, the Respondent had not established the legal standard that the Appellant was allegedly involved in the alleged discussions whose aim was price fixing. It was the Appellants contention, that the Respondent has not proved that there was any agreement or if indeed the Appellant was part of the said agreement whose aim was price fixing.[47]

47. Further it was argued that the Respondent has not proved that the Appellant was part of any agreement for the Respondent to analyze whether the said agreement was a Hard-core Restrictive Agreement and the conduct associated with the Appellant's alleged involvement in price fixing constitute a mere presumption.[48]

48. The Respondent had not established that the Appellant was part of the said discussions and that there was an agreement whose effect was to engage in price fixing. The Respondent has also failed to establish that the Appellant participated in output restriction agreements and also engaged in coordinated practices with other steel manufacturers and distributors on price fixing and output restriction. The analysis carried out by the Respondent in incomplete and in any event does not make it possible to establish the legal standard in Clause 28, 29 and 41 of the Guidelines.[49]

49. The Appellant argued that institutional and legitimate role of trade associations is that of collecting and disseminating information on the relevant industry sector among the members. Thus, it is particularly important to distinguish those cases where the dissemination underlies a conspiracy between the members, from those cases where the activity of the trade association renders the market more efficient, making both competitors and consumers better off.[50]

50. Finally, that trade associations or combinations of persons or corporations which openly and fairly gather and disseminate information as to the cost of their product, the volume of production, the actual price which the product has brought in past transactions, stocks of merchandise on hand, approximate cost of transportation from the principal point to the points of consumption as did the manufacturers and distributors of steel and who, as they did, meet and discuss such information and statistics without, however, reaching or attempting to reach any agreement or any concerted action with respect to prices or production or restraining

[47] Appellant's written submissions dated 27th September, 2024 page 21 paragraph 102.
[48] Appellant's written submissions dated 27th September, 2024 page 21 paragraph 103.
[49] Appellant's written submissions dated 27th September, 2024 page 21 paragraph 104.
[50] Appellant's written submissions dated 27th September, 2024 page 21 paragraph 105.

competition, do not thereby engage in unlawful restraint of commerce. Thus, the Appellant herein did not engage in output restriction.[51]

51. In conclusion, the Appellant submitted and prayed that the Appeal herein be allowed; the Decision be set aside and substituted by an order quashing the charges as against the Appellant in entirety and Costs for the Appeal be provided for.

D. RESPONDENT'S CASE.

52. The Respondent avers that in August 2020, the Respondent pursuant to section 31 of the Act Cap. 504 (the Act), initiated investigations in the steel manufacturing and distribution sector in Kenya based on market intelligence that these manufacturers and distributors were engaging in coordinated conduct prohibited under Section 21 of the Act.[52]

53. 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 simultaneously conducted a search and seizure exercise at the premises of Doshi Group (Doshi), Devki Steel Mills Limited (Devki), Tarmal Wire Products Limited (Tarmal), Mabati Rolling Mills Limited (MRM), Tononoka Rolling Mills (Tononoka), Abyssinia Group Industries (Abyssinia), Apex Steel Limited (Apex) on 15th December, 2021 and Insteel Limited (Insteel) on 21st December, 2021.[53]

54. After initial analysis of the evidence obtained during the search, the Respondent established that other than the eight (8) companies mentioned in the paragraph above, an additional six (6) companies namely Blue Nile Wire Products Limited (Blue Nile), Accurate Steel Mills Limited (Accurate), **Jumbo Steel Mills Limited (Jumbo) /Appellant**, Nail and Steel Products Limited (Nail and Steel), Corrugated Sheets Limited (Corrugated) and Brollo Kenya Limited (Brollo) were also subjects of interest in the investigation.[54]

55. Subsequently, on 11th March 2022, the Respondent issued Notices of Investigation and Summons for Appearance pursuant to section 31 of the Act to six (6) companies, namely Blue Nile, Accurate**, Jumbo/Appellant**, Nail and Steel, Corrugated, Brollo, and Kenya Association of Manufacturers (KAM), inviting them to appear before the Respondent for interviews.[55]

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[51] Appellant's written submissions dated 27th September, 2024 page 22 paragraph 106.
[52] Respondent's written submissions dated 12th November, 2024 page 2 paragraph 3.
[53] Respondent's written submissions dated 12th November, 2024 page 2 paragraph 4.
[54] Respondent's written submissions dated 12th November, 2024 page 2 paragraph 5.
[55] Respondent's written submissions dated 12th November, 2024 page 2 paragraph 6.

56. After a thorough assessment of the evidence and explanations presented during the interview, the Respondent, acting under section 34 of the Act, issued a Notice of Proposed Decision *(hereinafter referred to as the "NOPD")* to the Appellant on 4th May, 2022. In conjunction with this, the Respondent furnished the Appellant with the bundle of evidence relied upon in reaching the NOPD, granting the Appellant a period of 21 days to submit written representations and/or to indicate whether a request for an opportunity to present oral representations was warranted.[56]
57. In response to the Respondent's NOPD, the Appellant duly submitted their written representations dated 25th May, 2022. Thereafter, in observance of the duty imposed by Article 47 of the Constitution, and in line with section 35 of the Act as read with section 4 of the Fair Administrative Action Act, 2015, the Respondent convened a hearing conference with the Appellant on 8th June, 2022.[57]
58. The Respondent having considered the Appellant's written representations, submissions and other matters raised during the hearing conference, pursuant to section 36 of the Act, made a finding that:[58]
    i. The conduct of the Appellant,
        a) together with 13 other manufacturers and distributors of steel products in Kenya constituted an infringement of section 21(1) of the Act as read together with section 21(3)(a) of the Act by participating in Price-fixing; and
        b) together with 13 other manufacturers and distributors of steel products in Kenya constituted an infringement of section 21(1) as read together with section 21(3)(e) of the Act by participating in restricting output agreements.
    ii. the Respondent restrained the Appellant from engaging in conduct that violates section 21(1) of the Act as read together with section 21(3)(a) and section 21(3)(e) of the Act.
    iii. the Respondent restrained the Appellant from engaging in future violations of the Act.

[56] Respondent's written submissions dated 12th November, 2024 page 2 paragraph 7.
[57] Respondent's written submissions dated 12th November, 2024 page 3 paragraph 8.
[58] Respondent's written submissions dated 12th November, 2024 page 3 paragraph 9.

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

v. The Respondent imposed a financial penalty of 0.5% of Jumbo's 2021 gross annual turnover in Kenya amounting to KES. 33,140,459.40.

59. During the investigation process, and prior to the issuance of the determination, five of the fourteen steel manufacturing and distribution firms invoked section 38 of the Act, thereby initiating settlement negotiations with the Respondent. Subsequently, two additional firms commenced settlement negotiations following the filing of the Appeal.[59]

60. In light of the above submissions and in response to the Appellant's submissions dated 27th September, 2024, the Respondent submitted that the issues for determination by this Honorable Tribunal are as follows:[60]

i. Whether the Appellant engaged in conduct that constituted an infringement of section 21(1) of the Act as read together with section 21(3)(a) of the Act (price fixing) and section 21(1) of the Act as read together with section 21(3)(e) of the Act (output restriction); and

ii. Whether the Respondent was bound by the rules of evidence in reaching its decision dated 17th August, 2023.

Whether the Appellant engaged in conduct that constituted an infringement of section 21(1) of the Act as read together with section 21(3)(a) of the Act (price fixing) and section 21(1) of the Competition Act as read together with section 21(3)(e) of the Act (output restriction)

61. The Respondent submitted, that the Appellant's conduct constitutes a manifest contravention of Section 21(1) of the Act, when read conjointly with Sections 21(3)(a) and 21(3)(e) thereof, and that the Appellant's actions amount to a flagrant breach of the statutory prohibitions enshrined within the Act.[61]

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[59] Respondent's written submissions dated 12th November, 2024 page 4 paragraph 10.
[60] Respondent's written submissions dated 12th November, 2024 page 4 paragraph 11.
[61] Respondent's written submissions dated 12th November, 2024 page 4 paragraph 12.

62. Referencing section 21(1) of the Act, construed in *pari materia* with sections 21(3)(a) and 21(3)(e) thereof, which respectively stipulate as follows:[62]

> *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;*

63. From a reading of the foregoing provisions, the Act prohibits any agreement, decision or concerted practices by undertakings whose object or effect is to prevent, distort or lessen competition of goods or services in Kenya unless it is exempt as provided under the Act. The Act further provides a non-exhaustive list of the prohibited agreements, decisions or concerted practices and in this matter, they were price fixing and output restriction.[63]
64. In alignment with this, the Federal Trade Commission characterizes price-fixing as any agreement—whether written, oral, or inferred from conduct—among competitors aimed at raising, lowering, or stabilizing prices or other competitive terms.[64]
65. Price-fixing is delineated under Clause 30 of the Consolidated Guidelines to encompass:[65]
    a. fixing the price itself; or fixing an element of the price such as fixing a discount, setting percentage price increase; or
    b. setting the permitted range of prices between competitors;

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[62] Respondent's written submissions dated 12th November, 2024 page 5 paragraph 14.
[63] Respondent's written submissions dated 12th November, 2024 page 5 paragraph 15.
[64] Respondent's written submissions dated 12th November, 2024 page 5 paragraph 16.
[65] Respondent's written submissions dated 12th November, 2024 page 5 paragraph 17.

c. Setting the price of transport charges (such as fuel charges), credit interest rate terms etc.; and

d. An agreement or arrangement to indirectly restrict price competition in some way such as recommended pricing.

