THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CAC Case No: 124/CACOct12

In the matter between:

VIDEX WIRE PRODUCTS (PTY) LTD **APPELLANT**

and

COMPETITION COMMISSION OF SOUTH AFRICA **RESPONDENT**

Coram: DAVIS JP, MOLEMELA AJA & ROGERS AJA

Heard: **13 SEPTEMBER 2013**

Delivered: **14 MARCH 2014**

JUDGMENT

THE COURT:

Introduction

[1] On 26 January 2009 the respondent in this appeal ('the Commission') initiated a complaint in which it alleged that four firms in the market for the supply of mining roof bolts participated in a cartel over the period at least June 2004 to June 2008. The four firms named in the initiation document were RSC Ekusasa (Pty) Ltd ('RSC') (at all material times a Murray & Roberts company), Aveng (Africa) Ltd t/a Duraset ('Duraset'), Dwidag-Systems International (Pty) Ltd ('DSI') and the appellant Videx Wire Products (Pty) Ltd ('Videx'). By the time the complaint was initiated, corporate leniency had been granted to RSC.

[2] On 30 September 2010 the Commission referred the complaint to the Tribunal, citing the four firms as respondents. RSC was the first respondent. By then Duraset, which was cited as the second respondent, had reached a settlement with the Commission and the settlement had been made an award of the Tribunal. In terms of that settlement Duraset agreed to pay an administrative penalty of R12,9 million, being 5% of its total annual turnover for its 2008 financial year. DSI and Videx were the third and fourth respondents. In its referral affidavit the Commission alleged that the cartel involved [a] the allocation of customers and maintaining of market shares and [b] collusive tendering in a number of specified instances in the period 2004 to 2006. (DSI claimed that in some instances the relevant firm which participated in interactions with the other firms was not itself but an associated BEE company, DSI-Mandirk Strate Support (Pty) Ltd. For purposes of the present appeal it is unnecessary to make any distinction.)

[3] The Tribunal heard evidence over several weeks in October 2011 and January 2012. Witness statements were filed in advance of the hearing. The witnesses for the Commission were executives or former executives of RSC and Duraset. These witnesses, in the order they testified, were: [a] Mr Allen Koszewski: He was previously employed as the general manager of RSC. By the time he testified, the business in which he was employed had been sold by the controlling shareholder, Murray & Roberts, to the Barnes group. Koszewski then became the general manager of BRC Mesh. [b] Mr Neville Henderson: Over the period 2002 to 2008 he worked for RSC, most recently as its sales and marketing manager. He left

RSC in August 2008 and joined Duraset. He retired from Duraset in February 2010. [c] Mr Hannes Bornman: He was employed by Duraset over the period 2000 to 2009 and was its marketing director as from 2003. He was no longer employed by Duraset or any of the firms by the time he gave evidence. [d] Mr Martin Cawood: From October 2003 to mid-2007 he worked for RSC, being promoted to the position of regional sales manager and then sales manager, responsible for the sale of components used in hard rock mining. Like Koszewski, his employment was transferred to the BRC Mesh in 2007. He rejoined RSC for a brief period in September 2010. By the time he testified he was employed by an unrelated entity, New Concept Mining.

[4] DSI called two witnesses, Nigel Henson and Lukas van der Merwe. Henson was DSI's managing director. Van der Merwe had previously worked for RSC (until November 2010) but by the time he testified was an employee of DSI. Videx called, as its only witness, Mr Leon le Roux who was its manufacturing director and had been employed by Videx since August 1997.

[5] The various witnesses confirmed their witness statements (subject to certain corrections noted at the beginning of their evidence), were led on certain aspects and cross-examined at the discretion of opposing counsel.

[6] In argument before the Tribunal the Commission's counsel submitted that there had been an overarching cartel agreement during the period 2004 to 2007 and that certain specific instances of collusive tendering were merely the implementation of this overarching agreement (the Commission's counsel in their submissions to us used the expression 'single conspiracy' but we shall refer to it as the alleged overarching agreement). The specific instances which received attention in the referral affidavit, witness statements and oral evidence were; [a] a reverse auction conducted via the internet in June 2004 by a large platinum mining customer, Amplats; [b] a reverse auction conducted via the internet in October 2004 by a large gold mining customer, Goldfields; [c] a second reverse auction conducted via the internet by Amplats in May 2005; [d] a tender issued by Xstrata in mid-2005; [e] a tender issued by a large gold mining customer, Harmony, in October 2005; [f] a tender issued by a large coal mining customer, Anglo Coal, in the first half of 2006.