66. The Respondent argued that Price fixing can take various forms and is not limited to the outright forms of what encompasses price fixing as stated in the Competition Law, (7th Edition) book on page 523, *"It is also important to appreciate that prices can be fixed in numerous different ways, and that a fully effective competition law must be able to comprehend not only the most blatant forms of the practice but also a whole range of more subtle collusive behaviour whose object is to limit price competition."*[66]

67. The Appellant argued that the Respondent had failed to establish the Appellant's culpability for price-fixing, asserting that there is a lack of evidence to demonstrate the existence of a collusive agreement implicating the Appellant. However, in reply the Respondent submitted that, in evaluating hard-core restrictions, it is guided by Clause 41 of the Consolidated Guidelines, which mandates that horizontal collusive agreements be subjected to an "object" analysis. This requires a *per se* or strict scrutiny approach, under which no defences may be invoked. The Respondent focused solely on the content and nature of the agreement, rather than its actual effects.[67]

68. The Respondent submitted, that this position was amplified in ***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)***, paragraph 31 wherein it was stated 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 occur is only relevant for determining the amount of any fine and assessing any claim for damages..."*

69. This was further highlighted in the case of ***Case C-105/04 P Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission [2006] ECR I-8725,*** where paragraph 125 of the Judgement, the Court held that: *"That paragraph of the judgment under appeal reveals no error of law on the part of the Court of First Instance, since,*

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[66] Respondent's written submissions dated 12th November, 2024 page 6 paragraph 18.
[67] Respondent's written submissions dated 12th November, 2024 page 6 paragraph 19.

for the purposes of applying Article 81(1) EC, there is no need to take account of the actual effects of an agreement once it appears that its object is to prevent, restrict or distort competition within the common market....."

70. The Respondent further submitted that in instances where the concerted practice is between undertakings in a horizontal relationship, clauses 28 and 42 of Consolidated Guidelines state that it is considered that the conduct is a hardcore restriction and that is by its very nature injurious to the proper functioning of competition and has no redeeming value whatsoever.[68]
71. To support its argument it relied on the case of ***Competition Commission v South African Breweries Limited and Others (129/CAC/Apr14) [2015] ZACAC 1; 2015 (3) SA 329 (CAC) (2 February 2015)*** where *the South African Competition Appeal Court followed the European Commission in its Guidelines to Technology Transfers Agreements (2004) which states that:*

    'In order to determine the competitive relationship between the parties it is necessary to examine whether the parties would have been actual or potential competitors in the absence of the agreement. If without the agreement the parties would not have been actual or potential competitors in any relevant market affected by the agreement they are deemed to be non-competitors.'

    51. The characterisation principle above if applied to the Appellant shows that the nature of the agreement as exhibited in the Appellant rulebook i.e. brokers members be the only ones to offer tea for sale at an auction and producer members barred from acting as brokers shows that in absence of the agreements, brokers can compete with the producers.

    52. Applying the characterisation principle established in the case of ***Competition Commission v South African Breweries Limited and Others*** *(Supra) leads us to the conclusion that the members of the Appellant are in a horizontal relationship. Consequently, any price-fixing within the auspices of the Appellant can be termed as a horizontal restriction.*
72. Output restriction is defined under clause 39 of the Consolidated Guidelines "*to occur when competitors agree to prevent, reduce or restrict supply to create scarcity. The purpose of the arrangement is to prop up or increase prices (or counter falling prices). This may be inferred where the arrangement directly or indirectly prevents, restricts or limits*

[68] Respondent's written submissions dated 12th November, 2024 page 7 paragraph 22.

a. *the production, or likely production, of goods by any or all of the parties to the contract, arrangement or understanding; or*

b. *the capacity, or likely capacity, of any or all of the parties to the contract, arrangements or understanding to supply services; or*

c. *the supply, or likely supply, of goods or services to persons or classes of persons by any or all of the parties to the contract, arrangement or understanding."*

73. The Respondent submitted that clause 40 of the Consolidated Guidelines clarifies that any undertaking may independently decide to reduce output to respond to market demand. **What is prohibited is an agreement with competitors on the coordinated restriction of output.** The Respondent argued that the Appellant in this matter is not operating autonomously but is instead colluding with other market players, acting in concert to undermine competitive integrity.[69]

74. The Respondent further submitted that under clause 29 of the Consolidated Guidelines, price fixing and output restriction between undertakings in a horizontal relationship are hard-core restrictions that are by their very nature injurious to the proper functioning of competition and have no redeeming value whatsoever. This means that price fixing and output restriction between undertakings in a horizontal relationship have automatically as their object the restriction of competition and therefore once established, there is no need to show the effect of the conduct in the market.[70]

75. Based on these arguments and explanation of the offence of price-fixing and output restriction, the Respondent submitted that the Appellant's conduct in engaging in price-fixing and output restriction constituted a concerted practice which is defined in section 2 of the Act as *a co-operative or coordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement.* The Respondent argued that there was direct communication among these firms, with the explicit aim of influencing each other's market conduct or disclosing intended courses of action—disclosures that would not typically occur under competitive conditions. Notably, the firms operated in competition and thus shared a horizontal relationship; their conduct thereby

[69] Respondent's written submissions dated 12th November, 2024 page 8 paragraph 25.
[70] Respondent's written submissions dated 12th November, 2024 page 8 paragraph 26.

constituted hard-core restrictions, fundamentally detrimental to the proper functioning of competition and devoid of any redeeming or pro-competitive value.

76. The Respondent relied on the case of **Commission v Anic Partecipazioni, C-49/92 P, EU:C:1999:356** a concerted practice was defined as follows:

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

77. Clause 12 of the Guidelines further provides that a concerted practice, therefore, can include any type of coordinated activity between undertakings which substitute practical co-operation between them for the risks presented by effective competition, and includes any practice which involves direct or indirect contact or communication between undertakings, the object or effect of which is either to influence the conduct of undertakings on a market or to disclose the course of conduct which an undertaking has decided to adopt or is contemplating to adopt in circumstances where the disclosure would not have been made under normal conditions of competition

78. In this matter, the Respondent submitted that there was evidence, Evidence 45E, an email dated 15th September 2021, from Mr Manish Mehra (MRM) to Mr Neelesh Shah (MRM)) as elaborated in paragraph 14 of its Replying Affidavit, that on 14th September, 2021 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 (Annexure marked GM-6 in the Replying Affidavit). The evidence confirms that the meeting was attended by Brollo; Tononoka; **Jubilee Jumbo (the Appellant)**; Abyssinia; Nail & Steel Limited; Blue Nile; MRM, Insteel; Devki and Apex.

79. In response to Evidence 45E, the Appellant contended that the document did not constitute formal minutes and lacked reliability as a credible account of the meeting's proceedings. However, the Respondent submits that, notwithstanding the Appellant's assertion, Evidence 45E was not formal minutes but rather email correspondence created in the regular course of business by a participant in the discussions; as such, it did not necessitate formal execution to substantiate its credibility.

80. In addition the Respondent 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 Act as read together with section 21(3) (a) of the Act.
81. Further, the Respondent submitted that the mere mention of the Appellant in the email as having attended the meeting suffices to infer its participation in the concerted conduct alongside other steel manufacturers and distributors. This implication strongly suggests the Appellant's active involvement in the coordinated practices under scrutiny.
82. In another instance of price discussion is Evidence 52, which is a WhatsApp communication dated 23rd January, 2020 Mr Samir Patel of Apex shared a message with Mr Kush Nathwani of Apex on deformed bar pricelists which were to take effect on Monday 20th January, 2020 and further stated that the prices of the items listed in the message had been confirmed by Devki, Abyssinia, Blue Nile, **Jumbo** and Tarmal. (Annexure marked GM-7 in the Replying Affidavit). The Respondent submits that Evidence 52 illustrated that there were discussions and agreements by the companies mentioned including the Appellant to increase deformed bars prices effective on the aforementioned date.
83. Furthermore, Evidence 56, being the daily sales report dated 10th November 2020 from Devki, provides further indication of price agreements among steel manufacturers and distributors. The report records Devki's complaint regarding competitors Tononoka, Blue Nile, Tarmal, and **Jumbo,** who failed to implement agreed-upon price increases. *(Annexure marked GM-8 in the Replying Affidavit).
84. The Respondent submitted the above pieces of evidence illustrated the Appellant's participation in price discussions with its competitors which is per se a prohibition under section 21(1) of the Act as read together with section 21(3)(a) of the Act and the Appellant has not produced evidence or provided any plausible explanations to exonerate them from the finding of their culpability of the offence of engaging in price fixing.
85. The Respondent argued that discussions on prices between competitors are strictly precluded by section 21(1) of the Act as read together with section 21(3)(a) of the Act as it restricts price competition between companies. It relied on the case of ***Case T-587/08 Fresh Del Monte Produce v Commission*** wherein the Court held the following with regard to pre-pricing communications between the undertakings concerned:

*302. **While it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it does, none the less, strictly preclude any direct or indirect contact between such operators by which an undertaking may influence the conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question**, regard being had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of that market (see, to that effect, Suiker Unie and Others v Commission, paragraph 151 above, paragraph 174; Züchner, paragraph 301 above, paragraph 14; John Deere v Commission, paragraph 301 above, paragraph 87; and T-Mobile Netherlands and Others, paragraph 297 above, paragraph 33).*

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

86. The Respondent also submitted that adherence by the concerned parties to the discussions is not required for a finding of infringement of section 21(1) of the Act as read together with section 21(3)(a) of the Act. It relied on the case of ***Associated Lead Manufacturers Ltd (White Lead) v OJ [1979] L 21/16, [1979] 1 CMLR 464;***

Furthermore, the Commission held that it was irrelevant that the quotas were not always meticulously observed: an agreement did not cease to be anti- competitive because it was temporarily or even repeatedly circumvented by one of the parties to it.

87. The Respondent submitted that there are other corroborating pieces of evidence that highlight that the Appellant was indeed in contravention of section 21 (3) (a). The illustration below will show other instances of discussion on pricing by the steel manufacturers and distributors:

a. **Evidence 31** (Annexure marked GM-9 in the Replying Affidavit)[71]

[71] Replying Affidavit sworn by Gideon Mokaya on 25th October, 2023 page 137.

Indicates that there was a Tube Sub sector meeting held on 21st November, 2018 and a follow up meeting held on 22nd November, 2018 to discuss prices and how to reduce stock between manufacturers to ensure price stability.

b. **Evidence 34** (Annexure marked GM-10 in the Replying Affidavit)[72]

This evidence indicates that there were tubes meeting held on 6th July, 2018 at Art caffe in Westgate.

c. **Evidence 35** (Annexure marked GM-11 in the Replying Affidavit)[73]

There was a meeting scheduled for 10th May, 2020 which was restricted to Apex, Doshi, Brollo and Insteel.

d. **Evidence 36** (Annexure marked GM-12 in the Replying Affidavit)[74]

This evidence establishes that on 21st November, 2021 communication occurred with Mr. Kush Nathwani of Apex, wherein he confirmed that a meeting of the steel sector had been convened at Zen Gardens to deliberate on pricing matters.

e. **Evidence 38** (Annexure marked GM-13 in the Replying Affidavit)[75]

This evidence demonstrates that a WhatsApp message dated 4th July, 2014 reflects a meeting held at the offices of Athi Steel, specifically addressing the issue of deformed bar pricing.

f. **Evidence 40A** (Annexure marked GM-14 in the Replying Affidavit)[76]

This evidence reveals a WhatsApp message dated 5th July, 2013 documenting a meeting convened at Zen Gardens Restaurant concerning matters pertaining to the Hot Rolling Sector.

g. **Evidence 41** (Annexure marked GM-15 in the Replying Affidavit)[77]

This evidence consists of an internal Apex email dated 6th October, 2018 from Beatrice Ochiel, indicating that a meeting among tube manufacturers was to be held for the purpose of sharing new prices and discounts.

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[72] Replying Affidavit sworn by Gideon Mokaya on 25th October, 2023 page 140.
[73] Replying Affidavit sworn by Gideon Mokaya on 25th October, 2023 page 143.
[74] Replying Affidavit sworn by Gideon Mokaya on 25th October, 2023 page 147.
[75] Replying Affidavit sworn by Gideon Mokaya on 25th October, 2023 page 151.
[76] Replying Affidavit sworn by Gideon Mokaya on 25th October, 2023 page 155.
[77] Replying Affidavit sworn by Gideon Mokaya on 25th October, 2023 page 157.

h. **<u>Evidence 48, 51A and 50</u>** (Annexure marked GM-16, 17 and 18 respectively in the Replying Affidavit)[78]

This evidence includes a sales report by MRM, which noted that the three major manufacturers—Devki, Abyssinia, and Tarmal continued to operate under the prior price list, offering a 32% discount. This was substantiated by Evidence 51A, an excerpt from the Insteel Management Report for the first quarter ending 31st March, 2017 which assessed local market competition, which reads *"that there was cut throat competition with most manufacturers struggling to survive hence not maintaining the agreed pricing/discount"*. Further corroboration is provided by Evidence 50, referencing a report dated 1st April, 2021 indicating alignment within the industry on prices and discounts.

88. Notwithstanding the Appellant's denial of awareness of, or notification of, the meetings nor attendance by any of its representatives and its assertion that it is not a tube manufacturer, the Respondent submits that its duty was to demonstrate the existence of an agreement, concerted practice, or decision among steel product manufacturers and distributors, and to show that the Appellant indeed participated in such an arrangement. In this context, any statement, action, or written communication made by any party in furtherance of the agreement or concerted practice, reflecting their shared intent, constitutes a pertinent fact against each participant. Such evidence establishes both the existence of the concerted practice and demonstrates that each party, including the Appellant, was involved in the said practice.

89. The Respondent in support of the above submission relied on the case of ***Polypropylene OJ [1986] L 230/1, [1988] 4 CMLR 347*** where the European Commission investigated a complex cartel agreement in the petrochemicals sector involving 15 firms over many years. It held *that the detailed arrangements whereby the cartel operated were all part of a single, overall agreement: this agreement was oral, not legally binding, and there were no sanctions for its enforcement. Having established that there was a single agreement, the Commission concluded that all 15 firms were guilty of infringing Article 101, even though some had not attended every meeting of the cartel and had not been involved in every aspect of its decision- making: participation in the overall agreement was sufficient to establish guilt. Furthermore, the fact that some members of the cartel had reservations about whether to participate – or indeed intended*

[78] Replying Affidavit sworn by Gideon Mokaya on 25th October, 2023 page 160-170.

to cheat by deviating from the agreed conduct – did not mean that they were not party to an agreement.

90. Upon Appeal of the Commission's decision in the Polypropylene matter in ***T-305/94 - LVM v Commission,*** the Court upheld the Commission's decision stating that *"An undertaking may be held responsible for an overall cartel even though it is shown to have participated directly only in one or some of its constituent elements if it is shown that it knew, or must have known, that the Page 16 of 28 collusion in which it participated, especially by means of regular meetings organised over several years, was part of an overall plan intended to distort competition and that the overall plan included all the constituent elements of the cartel."*
91. The Respondent submitted that where an undertaking, even passively, participates in meetings or discussions with an anti-competitive purpose and does not publicly repudiate such engagement, it shall be construed as complicit in the prohibited conduct. The absence of disassociation unequivocally signifies tacit involvement in the anti-competitive activities under examination.
92. In light of the foregoing, the Respondent further submitted that the corroborative evidence presented is materially relevant against the Appellant, as it substantiates both the existence of the concerted practice and the Appellant's participation therein, evidencing actions undertaken in furtherance of this concerted practice aligned with a common anti-competitive intent.
93. With regard to output restriction, the Respondent stated, it occurs when competitors agree to prevent, reduce or restrict supply with the aim of creating scarcity. The purpose of the arrangement is to prop up or increase prices (or counter falling prices). This may be inferred where the arrangement directly or indirectly prevents, restricts or limits the production, or likely production, of goods by any or all of the parties to the contract, arrangement or understanding, the capacity, or likely capacity, of any or all of the parties to the contract, arrangements or understanding to supply services, the supply, or likely supply, of goods or services to persons or classes of persons by any or all of the parties to the contract, arrangement or understanding.
94. The Respondent observed that in evidence 45E which was an email dated 15th September 2021 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:

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.*

95. The Respondent submitted that having established that the Appellant attended the anti-competitive meeting demonstrated in Evidence 45E, the Appellant, by merely denying attendance of the meeting has failed to distance itself from the cartel in the manner required to exonerate them of participation. The Respondent relied on the case of ***Case T-83/08 Denki Kagaku Kogyo Kabushiki Kaisha and Denka Chemicals GmbH v Commission***, the Court held that the Appellants' mere denial and failure to provide a possible alternative explanation for their presence at that meeting did not amount to them distancing themselves from the cartel in the manner required by the case-law. The Court stated as follows:

"52. When agreements of an anti-competitive nature are reached at meetings of competing undertakings, ***it is sufficient for the Commission to establish that the undertaking concerned participated in meetings during which agreements of an anti-competitive nature were concluded in order to prove that the undertaking participated in the cartel. Where participation in such meetings has been established, it is for that undertaking to put forward indicia to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs. The reason underlying that rule is that, having participated in the meeting without publicly distancing itself from what was discussed, the undertaking gave the other participants to believe that it subscribed to what was decided there and would comply with it (see Joined Cases C-403/04 P and C-405/04 P Sumitomo Metal Industries and Nippon Steel v Commission [2007] ECR I-729, paragraphs 47 and 48 and the case-law cited).***

53. It must be pointed out in this regard that the notion of publicly distancing oneself as a means of excluding liability must be interpreted narrowly. In order to disassociate itself effectively from anti-competitive discussions, it is for the undertaking concerned to

indicate to its competitors that it does not in any way wish to be regarded as a member of the cartel and to participate in anti-competitive meetings. In any event, silence by an operator in a meeting during which an unlawful anti-competitive discussion takes place cannot be regarded as an expression of firm and unambiguous disapproval. A party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery (see, to that effect, Case T-303/02 Westfalen Gassen Nederland v Commission [2006] ECR I-4567, paragraphs 103 and 124).

*197. ..... **As regards that London meeting, during the administrative procedure the applicants merely denied having participated in the anti-competitive discussions and submitted no possible alternative explanation for their presence at that meeting, which was characterized as an anti-competitive meeting by all the other participants. The applicants' arguments that the Commission failed to prove their participation in the cartel during the period between those two meetings of May 1996 and July 1997 are ineffective. It is sufficient to note, as the Commission states, (i) that the applicants did not distance themselves from the cartel in the manner required by the case-law cited in paragraphs 52 and 53 above** and (ii) that it would be artificial to subdivide into a number of distinct actions an anti-competitive agreement which is characterised by a series of efforts pursuing a single economic end (see the case-law cited in paragraph 180 above)*

96. Contrary to paragraph 79 of the Appellant's submissions, the Respondent further submitted that output restriction was established in **Evidence 3** which was an email communication date 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 this 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.

97. The Respondent in its investigations submitted that it found communication whose object was to limit output in the steel sector as stated under paragraph 25 of the Replying Affidavit and paragraphs 164 to 174 of the Statement of Reasons for Decision.

98. In conclusion, the Respondent asserted that the provisions of section 21(1) of the Act, in conjunction with sections 21(3)(a) and 21(3)(e), were indeed the pertinent sections applicable to the violations under review. The Respondent contends that its interpretation and application of these provisions were accurate and conducted in a comprehensive, holistic manner, without selective emphasis, contrary to the Appellant's assertions.

Whether the Respondent was bound by the rules of evidence in reaching its decision dated 17th August, 2023.

99. The Respondent submitted that pursuant to section 31 of the Act, it is empowered on its own initiative or upon receipt of information from any person or Government agency or Ministry, to carry out an investigation into any conduct or proposed conduct which may constitute an infringement of the prohibition relating to Restrictive Trade Practices.

100. The Respondent argued that it carried out its mandate in a lawful, reasonable and procedurally fair manner in compliance with the obligations under Article 47 of the Constitution and the Fair Administrative Action No. 4 of 2015 *(hereinafter referred to as the "FAAA")* whenever it is discharging its administrative function.