[7] The question whether there was an overarching agreement was important because DSI and Videx, who claimed that these incidents were isolated *ad hoc* acts of collusion, contended that the complaints in respect of the collusion concerning Amplats (in 2004 and 2005), Goldfields and Harmony were time-barred by s 67(1) of the Competition Act 89 of 1998 ('the Act'). That section provides that 'a complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased'. The initiation, as already mentioned, occurred on 26 January 2009, meaning that a prohibited practice which had 'ceased' prior to 26 January 2006 ('the cut-off date') could not validly be the subject of the complaint. Videx denied its involvement in the Xstrata collusion (which, viewing that incident in isolation, was correct). In regard to the Anglo Coal incident, which was also said to be an *ad hoc* occurrence, DSI and Videx contended that the incident as alleged in the referral affidavit implicated only RSC and Duraset; that the Commission was not entitled at the end of the hearing to seek a finding against DSI and Videx in respect of that incident based on the oral evidence (which indeed implicated Videx and DSI); and that in any event the evidence did not show that they were parties to any agreement reached at the relevant meeting, even if their representatives were present.

[8] In response to the position adopted by DSI and Videx in relation to the Anglo Coal incident, the Commission applied, after the completion of argument, for an amendment of the referral. This was opposed by DSI and Videx. No oral argument concerning the amendment application was heard.

[9] The Tribunal delivered its decision and reasons on 19 September 2012. The Tribunal held that no overarching agreement had been established. It found that the complaints in respect of the 2004 Amplats auction, the Goldfields auction, the Xstrata tender and the Harmony tender (which were not contested by DSI and Videx on their merits) were time-barred. The Tribunal held that the complaint in respect of the 2005 Amplats auction was not time-barred because the prohibited practice had ongoing effects which were not shown to have ceased by the cut-off date. In regard to the Anglo Coal tender, the Tribunal dismissed the Commission's belated amendment application. Notwithstanding such dismissal, the Tribunal considered whether it should nevertheless adjudicate that complaint, having regard to the

guidance afforded by the judgment of the Constitutional Court in *Competition Commission v Senwes Ltd* [2012] ZACC 6; 2012 (2) BCLR 667 (CC). The Tribunal concluded that it should not do so. This was not because DSI and Videx had not had a fair opportunity to deal with the matter in evidence but because the Tribunal considered that, based upon the evidence presented, the case was not sufficiently consistent and coherent. The Tribunal thus found a single contravention by DSI and Videx, namely the 2005 Amplats incident. This was held to be a contravention of s 4(1)(b)(iii) of the Act covering a period of one year from 2005 to 2006. Administrative penalties of R1 848 301 and R4 765 502 were imposed on DSI and Videx respectively.

[10] Videx (but not DSI) appealed to this court against the Tribunal's decision, contending that the Tribunal had erred in finding that the 2005 Amplats complaint was not time-barred and had erred in any event in its computation of the administrative penalty. The Commission cross-appealed, contending that the Tribunal should have found that there was an overarching agreement and thus that none of the incidents in 2004 and 2005 were time-barred, and had erred in refusing the amendment application and in declining to adjudicate the Anglo Coal incident. The Commission's conduct in pursuing the cross-appeal only against Videx (and not also DSI) strikes us, regrettable as it is to so say, as unprincipled, because there would appear to be no material distinction between the position of Videx and DSI in that regard. However, as a matter of procedure the Commission is not precluded from following its course, though, if the cross-appeal succeeds, our finding would be binding only as against Videx.