101. Pursuant to section 2 of the Evidence Act Cap 80 (the Evidence Act), it is asserted that the Act applies to judicial proceedings in any court except a Kadhi's court, but not to proceedings before an arbitrator. Additionally, Section 2 of the FAAA defines administrative action as the powers, functions, and duties exercised by authorities or quasi-judicial tribunals. Therefore, the emphasis is on ensuring the lawfulness and procedural correctness of the administrative action or decision, rather than replacing the express statutory procedure with judicial procedure.

102. In this case, the Respondent maintained that the technical rules of evidence espoused under Articles 50 (2) (k), 50 (3), 50 (4) of the Constitution of Kenya, *2010 (hereinafter referred to as the "Constitution")* and Section 106B (4) of the Evidence Act do not apply when carrying out its administrative duties. On the contrary, the Appellant arguments lacked basis in law and

procedure as the process of collecting, preserving and analyzing the evidence was done procedurally and in a fair manner as envisaged under Article 47 of the Constitution, the Act and the Fair Administrative Actions Act, 2015 (FAAA).

103. It was the Respondent's submission that the proceedings before it are administrative in nature and therefore the strict rules of evidence do not apply. This was the position of the court in ***Joseph Mbalu Mutava v Attorney General & another [2014] eKLR,*** in which the court while examining the question of whether procedural fairness was applied by an administrative body in the exercise of its mandate, stated 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..."*

104. The Respondent submitted that the proceedings before it is administrative in nature and therefore the strict rules of evidence do not apply as alleged by the Appellant in its submissions.

105. The Respondent further submitted that its investigation process is guided by Article 47 of the Constitution, sections 31 through 40 of the Act as read together with section 4 of the Fair Administrative Action Act which prescribes the approach to be followed in an administrative process. As such, 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.

106. 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 the party under investigation as envisaged under the Constitution, the Act and FAAA and not the Evidence Act. In furtherance to the above obligation, the Respondent extracted the information from the electronic devices and issued an inventory list of the said evidence to the Appellant on site of all the digital and documentary information extracted.

107. Additionally, pursuant to sections 32(4) of the Act which provides that the Respondent may seek the assistance of police officers and other law enforcement agencies in its execution of the mandate as read together with section 9(m) of the Act which provides that the Respondent may liaise with regulatory bodies and other public bodies in all matters relating to competition

and consumer protection, 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.

108. The Respondent subsequently forwarded mobile phones and laptops to EACC for purposes of extraction of the digital information after which the EACC extracted the digital information and forwarded the report together with the certificate of electronic records. Further, pursuant to section 13(2) of the Act which provides that the Respondent may engage consultants and experts to assist it in performing its functions and exercising its powers, it sought the assistance of a consultant and experts in the extraction of information from desktops and hard drives.

109. The Respondent thereafter forwarded desktops and hard drives to the forensic consultant for purposes of extraction of the digital information after which the forensic consultant extracted the digital information and forwarded the report that included the certificate of electronic record. Following the extraction of information, the Respondent invited the owners of the devices, who appeared before it and were accorded an opportunity to verify the extracted information, which they confirmed.

110. Per Section 33 of the Act, the Respondent has the power to take evidence, which it did in this instance during the search and seizure and was in accordance with the Act as well as the FAAA and the Constitution.

111. The Respondent annexed the Electronic Certificates in a bid to regularize the inadmissible evidence and further maintains that in the course of its investigations into decision-making, it was guided by the provisions of Article 47 of the Constitution, sections 31 to 36 of the Act & section 4 of the Fair Administrative Action Act which prescribe the approach to be followed in an administrative process. The technical rules of evidence do not therefore apply to administrative processes.

112. The aforementioned is further supported by the **Supreme Court of the Philippines in Divina Palao vs Florentino International, INC** held as follows,...*that administrative bodies are not strictly bound by technical rules of procedure.*

113. Administrative bodies are not bound by the technical niceties of law and procedure and the rules obtained in courts of law. Administrative tribunals exercising quasi-judicial powers are unfettered by the rigidity of certain procedural requirements, subject to the observance of fundamental and essential requirements of due process in justiciable cases presented before

them. In administrative proceedings, technical rules of procedure and evidence are not strictly applied and administrative due process cannot be fully equated with due process in its strict judicial sense.

114. The Respondent submitted that the Appellant was, upon commencement of investigation and making a preliminary finding, issued with all the information, materials and evidence relied upon in making the decision through its Notice of Proposed Decision dated 4th May, 2022.

115. In support of the above the Respondent relied on ***Majid Al Futtaim Hypermarkets Limited v Competition Authority of Kenya & another [2021] eKLR*** wherein this Tribunal held *that:*

> *"131. The said Notice duly notified the Appellant of the findings of the 1st Respondent and the orders it intended to make against the Appellant. The Notice called for evidence in rebuttal through written representations pursuant to section 34 (2) of the Act. The Appellant was also notified of its right to a hearing conference pursuant to section 35 of the Act.*
>
> *132. The Appellant insisted that it could not participate in the proceedings as the 1st Respondent had not provided it with all the evidence. Further, that the rules and procedure for the hearing conference had not been disclosed. The Appellant was also apprehensive that, according to the Notice of the Proposed Decision, a determination had already been reached without the Appellant's participation.*
>
> *133. We have reviewed the procedure laid down at paragraph 34 and 35 of the Act, and we are of the opinion that the 1st Respondent acted according to the laid down procedure. The Appellant is only invited to bring evidence in rebuttal through written representations and conference hearing only upon issuance of a proposed decision.*
>
> *143. We have, hereinabove, determined that the Appellant was supplied with all the documents that the 1st Respondent relied upon. We have also determined that the 1st Respondent followed the correct procedure as laid down in part E of the Act. We find that process does not require formal rules for it to achieve the threshold of natural justice. The Appellant was given adequate notice to rebut the evidence against it. The Appellant was also given an opportunity to be heard."*

116. In conclusion, the Respondent's argued that it has successfully demonstrated 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.

117. The Respondent prayed that this Honorable Tribunal :

a. dismisses the Appellant's Memorandum of Appeal dated 20th September, 2023 and upholds the Respondent's decision dated 21st August, 2023 in its entirety; and

b. Costs of the appeal be awarded to the Respondent.

E. ISSUES FOR CONSIDERATION

118. Having carefully examined the pleadings of the parties, the evidence presented before the Tribunal as well as their written submissions, this Tribunal frames the following main issue for determination;

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

ii. Whether the Respondent was bound by the rules of evidence in reaching its decision of 17th August 2023.

iii. Who bears the cost of this Appeal?

F. ANALYSIS AND DETERMINATION

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

119. In answering the first issue the Tribunal will seek to answer the following questions: Whether the Appellant acting in concert with other steel manufacturers and distributors

(a) Engaged in the conduct of price fixing contrary to Section 21 (1) as read together with Section 21(3)(a).

(b) Participated in restricting output contrary to Section 21 (1) as read together with Section 21(3)(e).

(c) Whether the Respondent was bound by strict rules of evidence in reaching its decision of 17th August 2023.

(d) Who bears the costs of this Appeal?

120. The Appellants case is that the Respondent merely relied on emails copied to the Appellant by third parties did not discharge the burden of proving contravention of the Act. Further, the Appellant argues that the Appellant was not mentioned in Evidence 1 and 2 for having been culpable of the offence of price fixing. In its submissions in response to the Evidence 1 and 2, the Appellant submitted that "The **Appellant was not mentioned in this Evidence**".

121. The Appellant has submitted that the respondent erred in law and in fact misdirected itself ,by whilst on one hand acknowledging at Paragraph 149 of its decision of the impugned decision that the Appellant was not adversely mentioned for engaging in price fixing having reviewed Evidence 1 and 2, the Respondent proceeded to make an erroneous finding that since the Appellant was mentioned in the said emails as being present in the meeting, the Appellant was culpable of having engaged in price fixing contrary to section 21(1) as read together with Section 21 (3) (a) of the Act.

122. On the other hand, the Respondent maintains that in an internal email dated 15th September 2021, Mr. Manish Mehra of MRM reported that on 14th September 2021, there was an informal meeting held at Zen Gardens, Lower Kabete. The evidence established that the meeting was attended by the representatives of Brollo, Tononoka, Jubilee, **Jumbo**, Abyssinia, Nail and Steel Limited, Blue Nile, MRM, Insteel Devki and Apex. The evidence further indicated the main agenda of the meeting on metal sector pricing. See evidence 45E.[79]

123. In the NOPD dated 4th May 2022, the Respondent made a preliminary finding that the Appellant together with other Companies had a case to answer for offences relating to price fixing, output restriction and /or participated in sharing of commercially sensitive information which ultimately aided in coordination amongst the companies which, limited, prevented or distorted competition among the companies and also participated in making directly or indirectly of recommendations relating to prices changed or to be charged by the group of Members being offences contrary to section 21 (1) as read with section 21 (3) (a), (b) , (f) and 22(1) (b) of the Act.

124. Upon the issuance of the NOPD, the Responded wrote to the Appellant requiring it, within 21 days to make any written representations to it and indicate whether it required an opportunity to make oral representations.

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[79] Replying Affidavit sworn by Gideon Mokaya on 25th October, 2023 page 127.

125. The Appellant in compliance with the NOPD, did both oral and written representations where the Respondent issued its decision, finding the Appellant culpable of the offences similar to those it had reached its decision in the NOPD.

126. In its instructive to note that upon hearing the respondents oral and written representations, the Respondent observed in paragraph 149 of decision that "***The Authority having reviewed Jumbo's responses in Evidence 1 and 2 is of the Opinion that Jumbo was not adversely mentioned in engaging in price fixing in these instances***".

127. In looking at Evidence 1 and 2 the Respondent is bound by its pleadings. Pleadings are therefore paramount. In the case **of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, A C Mrima** stated as follows: -

> "It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC** expressed himself thus on the importance and place of pleadings: -
>
> > ".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
> >
> > ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

128. On Evidence 1 and 2, the Tribunal adopts the Respondents' findings, absolving the Appellant from culpability <u>on these specific pieces of evidence</u>.

129. The Respondent went on to expound the nature of the offence for which the Appellant was found culpable, laying a foundation underpinning the finding that the Appellant did indeed engage in price-fixing.

130. Referring to section 21(1) of the Act, construed in *pari materia* with sections 21(3)(a) and 21(3)(e) thereof, which respectively stipulate 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;*
>
> *(e) limits or controls production, market outlets or access, technical development or investment;*

131. The Act prohibits any agreement, decision or concerted practices by undertakings whose object or effect is to prevent, distort or lessen competition of goods or services in Kenya unless it is exempt as provided under the Act. The Act further provides a non-exhaustive list of the prohibited agreements, decisions or concerted practices and in this matter, they were price fixing and output restriction.

132. This Tribunal notes that, the Federal Trade Commission characterizes price-fixing as any agreement—whether written, oral, or inferred from conduct—among competitors aimed at raising, lowering, or stabilizing prices or other competitive terms.

133. Price-fixing is delineated under Clause 30 of the Consolidated Guidelines to encompass:

i. fixing the price itself; or fixing an element of the price such as fixing a discount, setting percentage price increase; or

ii. setting the permitted range of prices between competitors;

iii. Setting the price of transport charges (such as fuel charges), credit interest rate terms etc.; and

iv. An agreement or arrangement to indirectly restrict price competition in some way such as recommended pricing.

134. The Respondent argued that Price fixing can take various forms and is not limited to the outright forms of what encompasses price fixing as stated in the Competition Law, (7th Edition) book on page 523, *"It is also important to appreciate that prices can be fixed in numerous different ways, and that a fully effective competition law must be able to comprehend not only the most blatant forms of the practice but also a whole range of more subtle collusive behaviour whose object is to limit price competition."*

135. The Appellant contends that the Respondent has failed to establish the Appellant's culpability for price-fixing, asserting that there is a lack of evidence to demonstrate the existence of a collusive agreement implicating the Appellant. This Tribunal notes that, in evaluating hard-core restrictions, it is guided by Clause 41 of the Consolidated Guidelines, which mandates that horizontal collusive agreements be subjected to an "object" analysis. This requires a per se or strict scrutiny approach, under which no defenses may be invoked. The Guidelines require the Respondent to focus solely on the content and nature of the agreement, rather than its actual effects.

136. This position was amplified in ***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)***, paragraph 31 wherein it was stated 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 occur is only relevant for determining the amount of any fine and assessing any claim for damages..."*

137. This was further highlighted in the case of ***Case C-105/04 P Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission [2006] ECR I-8725,*** where paragraph 125 of the Judgement, the Court held that: *"That paragraph of the judgment under appeal reveals no error of law on the part of the Court of First Instance, since, for the purposes of applying Article 81(1) EC, there is no need to take account of the actual effects of an agreement once it appears that its object is to prevent, restrict or distort competition within the common market....."*

138. We note that under section 2 of the Act an "**Agreement** "when used in in relation to a restricted practice includes a contract, arrangement or understanding **whether legally enforceable or not:** Further clauses 28 and 42 of the Guidelines state where the concerted practice is between undertakings in a horizontal relationship, it is considered that the conduct is a hardcore restriction **and that is by its very nature injurious to the proper functioning of competition and has no redeeming value whatsoever.**

139. As ascertained and well elaborated ***in Competition Commission v South African Breweries Limited and Others (129/CAC/Apr14) [2015] ZACAC 1; 2015 (3) SA 329 (CAC) (2 February 2015)*** where *the South African Competition Appeal Court followed the European Commission in its Guidelines to Technology Transfers Agreements (2004) which states that:*

> ***'In order to determine the competitive relationship between the parties it is necessary to examine whether the parties would have been actual or potential competitors in the absence of the agreement. If without the agreement the parties would not have been actual or potential competitors in any relevant market affected by the agreement they are deemed to be non-competitors.'***
>
> *51. The characterisation principle above if applied to the Appellant shows that the nature of the agreement as exhibited in the Appellant rulebook i.e. brokers members be the only ones to offer tea for sale at an auction and producer members barred from acting as brokers shows that in absence of the agreements, brokers can compete with the producers.*
>
> *52. Applying the characterisation principle established in the case of* ***Competition Commission v South African Breweries Limited and Others*** *(Supra) leads us to the conclusion that the members of the Appellant are in a horizontal relationship. Consequently, any price-fixing within the auspices of the Appellant can be termed as a horizontal restriction.*

140. The Appellant attacked the Minutes in Evidence 45E that there were not signed or legally binding, and the Respondent relied on them to make a finding that since the Appellant was mentioned in this evidence as meetings as being present in the said meeting, the Appellant was capable of having engaged in price fixing contrary to Section 21(1) as read with Section 21(3)(a) of the Act.

141. A careful reading of the definition of an "**Agreement**" in Section 2 of the Act, does not support the Appellants' arguments on this point, that where a restricted practice is concerned can

be deemed to be an understanding whether its legally enforceable or not. We find that the failure of the Minutes not having been signed does not render Evidence 45E useless. It has the effect of showing that the parties (*the Appellant included*) having engaged in sharing commercially sensitive information as competitors in a horizontal relationship.

142. This Tribunal has also considered Evidence 52 and 56 in which the Appellant is mentioned as which having been engaged in price discussions. Evidence 52 dated 23/01/2020, 09:11:06 from Samir Patel states " *Hallo, Please find below the prices of TMT bars effective Monday 20th January 2021..... The prices above have been confirmed by Devki Steel Mills Limited, Abyssinia Iron and Steel Limited, Blue Nile Rolling Mills Limited and Jumbo Steel Limited and Tarmal Wire products Limited*

143. Evidence 56 is an extract of a daily sales report dated 10th November 2020 from Devki on existence of price arrangements. Devki seems to be complaining that its *competitors Tononoka, Abyssinia, Blue Nile, Tarmal and Jumbo were not increasing their prices after agreements to do so.* "

144. This Tribunal is persuaded that there is evidence on record, that the Appellant was adversely mentioned in offences contravening the Act of price fixing, output restriction and sharing commercially sensitive information with its competitors being in a horizontal relationship. The Appellant other than merely denying culpability offered no plausible explanation of how it found itself within the steel cartel nor did it distance itself collusive conduct of the other steel manufacturers and distributors. These were *per se* offences which were restrictive by object whose effects or consequences were not required to be considered.

145. This finding is supported by 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)***, paragraph 31 wherein it was stated 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 occur is only relevant for determining the amount of any fine and assessing any claim for damages..."*

146. This was further highlighted in the case of ***Case C-105/04 P Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission [2006] ECR I-8725,*** where paragraph 125 of the Judgement, the Court held that: *"That paragraph of the*

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

147. On the other hand Output restriction is defined under clause 39 of the Guidelines to occur when competitors agree to prevent, reduce or restrict supply to create scarcity. The purpose of the arrangement is to prop up or increase prices (or counter falling prices). This may be inferred where the arrangement directly or indirectly prevents, restricts or limits

a) the production, or likely production, of goods by any or all of the parties to the contract, arrangement or understanding; or

b) the capacity, or likely capacity, of any or all of the parties to the contract, arrangements or understanding to supply services; or

c) the supply, or likely supply, of goods or services to persons or classes of persons by any or all of the parties to the contract, arrangement or understanding.

148. Clause 40 of the Guidelines clarifies that any undertaking may independently decide to reduce output to respond to market demand. What is prohibited is an agreement with competitors on the coordinated restriction of output. It is clear that the Appellant in this matter is not operating autonomously but is instead colluding with other steel players, acting in concert to undermine competition.

149. Clause 29 of the Guidelines, price fixing and output restriction between undertakings in a horizontal relationship are hard-core restrictions that are by their very nature injurious to the proper functioning of competition and have no redeeming value whatsoever. This means that price fixing and output restriction between undertakings in a horizontal relationship have automatically as their object the restriction of competition and therefore once established, there is no need to show the effect of the conduct in the market.

150. With regards to the foregoing explication of the offence of price-fixing and output restriction, the Respondent submits that the Appellant's conduct in engaging in price-fixing and output restriction constituted a concerted practice which is defined in section 2 of the Act as *a co-operative or coordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement.* Moreover,

the Respondent submits that there was direct communication among these firms, with the explicit aim of influencing each other's market conduct or disclosing intended courses of action—disclosures that would not typically occur under competitive conditions. Notably, the firms operated in competition and thus shared a horizontal relationship; their conduct thereby constituted hard-core restrictions, fundamentally detrimental to the proper functioning of competition and devoid of any redeeming or pro-competitive value.

151. In the case of **Commission v Anic Partecipazioni, C-49/92 P, EU:C:1999:356** a concerted practice was defined as follows:[80]

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

152. Clause 12 of the Guidelines further provides that a concerted practice, therefore, can include any type of coordinated activity between undertakings which substitute practical co-operation between them for the risks presented by effective competition, and includes any practice which involves direct or indirect contact or communication between undertakings, the object or effect of which is either to influence the conduct of undertakings on a market or to disclose the course of conduct which an undertaking has decided to adopt or is contemplating to adopt in circumstances where the disclosure would not have been made under normal conditions of competition.[81]

153. In this instant case, the Respondent submitted that there was evidence, Evidence 45E, an email dated 15th September 2021, from Mr Manish(MRM) to Mr Nilesh (MRM)) as elaborated in paragraph 14 of its Replying Affidavit, that on 14th September, 2021 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 (Annexure marked GM-6 in the Replying Affidavit). The evidence confirms that the meeting was attended by Brollo; Tononoka; **Jubilee Jumbo (the Appellant)**; Abyssinia; Nail & Steel Limited; Blue Nile; MRM, Insteel; Devki and Apex.[82]

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[80] Respondent's written submissions dated 12th November, 2024 page 9 paragraph 28.
[81] Respondent's written submissions dated 12th November, 2024 page 9 paragraph 29.
[82] Replying Affidavit sworn by Gideon Mokaya on 25th October, 2023 page 127.