[11] It is convenient here briefly to elaborate on the significance of the question whether there was an overarching agreement. If there was an overarching agreement during 2004 and 2005 of which the various incidents were merely acts of implementation, the onus would rest on Videx to show that the overarching agreement came to an end before the cut-off date of 26 January 2006. This would require a clear act of termination of or withdrawal from the cartel. It would not be enough for Videx to show that the last act of implementation was the Harmony incident in October 2005. In any event, if the Tribunal was correct in holding that the prohibited conduct constituted by the 2005 Amplats collusion had not ceased by the

cut-off date, and if that particular collusion was merely one aspect of the implementation of an overarching cartel agreement, the non-cessation of that particular prohibited practice would simultaneously establish the non-cessation of the overarching agreement. It would follow, on either of these lines of reasoning, that the prohibited practice constituted by the overarching agreement had not ceased by the cut-off date and that Videx should have been found to have contravened s 4(1)(b) of the Act over the period from 2004 until the cartel terminated. In the imposition of an administrative fine, regard would then need to be had to all the incidents in 2004 and 2005, and not merely the 2005 Amplats incident.

[12] Furthermore, a finding that there was an overarching agreement in 2004 and 2005 which had not been terminated by 26 January 2006 would have implications for the assessment of the Anglo Coal incident. If the Anglo Coal incident was an *ad hoc* occurrence, it might be open to a participant at the relevant meeting to say that it was a passive bystander with no part in the alleged agreement reached at the meeting. By contrast, if the Anglo Coal incident was simply another meeting of the cartel members in implementation of an overarching agreement, the fact that one of the cartel members had no direct interest in that particular act of implementation would not exonerate it from participation in the ongoing cartel. This case requires a determination of the requirements for an agreement of the kind which would fall within the scope of s 4(1)(b) of the Act.

Was there an overarching agreement?

[13] Prohibited conduct in the form of an overarching agreement would require there to be the requisite element of consensus as described in *NetStar (Pty) Ltd & Others v Competition Commission of South Africa & Others* 2011 (3) SA 164 (CAC) paras 25 and 26 and *MacNeil Agencies (Pty) Ltd v Competition Commission* [2013] ZACAC 3 paras 53-56. As stated in *MacNeil*, the requirement of consensus does not mean that such consensus should amount to a contract at private law. Particularly in regard to the *per se* prohibitions in s 4(1)(b), the parties would, by the very illicit nature of their arrangement, not contemplate legal enforcement. They need not even have agreed upon a punishment mechanism. Importantly, the court added in *MacNeil* that ‘the content of the consensus need not… rise to the level of precision

sufficient to satisfy the requirement of certainty applicable to private law contracts, ie the precision needed to defeat an argument that the alleged agreement is void for vagueness' (para 56). In *Netstar supra* para 54 the court noted that

'… an agreement arises from the actions of and the discussions among the parties directed at arriving at an arrangement that will bind them either contractually or by virtue of moral suasion or commercial interest. It may be a contract, which is legally binding or an arrangement or understanding that is not, but which the parties regard as binding upon them. Its essence is that the parties have reached some kind of consensus'.

[14] The definition of agreement in s 1 of the Act, which includes an arrangement or understanding, is also to be found in the relevant Australian legislation, the Competition and Consumer Act 2010. In dealing with the phrase 'arrangement or undertaking', the court in *ACCC v CC (NSW) Pty Ltd* [1999] FCA 954 at para 141 said: 'The cases require that at least one party assume an obligation or give an assurance or undertaking that it will act in a certain way. A mere expectation that as a matter of fact a party will act in a certain way is not enough even if it has been engendered by that party.' But it is recognised that evidence of collusion between the parties, evidence of price fixing or the way the understanding was reached between the parties may be inferred from circumstantial evidence: Russell *Miller's Australian Competition Law and Policy* 2012 at 153-154 .

[15] It follows that if in year 1 a number of competitors reach an agreement, in terms of which they assume certain obligations which relate to collusion regarding prices and/ or customer allocation in that year, and then repeat a similar exercise in years 2, 3 and 4, a court can surely infer an overarching understanding or arrangement sufficient to constitute an agreement, particularly when each of the parties takes some benefit from each of the separate agreements. The four separate agreements may not be sufficient to justify a conclusion as to the existence, from the outset of the firms' collaboration, of an overarching agreement with particular terms as to market division or price-fixing; but, given the manner in which the legislature expanded the scope of agreement in s 1 of the Act, a court is obliged to examine the evidence presented holistically to determine whether the conduct of the parties, as assessed over all the alleged conduct, justifies, on the probabilities, a conclusion that the parties possessed the kind of understanding that justified their ongoing

collaboration (in our example on an annual basis) by engaging in successive agreements which represented a close variation of conduct agreed upon at the earlier meeting (or meetings).

[16] The content of the overarching agreement thus inferred might not be agreement on the specifics of prices to be charged/tendered or of customer allocation (that would happen at meetings held from time to time) but rather an understanding that the firms will benefit from ongoing cooperation on these matters and will thus remain in communication and have an open door for purposes of working out details as occasion demands. An overarching understanding of this kind 'involves' (as that word is used in s 4(1)(b)) price-fixing/bid-rigging or customer allocation (for example), because it is directed at those outcomes even though it does not itself actually fix the prices or rig a particular tender or allocate specific customers. This is the sort of understanding that often gives a cartel its continuing character. Although the Act does not use the word 'cartel', it is widely deployed as a term of convenience in competition jurisprudence. It denotes some sort of ongoing cooperation; one would not usually describe firms which have engaged in an isolated case of collusion as a cartel. And once one finds the sort of continuing cooperation typical of a cartel, it will usually not be hard to discern the underlying understanding that holds it together.

[17] This interpretation of s 1 read with s 4(1)(b) best serves the purposes of the Act. The distinction between isolated prohibited conduct and continuing prohibited conduct is relevant mainly, if not exclusively, to the time-barring provisions of s 67(1). Where firms have an overarching understanding that they will benefit from prohibited conduct of a certain kind and that they will thus remain in communication on such matters, the lawmaker could not have intended that the more detailed arrangements worked out from time to time pursuant to the broad understanding would become time-barred just because those specific instances occurred more than three years before the initiation of the complaint; what would be important is whether the broad understanding had ceased more than three years before the initiation of the complaint (a cessation which would be manifested *inter alia* by the absence of specific manifestations during the three-year period). This is what we

would mean if we said the 'cartel' had come to an end, and we see no reason why the Act should be interpreted in a manner at odds with this common-sense view.

[18] In dealing with the argument in the present case that an overarching agreement existed between the parties by which they considered themselves bound as contemplated in the *dictum* from *Netstar* to rig tenders and allocate markets over a period of time as opposed to a series of *ad hoc* arrangements, one needs to analyse the precise case brought by the Commission before the Tribunal. The Tribunal at para 25 of its determination found that the Commission had not proved the existence of a single conspiracy involving all the parties. It observed, correctly in our view, that the complaint referral could be read to suggest a single conspiracy although that required some generosity of reading. In the founding affidavit reference is made to a cartel in supplying roof bolts which may have started in the 1990s; to a cartel that in more recent years was 'resuscitated' and that cartel meetings 'continued until at least October 2007'. The case as developed by the Commission before the Tribunal dealt not with an overarching agreement but rather with separate incidents, each as constituting an independent contravention of s 4. When the appeal was argued before this court, counsel for the Commission hardly addressed the exact nature of the alleged overarching agreement or the evidential basis upon which such a finding could be justified.

[19] For this reason, the conduct of the Commission dictates caution in determining this appeal on the basis of an overarching agreement. But, as this court held in *Netstar*, 'an agreement arises from the actions of and discussions among the parties directed at arriving at an arrangement that will bind them either contractually or by virtue of moral suasion or commercial interest'. The question on appeal is whether the evidence, analysed holistically and sensibly, justifies on a balance of probabilities the conclusion that during the period mid-2004 until at least February 2007 there existed an agreement of this kind between the four firms, and in particular whether there was evidence of either [a] a continued understanding that they would share the market more or less equally among themselves and that they would not disturb their respective market shares by attacking each other's customers with low prices or [b] a continued understanding at least that they would benefit from ongoing communication on such matters with a view to working out

detailed arrangements as market circumstances might dictate and that each would thus be free to approach the others with proposals to the end of protecting their respective market shares at prices acceptable to them.

The evidence of an overarching agreement

[20] The existence of a continuing understanding sufficient to justify the existence of an agreement in terms of s 4 is largely a matter of inference from the facts. Statements by witnesses, particularly in response to leading questions, that there was or was not a cartel agreement or that instances of collusion were isolated *ad hoc* agreements must in our view be treated with some caution, because such statements tend to embody legal conclusions. The witnesses were unlikely to be familiar with the legal requirements for an 'agreement' as defined in s 1 of the Act. Regard must naturally be had to such evidence, but it must be viewed in the context of the facts as a whole.