154. In response to Evidence 45E, the Appellant contended that the document did not constitute formal minutes and lacked reliability as a credible account of the meeting's proceedings. However, the Respondent submits that, notwithstanding the Appellant's assertion, Evidence 45E was not formal minutes but rather email correspondence created in the regular course of business by a participant in the discussions; as such, it did not necessitate formal execution to substantiate its credibility.

155. The Respondent 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 Act as read together with section 21(3) (a) of the Act.

156. Further, the Respondent submitted that the mere mention of the Appellant in the email as having attended the meeting suffices to infer its participation in the concerted conduct alongside other steel manufacturers and distributors. This implication strongly suggests the Appellant's active involvement in the coordinated practices under scrutiny.

157. In another instance of price discussion is **Evidence 52**, which is a WhatsApp communication dated 23rd January, 2020 Mr Samir Patel of Apex shared a message with Mr Kush Nathwani of Apex on deformed bar pricelists which were to take effect on Monday 20th January, 2020 and further stated that the same had been confirmed by Devki, Abyssinia, Blue Nile, Jumbo and Tarmal. (Annexure marked GM-7 in the Replying Affidavit). The Respondent submits that Evidence 52 illustrated that there were discussions and agreements by the companies mentioned including the Appellant to increase deformed bars prices effective on the aforementioned date.

158. Furthermore, **Evidence 56**, being the daily sales report dated 10th November 2020 from Devki, provides further indication of price agreements among steel manufacturers and distributors. The report records Devki's complaint regarding competitors Tononoka, Blue Nile, Tarmal, and **Jumbo,** who failed to implement agreed-upon price increases. (Annexure marked GM-8 in the Replying Affidavit).

159. The above pieces of evidence illustrated the Appellant's participation in price discussions with its competitors which is a *per se* prohibition under section 21(1) of the Act as read together with section 21(3)(a) of the Act and the Appellant has not produced evidence or provided any

plausible explanations to exonerate them from the finding of their culpability of the offence of engaging in price fixing.

160. Discussions on prices between competitors are strictly precluded by section 21(1) of the Act as read together with section 21(3)(a) of the Act as it restricts price competition between companies. This was affirmed in the case of ***Case T-587/08 Fresh Del Monte Produce v Commission*** wherein the Court held the following with regard to pre-pricing communications between the undertakings concerned:

> *302.* ***While it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it does, none the less, strictly preclude any direct or indirect contact between such operators by which an undertaking may influence the conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question****, regard being had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of that market (see, to that effect, Suiker Unie and Others v Commission, paragraph 151 above, paragraph 174; Züchner, paragraph 301 above, paragraph 14; John Deere v Commission, paragraph 301 above, paragraph 87; and T-Mobile Netherlands and Others, paragraph 297 above, paragraph 33).*
>
> ***303 It follows that the exchange of information between competitors is liable to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted*** *(John Deere v Commission, paragraph 301 above, paragraph 90; Case C-194/99 P Thyssen Stahl v Commission [2003] ECR I-10821, paragraph 81; and T-Mobile Netherlands and Others, paragraph 297 above, paragraph 35).*

161. This Tribunal observes that adherence by the concerned parties to the discussions is not required for a finding of infringement of section 21(1) of the Act as read together with section 21(3)(a) of the Act as was stated ***in Associated Lead Manufacturers Ltd (White Lead) v OJ [1979] L 21/16, [1979] 1 CMLR 464;***

Furthermore, the Commission held that it was irrelevant that the quotas were not always meticulously observed: an agreement did not cease to be anti- competitive because it was temporarily or even repeatedly circumvented by one of the parties to it.

162. There are other corroborating pieces of evidence that highlight that the Appellant was indeed in contravention of section 21 (3) (a). The illustration below will show other instances of discussion on pricing by the steel manufacturers and distributors:

a) **Evidence 31** (Annexure marked GM-9 in the Replying Affidavit)[83]
Indicates that there was a Tube Sub sector meeting held on 21st November, 2018 and a follow up meeting held on 22nd November, 2018 to discuss prices and how to reduce stock between manufacturers to ensure price stability.

b) **Evidence 34** (Annexure marked GM-10 in the Replying Affidavit)[84]
This evidence indicates that there were tubes meeting held on 7th July, 2018 at Artcaffe in Westgate.

c) **Evidence 35** (Annexure marked GM-11 in the Replying Affidavit)[85]
There was a meeting scheduled for 10th May, 2020 which was restricted to Apex, Doshi, Brollo and Insteel.

d) **Evidence 36** (Annexure marked GM-12 in the Replying Affidavit)[86]
This evidence establishes that on 21st November, 2020 communication occurred with Mr. Kush Nathwani of Apex, wherein he confirmed that a meeting of the steel sector had been convened at Zen Gardens to deliberate on pricing matters.

e) **Evidence 38** (Annexure marked GM-13 in the Replying Affidavit)[87]
This evidence demonstrates that a WhatsApp message dated 4th July, 2014 reflects a meeting held at the offices of Arthi Steel, specifically addressing the issue of deformed bar pricing.

f) **Evidence 40A** (Annexure marked GM-14 in the Replying Affidavit)[88]

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[83] Replying Affidavit sworn by Gideon Mokaya on 25th October, 2023 page 137.
[84] Replying Affidavit sworn by Gideon Mokaya on 25th October, 2023 page 140.
[85] Replying Affidavit sworn by Gideon Mokaya on 25th October, 2023 page 143.
[86] Replying Affidavit sworn by Gideon Mokaya on 25th October, 2023 page 147.
[87] Replying Affidavit sworn by Gideon Mokaya on 25th October, 2023 page 151.
[88] Replying Affidavit sworn by Gideon Mokaya on 25th October, 2023 page 155.

This evidence reveals a WhatsApp message dated 5th July, 2013 documenting a meeting convened at Zen Gardens Restaurant concerning matters pertaining to the Hot Rolling Sector.

g) **Evidence 41** (Annexure marked GM-15 in the Replying Affidavit)[89]

This evidence consists of an internal Apex email dated 6th October, 2018 from Beatrice Ochiel, indicating that a meeting among tube manufacturers was to be held for the purpose of sharing new prices and discounts.

h) **Evidence 48, 51A and 50** (Annexure marked GM-16, 17 and 18 respectively in the Replying Affidavit)[90]

This evidence includes a sales report by MRM, which noted that the three major manufacturers—Devki, Abyssinia, and Tarmal—continued to operate under the prior price list, offering a 32% discount. This was substantiated by Evidence 51A, an excerpt from the Insteel Management Report for the first quarter ending 31st March, 2017 which assessed local market competition, which reads *"that there was cut throat competition with most manufacturers struggling to survive hence not maintaining the agreed pricing/discount"*. Further corroboration is provided by Evidence 50, referencing a report dated 1st April, 2021 indicating alignment within the industry on prices and discounts.

163. Notwithstanding the Appellant's denial of awareness of, or notification of, the meetings—nor attendance by any of its representatives—and its assertion that it is not a tube manufacturer, its duty was to demonstrate the existence of an agreement, concerted practice, or decision among steel product manufacturers and distributors, and to show that the Appellant indeed participated in such an arrangement. In this context, any statement, action, or written communication made by any party in furtherance of the agreement or concerted practice, reflecting their shared intent, constitutes a pertinent fact against each participant. Such evidence establishes both the existence of the concerted practice and demonstrates that each party, including the Appellant, was involved in the said practice.

164. The Respondents arguments were upheld in a similar case of ***Polypropylene OJ [1986] L 230/1, [1988] 4 CMLR 347*** where the European Commission investigated a complex cartel

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[89] Replying Affidavit sworn by Gideon Mokaya on 25th October, 2023 page 157.
[90] Replying Affidavit sworn by Gideon Mokaya on 25th October, 2023 page 160-170.

agreement in the petrochemicals sector involving 15 firms over many years. It held *that the detailed arrangements whereby the cartel operated were all part of a single, overall agreement: this agreement was oral, not legally binding, and there were no sanctions for its enforcement. Having established that there was a single agreement, the Commission concluded that all 15 firms were guilty of infringing Article 101, even though some had not attended every meeting of the cartel and had not been involved in every aspect of its decision- making: participation in the overall agreement was sufficient to establish guilt. Furthermore, the fact that some members of the cartel had reservations about whether to participate – or indeed intended to cheat by deviating from the agreed conduct – did not mean that they were not party to an agreement.*

165. Upon Appeal of the Commission's decision in the Polypropylene matter in ***T-305/94 - LVM v Commission,*** the Court upheld the Commission's decision stating that *"An undertaking may be held responsible for an overall cartel even though it is shown to have participated directly only in one or some of its constituent elements if it is shown that it knew, or must have known, that the Page 16 of 28 collusion in which it participated, especially by means of regular meetings organised over several years, was part of an overall plan intended to distort competition and that the overall plan included all the constituent elements of the cartel."*

166. It is well settled law that where an undertaking, even passively, participates in meetings or discussions with an anti-competitive purpose and does not publicly repudiate such engagement, it shall be construed as complicit in the prohibited conduct. The absence of disassociation unequivocally signifies tacit involvement in the anti-competitive activities under examination.

167. We note from the pieces of evidence submitted, there is corroborative evidence presented against the Appellant, as it substantiates both the existence of the concerted practice and the Appellant's participation therein, evidencing actions undertaken in furtherance of this concerted practice aligned with a common anti-competitive intent.

168. We note that the Appellant attended the anti-competitive meeting demonstrated in Evidence 45E, the Appellant, by merely denying attendance of the meeting has failed to distance itself from the cartel in the manner required to exonerate them of participation. In ***Case T-83/08 Denki Kagaku Kogyo Kabushiki Kaisha and Denka Chemicals GmbH v Commission***, the Court held that the Appellants' mere denial and failure to provide a possible alternative

explanation for their presence at that meeting did not amount to them distancing themselves from the cartel in the manner required by the case-law. The Court stated as follows:

52. When agreements of an anti-competitive nature are reached at meetings of competing undertakings, it is sufficient for the Commission to establish that the undertaking concerned participated in meetings during which agreements of an anti-competitive nature were concluded in order to prove that the undertaking participated in the cartel. Where participation in such meetings has been established, it is for that undertaking to put forward indicia to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs. The reason underlying that rule is that, having participated in the meeting without publicly distancing itself from what was discussed, the undertaking gave the other participants to believe that it subscribed to what was decided there and would comply with it (see Joined Cases C-403/04 P and C-405/04 P Sumitomo Metal Industries and Nippon Steel v Commission [2007] ECR I-729, paragraphs 47 and 48 and the case-law cited).