[21] It is common cause that in February 2007 a decision was taken by Duraset's senior executives that they would no longer have collusive contact with the other firms, and this was expressly communicated by Duraset to the others. The evidence was that a similar decision was taken by RSC in September or October 2007 although it is unclear whether that was communicated to DSI and Videx. The evidence of implementation beyond late 2007 is thin. It is the earlier events that require great attention in determining whether there was an understanding which fell within the scope of 'agreement' as defined in s 1.

[22] It is convenient here to record our overall impression of the witnesses as it can be gleaned from the record (the Tribunal did not make specific credibility findings). In the main, the evidence of the witnesses for the Commission reads well. It is important to emphasise that although the witnesses in question had formerly been employed by RSC or Duraset, they were no longer with those companies by the time they testified before the Tribunal. Furthermore, RSC had obtained leniency and Duraset had settled with the Commission, so that the interests of those companies were not directly implicated by the evidence given by the Commission's witnesses. By contrast, the witnesses who testified for DSI and Videx were still

employed by those companies, which were very much in the firing line. There was thus a greater temptation for them to conceal the full extent of the collusion. We do not regard their evidence as altogether satisfactory. Henson, Van der Merwe and Le Roux tried on various occasions to dilute the damaging effect of statements made by them during the Commission's investigations or in their witness statements or in the answering affidavits filed on behalf of their companies, and on other occasions their evidence was vague or evasive.

The earlier history

[23] There was evidence that during the 1990s and early 2000s there was already a collusive relationship between RSC, Steeledale (which later sold the business which became Duraset to Grinaker) and Videx. Videx was initially a sub-contractor, supplying components to RSC and Steeledale. Henson, who was formerly employed by RSC but broke away to form DSI in 2002, stated that a cartel existed between RSC, Videx and Steeledale/Duraset during the 1990s and that he attended meetings of the cartel (as a representative of RSC) over the period 1996 to 2001.[1] The essence of the understanding was that the firms would not interfere with each other's customers, thus helping to maintain margins.[2] Videx, which entered the market directly in about 1994, was approached by RSC in about 1996 with a view to persuading Videx not to target their customers. It appears that Videx allowed itself to be drawn into arrangements of this kind, because Bornman claimed that in early 2000 he received an email from Videx's Le Roux requesting Duraset to provide cover prices for Videx on a tender which Harmony was issuing (Harmony being by then a 'Videx customer'). Le Roux informed Bornman that he was making the request in terms of 'old agreements' to which Steeledale had been a party. Bornman's colleagues at Duraset confirmed to him that he should cover Videx, which he did. Videx gave him the price he was to tender. Bornman was told by his colleagues that there were certain market arrangements in place which he had to honour, Harmony being one of them.

[1] Statement para 7.2 at 2/162. See also the interrogation transcript at 27/2649.
[2] 14/1441.

[24] DSI, a breakaway from RSC with Henson at the helm, entered the market in 2002. DSI began to acquire market share, mainly at the expense of RSC while Videx was gaining market share, primarily from Steeledale. According to Videx's answering papers, this led to a meeting initiated by Steeledale at the latter's head office in Germiston, at which RSC might also have been present. Steeledale wished to stabilise the market and proposed an agreement for the retention of existing market shares. Steeledale also wanted Videx to undertake not to supply product to the new entrant, DSI. Videx's representative at this meeting, Moshe Josef, claimed in his affidavit that 'nothing specific' was agreed at the meeting. However, Videx did not claim to have rebuffed Steeledale's approach, and DSI stated in its answering papers that it had indeed been thwarted by the other three firms in its endeavour to enter the market - Videx had refused to supply it with components, as did Duraset's steel supplier Scaw Metals and the Murray & Roberts steel mill CISCO.[3] Henson also stated, in his interrogation by the Commission, that because the cartel had been in existence for some years the margins being earned by RSC, Duraset and Videx were extremely good. It was this that enabled DSI quickly to win market share with lower prices.[4]

[25] Josef admitted in Videx's answering affidavit that there were other meetings of this kind in the period 2002-2003 and that at some stage RSC acknowledged DSI as a fourth player in their industry meetings. Le Roux explained in cross-examination that Videx had been vulnerable as a small player and that it had been told by RSC and Steeledale (later Duraset) to toe the line. He said that if Videx had ignored cartel meetings and chosen not to attend, it could have lost business. He placed the termination of this collusive relationship in late 2005 as a consequence of RSC's behaviour in the Harmony tender. That is a matter to which I shall return later.