53. It must be pointed out in this regard that the notion of publicly distancing oneself as a means of excluding liability must be interpreted narrowly. In order to disassociate itself effectively from anti-competitive discussions, it is for the undertaking concerned to indicate to its competitors that it does not in any way wish to be regarded as a member of the cartel and to participate in anti-competitive meetings. In any event, silence by an operator in a meeting during which an unlawful anti-competitive discussion takes place cannot be regarded as an expression of firm and unambiguous disapproval. A party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery (see, to that effect, Case T-303/02 Westfalen Gassen Nederland v Commission [2006] ECR I-4567, paragraphs 103 and 124).

*197. ..... **As regards that London meeting, during the administrative procedure the applicants merely denied having participated in the anti-competitive discussions and submitted no possible alternative explanation for their presence at that meeting, which was characterised as an anti-competitive meeting by all the other participants. The applicants'***

arguments that the Commission failed to prove their participation in the cartel during the period between those two meetings of May 1996 and July 1997 are ineffective. It is sufficient to note, as the Commission states, (i) that the applicants did not distance themselves from the cartel in the manner required by the case-law cited in paragraphs 52 and 53 above *and (ii) that it would be artificial to subdivide into a number of distinct actions an anti-competitive agreement which is characterised by a series of efforts pursuing a single economic end (see the case-law cited in paragraph 180 above)*

169. In **Evidence 3** which was an email communication date 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 this evidence, 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.

170. The Respondent in its investigations submitted that it found communication whose object was to limit output in the steel sector as stated under paragraph 25 of the Replying Affidavit and paragraphs 164 to 174 of the Statement of Reasons for Decision.

171. In conclusion, the Respondent asserts that the provisions of section 21(1) of the Act, in conjunction with sections 21(3)(a) and 21(3)(e), were indeed the pertinent sections applicable to the violations under review. The Respondent contended that its interpretation and application of these provisions were accurate and conducted in a comprehensive, holistic manner, without selective emphasis, contrary to the Appellant's assertions.

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

173. Similarly, it is well settled by case law that a party's silence to the emails and/ or alleged non-action on the contents of the email does not amount to dissociating itself from the conduct

as the only acceptable dissociation to cartel conduct is by public distancing by writing to the author of the email and the other competitors to distance itself from the conduct as stated in the case of **Case T-303/02 Westfalen GassenNederland v Commission [2006] ECR I-4567** wherein it was held that:

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

124. Silence by an operator in a meeting during which the parties colluded unlawfully on a precise question of pricing policy is not tantamount to an expression of firm and unambiguous disapproval. On the other hand, according to case-law, a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery. That complicity constitutes a passive mode of participation in the infringement, which is therefore capable of rendering the undertaking liable (see, to that effect, Aalborg Portland and Others v Commission, paragraph 76 above, paragraph 84).

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

123. By the second part of its fourth ground of appeal, the appellant criticises the General Court for holding that the Commission had rightly considered, in the decision at issue, that

the appellant's contribution, through its own conduct, to the infringement at issue was established by the fact that it had not publicly distanced itself from the unlawful conduct, whereas its participation consisted solely in being copied in internal Sony Optiarc emails referring to unlawful exchanges of information between competitors.

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

125. ***From that perspective, a party that tacitly approves of an unlawful initiative, without publicly distancing itself from the content of that initiative or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery. That complicity constitutes a passive mode of participation in the infringement which is capable of rendering the undertaking concerned liable*** *(judgment of 6 December 2012, Commission v Verhuizingen Coppens, C-441/11 P, EU:C:2012:778, paragraph 73).*

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

175. This tribunal makes a finding that the Respondent proved through evidence that Appellant was culpable of the offences brought against it. Though in Evidence 1 and 2 the Appellant was not adversely mentioned on the offence of price fixing, there were other pieces of evidence as shown above which nailed the Appellant as a player in the steel cartel.

I. WHETHER THE RESPONDENT WAS BOUND BY THE RULES OF EVIDENCE IN REACHING ITS DECISION

176. The Appellant raised this issue and framed it as one of the issues to be determined by this Tribunal. The Appellant framed this issue as follows " **Whether the Respondent erred by relying on evidence that does not meet the requirements for admissibility in a court of law, making the decision by the Respondent dated 17th August 2023 erroneous in law and fact, contrary to equity and a miscarriage of justice.**". The Respondent also raised it as the third issue for determination by this Tribunal. In this ground of Appeal the Appellant raises issue with the interpretation and application of section 33 (1) of the Act as read together with sections 78A, 106A and 106B of the Evidence Act (Cap 80) with respect to the Electronic Evidence that was relied upon by the Respondent against the Appellant.

177. Section 33 (1) of the Act reads:

The Authority may receive in evidence any statement, document, Information or matter that may in its opinion assist to deal effectively with an Investigation conducted by it, but a statement, document, information or matter Shall not be received in evidence unless it meets the requirements for admissibility in a Court of law.

178. Section 78A of the Act reads:

(1) In any legal proceedings, electronic messages and digital material shall be admissible as evidence.

(2) The court shall not deny admissibility of evidence under subsection (1) only on the ground that it is not in its original form.

(3) In estimating the weight, if any, to be attached to electronic and digital evidence, under subsection (1), regard shall be had to—

(a) the reliability of the manner in which the electronic and digital evidence was generated, stored or communicated;

(b) the reliability of the manner in which the integrity of the electronic and digital evidence was maintained;

(c) the manner in which the originator of the electronic and digital evidence was identified; and

(d) any other relevant factor.

(4) Electronic and digital evidence generated by a person in the ordinary course of business, or a copy or printout of or an extract from the electronic and digital evidence certified to be correct by a person in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organization or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.

179. Sections 106A and 106B(1) of the Evidence Act further provides that :

106A. The contents of electronic records may be proved in accordance with the provisions of section 106B.

106B. (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.

180. the Appellant contended that, the provisions of Section 33 (1) of the Act requires the Respondent to comply with the strict rules of evidence. By extension sections 78A(1) and (4), 106A and 106B of the Evidence Act required the Respondent to produce certificates of evidence in support of all electronic evidence relied upon during the proceedings undertaken by the Respondent. Accordingly, failure to produce the certificates of electronic evidence alongside the electronic evidence meant that such evidence was inadmissible **in a court of Law**.(emphasis added)

181. The Appellant further contended that the evidence relied upon by the Respondent failed to meet the threshold as the impugned emails, what App conversations and photographic images relied upon have not been accompanied with an Electronic Certificate as envisaged under the provisions of Section 106B of the Evidence Act, Cap 80. In these circumstances, it was

imperative that the Respondent attach the Certificates of Evidence as mandated by sections 78A, 106A and 106B of the Evidence Act.

182. To buttress this position the Appellants relied on the case of the Court of Appeal decision in **Speaker County Assembly of Kisumu & 2 Others versus Clerk, Kisumu County Assembly Service Board & 6 Others (2015) eKLR** where the Court observed as follows;

> *66. **Section 106B** of the Evidence Act states that electronic evidence of a computer recording or output is admissible in evidence as an original document "if the conditions mentioned in this section are satisfied in relation to the information and computer."*
>
> *67. In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106B(2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced. For ease of reference, we wish to reproduce Section 106B of the Evidence Act in its entirety:*
>
> ***"106B (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.***

183. The Appellant relied on the case of **Samwel Kazungu Kambi versus Nelly Ilongo the Returning Officer, Kilifi County & 2 Others (2017) eKLR** where the Honorable Court observed as follows;

> *21. Sub-section (4) of Section 106B requires a certificate confirming the authenticity of the electronic record. Such a certificate should describe the manner of the production of the record or the particulars of the device. The certificate could also*

have the signature of the person in charge of the relevant device or the management of the relevant activities.

22. The source of the photocopies of the photographs annexed to the affidavit sworn by the Petitioner in support of the Petition was not disclosed. The device used to capture the images was unknown. The person who took the photographs was not named. The person who processed the images was not named. The Petitioner was not an eyewitness to the incident and he could not therefore tell the court that the photographs were a true reflection of the incident he witnessed.

184. The Appellant in its submissions argued before this Tribunal that where any electronic evidence is not accompanied by the requisite Electronic Certificate then the same are devoid and bereft of any legal or probative value; the impugned emails, WhatsApp conversations, and photographic images attract no legal weight or value which is essential in determining the issues in controversy before the Honourable Court. The Appellant appealed to the Tribunal that the various pieces of evidences relied upon by the Respondent should be struck out from the Court's record.

185. The Appellant argued that the Respondent erred by relying on evidence that does not meet the requirements for admissibility in a court of law, making the Decision was erroneous in law and fact, contrary to equity and a gross miscarriage of justice.

186. Similarly the Tribunal notes that in, **Jackline Vusevwa Selenge -vs- Olivier Guiguemde [2021] eKLR** where the Court held that Section 78A of the Evidence Act must be read together with Section 106A and on the case of **Republic -vs- Barisa Wayu Matuguda [2011] eKLR** where the Court stated that an Electronic Certificate was mandatory.

187. In the case of **Ogembo v Yongo (Civil Appeal E200 of 2023) [2024] KEHC 15763 (KLR),** where Hon. Lady Justice Aburilli stated that:

> **"...It is evidently clear that electronic documents must be accompanied by a certificate in terms of section 106 B (4) of the Evidence Act for them to be deemed admissible. There is no other way out. This is a requirement in civil and criminal cases before courts, except in matters where statutes exclude the application of strict rules of evidence such as the Small Claims Court or specific tribunals...It is my view, that the mandatory Provisions**

of the Evidence Act are not only about form but also substance. Thus, before the Court can admit electronic records/evidence, an electronic certificate is mandatory to confirm the source, process, custody and delivery of the said electronic record before admission so as to eliminate the possibility of manipulation of the record...I reiterate that the certificate of electronic evidence is a mandatory requirement in the absence of which the WhatsApp messages cannot be admitted as evidence. The certificate ought to have formed part of the evidence in the proceedings before the trial court. The Court of Appeal in County Assembly of Kisumu & 2 Others v Kisumu County Assembly Service Board & 6 Others [2015] eKLR stated as follows regarding non-production of certificate of electronic evidence "Section 106B of the Evidence Act states that electronic evidence of a computer recording or output is admissible in evidence as an original document "if the conditions mentioned in this section are satisfied in relation to the information and computer." In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions to vouch for the authenticity and integrity of the electronic record sought to be produced..."

188. The Respondents argument was that pursuant to section 31 of the Act, it is empowered on its own initiative or upon receipt of information from any person or Government agency or Ministry, to carry out an investigation into any conduct or proposed conduct which may constitute an infringement of the prohibition relating to Restrictive Trade Practices.

189. The Respondent further stated that it carried out its mandate in a lawful, reasonable and procedurally fair manner in compliance with the obligations under Article 47 of the Constitution and the Fair Administrative Action No. 4 of 2015 *(hereinafter referred to as the "FAAA")* whenever it is discharging its administrative function.

190. Pursuant to section 2 of the Evidence Act Cap 80 (the Evidence Act), it is asserted that the Act applies to judicial proceedings in any court except a Kadhi's court, but not to proceedings

before an arbitrator. Additionally, Section 2 of the FAAA defines administrative action as the powers, functions, and duties exercised by authorities or quasi-judicial tribunals. Therefore, the emphasis is on ensuring the lawfulness and procedural correctness of the administrative action or decision, rather than replacing the express statutory procedure with judicial procedure.

191. In the present case the Respondent maintains that the technical rules of evidence espoused under Articles 50 (2) (k), 50 (3), 50 (4) of the Constitution of Kenya, *2010 (hereinafter referred to as the "Constitution")* and Section 106B (4) of the Evidence Act do not apply when carrying out its administrative duties. On the contrary, the Respondent lacks basis in law and procedure as long as the process of collecting, preserving and analyzing the evidence was done procedurally and in a fair manner as envisaged under Article 47 of the Constitution, the Act and the Fair Administrative Actions Act, 2015 (FAAA).

192. It is the Respondent's submission that the proceedings before it are administrative in nature and therefore the strict rules of evidence do not apply. This was the position of the court in ***Joseph Mbalu Mutava v Attorney General & another [2014] eKLR,*** in which the court while examining the question of whether procedural fairness was applied by an administrative body in the exercise of its mandate, stated 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..."*

193. The Respondent argued, the proceedings before the Respondent are administrative in nature and therefore the strict rules of evidence do not apply as alleged by the Appellant in its submissions.

194. The Respondent further submitted that its investigation process is guided by Article 47 of the Constitution, sections 31 through 40 of the Act as read together with section 4 of the Fair Administrative Action Act which prescribes the approach to be followed in an administrative process. As such, 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.

195. 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 the party under investigation as envisaged under the Constitution, the Act and FAAA and not the Evidence Act. In furtherance to the above obligation, the Respondent extracted the information from the electronic devices and issued an inventory list of the said evidence to the Appellant on site of all the digital and documentary information extracted.

196. Additionally, pursuant to sections 32(4) of the Act which provides that the Respondent may seek the assistance of police officers and other law enforcement agencies in its execution of the mandate as read together with section 9(m) of the Act which provides that the Respondent may liaise with regulatory bodies and other public bodies in all matters relating to competition and consumer protection, 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.

197. The Respondent avers that it subsequently forwarded mobile phones and laptops to EACC for purposes of extraction of the digital information after which the EACC extracted the digital information and forwarded the report together with the certificate of electronic records. Further, pursuant to section 13(2) of the Act which provides that the Respondent may engage consultants and experts to assist it in performing its functions and exercising its powers, it sought the assistance of a consultant and experts in the extraction of information from desktops and hard drives.

198. The Respondent thereafter forwarded desktops and hard drives to the forensic consultant for purposes of extraction of the digital information after which the forensic consultant extracted the digital information and forwarded the report that included the certificate of electronic record. Following the extraction of information, the Respondent invited the owners of the devices, who appeared before it and were accorded an opportunity to verify the extracted information, which they confirmed.

199. The Respondent argued that under Section 33 of the Act, the Authority has the power to take evidence, which it did in this instance during the search and seizure and was in accordance with the Act as well as the FAAA and the Constitution.

200. The Respondent maintained that in the course of its investigations into decision-making, it was guided by the provisions of Article 47 of the Constitution, sections 31 to 36 of the Act & section 4 of the Fair Administrative Action Act which prescribe the approach to be followed in

an administrative process. The technical rules of evidence do not therefore apply to administrative processes.

201. This position is further supported by the **Supreme Court of the Philippines in Divina Palao vs Florentino International, INC** held as follows,....*that administrative bodies are not strictly bound by technical rules of procedure.*

Administrative bodies are not bound by the technical niceties of law and procedure and the rules obtained in courts of law. Administrative tribunals exercising quasi-judicial powers are unfettered by the rigidity of certain procedural requirements, subject to the observance of fundamental and essential requirements of due process in justiciable cases presented before them. In administrative proceedings, technical rules of procedure and evidence are not strictly applied and administrative due process cannot be fully equated with due process in its strict judicial sense.

202. We are persuaded by the argument by the position that that the Respondent was, upon commencement of investigation and making a preliminary finding, issued with all the information, materials and evidence relied upon in making the decision through its Notice of Proposed Decision dated 4th May, 2022.

203. In the case of ***Majid Al Futtaim Hypermarkets Limited v Competition Authority of Kenya & another [2021] eKLR*** where this Tribunal observed *that:*

> *"131. The said Notice duly notified the Appellant of the findings of the 1st Respondent and the orders it intended to make against the Appellant. The Notice called for evidence in rebuttal through written representations pursuant to section 34 (2) of the Act. The Appellant was also notified of its right to a hearing conference pursuant to section 35 of the Act.*
>
> *132. The Appellant insisted that it could not participate in the proceedings as the 1st Respondent had not provided it with all the evidence. Further, that the rules and procedure for the hearing conference had not been disclosed. The Appellant was also apprehensive that, according to the Notice of the Proposed Decision, a determination had already been reached without the Appellant's participation.*
>
> *133. We have reviewed the procedure laid down at paragraph 34 and 35 of the Act, and we are of the opinion that the 1st Respondent acted according to the laid down procedure.*

The Appellant is only invited to bring evidence in rebuttal through written representations and conference hearing only upon issuance of a proposed decision.

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

204. In the case of ***David Macharia & 2 others v Teachers Service Commission & another [2018] eKLR*** in ***Constantine Simati v Teachers Service Commission and another [2011] eKLR Azangalala J*** which distinguished judicial proceedings from administrative proceedings in stating that "***an internal disciplinary tribunal is not to be held to the same standards as a court of law."***

205. Also the case of ***Kenya Revenue Authority v Menginya Salim, Civil Appeal No. 108 of 2009,*** where the Court clarified that:

"There is ample authority that decision-making bodies other courts and bodies whose procedures are laid by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed."

206. We have considered the rival arguments by both parties. It is clear in our minds that the Respondent is a creature off statute and it was prior to reaching its decision being the subject of this Appeal, carrying out an administrative process and not was engaged in a judicial process. The judicial process is this Appeal now before This Tribunal. It could not have been the intention of Parliament to import the strict requirements of the law of evidence into an administrative process through section 33(1) of the Act. This provision, however, was introduced and was intended to be a safety measure in instances where the evidence is procured by "other persons" who are not the Respondent. The Respondent is required by law to subject that evidence to a higher test to verify its authenticity before relying on it to make a decision.

207. Our understanding of Sections 78A, Section 106A and 106B of the Evidence Act is that a certificate is meant to satisfy the person making a decision that the evidence is authentic. Where the evidence is collected by the Respondent itself during a search and seizure exercise, then the

Respondent does not need to satisfy itself as to the authenticity of evidence it collected itself. We are not persuaded that the processing of evidence through EACC laboratories amounted to receiving evidence from "other persons".

208. We are inclined to agree with the Respondent that the provisions of section 33 (1) of the Act was not applicable in the circumstances of this case. It was therefore not necessary for the electronic evidence to be accompanied by certificates of electronic evidence as envisaged by section 78A, 106A and 106B as the strict rules of evidence were not applicable in administrative proceedings.

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

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

> *"131. The said Notice duly notified the Appellant of the findings of the 1st Respondent and the orders it intended to make against the Appellant. The Notice called for evidence in rebuttal through written representations pursuant to section 34 (2) of the Act. The Appellant was also notified of its right to a hearing conference pursuant to section 35 of the Act.*
>
> *133. We have reviewed the procedure laid down at paragraph 34 and 35 of the Act, and we are of the opinion that the 1st Respondent acted according to the laid down procedure. The*

Appellant is only invited to bring evidence in rebuttal through written representations and conference hearing only upon issuance of a proposed decision.

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

211. The Tribunal is satisfied that the Respondent followed due process as set out in the Act, and the rights of the Appellant to a fair hearing was not a ground of Appeal. The upshot of this Appeal is that, the Tribunal answers all the issues for determination in favor of the Respondent and upholds the Decision. On the last issue of costs, since the Appellant has failed in this Appeal, the costs follow the cause.

J. ORDERS

212. We accordingly arrive at the conclusion *that* the Appellant by its conduct was guilty 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 11TH **day of** SEPTEMBER **2025**

DANIEL OCHIENG OGOLA
CHAIRPERSON

ODONGO MARK OKEYO
MEMBER

KIPROP MARRIRMOI

MEMBER

RAYMOND NYAMWEYA

MEMBER

I certify that this is a true copy of the original

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