[26] After Steeledale sold its mining roof bolts business to Grinaker, that business (trading as Duraset) became a somewhat unreliable member of the cartel. Initially the 'old agreements' appear to have been honoured. However, there were times when Duraset actively attacked the other firms. Bornman's evidence was that he

[3] And see also Henson's interrogation at 27/2650-1.
[4] 27/2652.

would give commitments to the other firms during meetings, which he understood to be in accordance with approved arrangements, but would then find himself countermanded by Duraset's managing director, Johann Smit. Bornman alleged that on 19 November 2002 he and Smit attended a meeting with Le Roux and Josef at Videx's invitation. Videx's representatives tried to convince Duraset to adhere to the old agreements with Steeledale. Smit said that Duraset was not interested in doing anything which contravened the Act. There was a further meeting to similar effect on 21 January 2003 where Smit repeated his position.

[27] Bornman claimed that it was this refusal by Duraset which caused Videx to attack Duraset's business with Lonmin in May/June 2003. Videx threatened that it would take away the Lonmin business with predatory prices and in due course acted on this threat. Bornman said that Duraset countered with a price which was just about at break-even level. Videx then offered Lonmin a further rebate, which Duraset believed was below cost. Duraset lost a considerable volume of business as a result of this attack and had to lay off people. Smit then wanted Videx to surrender the Lonmin business back to Duraset.

Industry meetings: 2004-2005

[28] Subsequent to Videx's attack on Duraset's Lonmin contract, RSC and Duraset began to call meetings with the other firms more frequently in order to 'stop the bleeding'. We have already alluded to Le Roux's explanation as to why Videx attended such meetings. It is clear that Videx previously had a collusive relationship with RSC and Steeledale, that Videx wished Duraset to honour these arrangements, that when Duraset refused to do so Videx 'punished' Duraset by taking away a large customer (Lonmin) at very low prices, and that this forced Duraset back to the table. Josef, who deposed to Videx's answering affidavit, said that between 2004 and 2005 there were about ten to twelve industry meetings, mainly at RSC's offices in Wadeville. The main topic of conversation was market stability. Videx's perception was that RSC and Duraset were the most anxious of the firms as they were losing market share. Videx felt it had to attend the meetings in order to operate in the industry and be seen as a serious player and in order to gather market intelligence. Josef said that there were tentative discussions about allocating market shares but

'nothing specific' was agreed. Importantly, Josef added the following in Videx's answering affidavit: 'There was, however, broad agreement that we should all "respect each other's businesses" and stop attacking one another's customers' though he claimed that this made little difference in practice because the so-called 'agreement' was 'largely ignored'.[5] Josef had made an identical allegation in a statement submitted to the Commission as part of its investigation.[6]

[29] Le Roux attempted to dilute this in his oral evidence, saying there 'was an intent to get to an agreement' but 'it never materialised' and that if it had 'there wouldn't have been the market dynamics that took place'.[7] He also said that Videx had gone to these meetings 'with probably malicious, misleading intent, to listen, learn, observe and do what we wanted to do'.[8] Elsewhere, however, he conceded the existence of what he called the *status quo* principle during 2004 and 2005[9] and later said: 'There was a situation of *status quo*, in general. It wasn't specific incidents, but there was a high level, despite supposedly to be remaining *status* quo situation, there was a high level of interaction activity that took place.'[10] He gave several examples (other than those specifically alleged by the Commission) where the *status quo* principle was applied, namely Exxaro/Isizwe, Total's Dorsfontein mine and Xstrata/BHPP Billiton. (He also gave, as an example, Impala Platinum, but later retracted it, saying that the Impala business had always been heavily contested between Videx and Duraset.)

[30] According to Henson of DSI, Videx was responsible for inviting DSI to attend three industry meetings of this kind in early 2004. He speculated that RSC and Duraset had asked Videx's Josef to make the approach because Henson did not have an amicable relationship with the senior executives of RSC or Duraset.[11] It will be recalled that the other three firms had not made life easy for DSI as a new entrant. Henson said that DSI attended these meetings in the hope that issues between itself and the other firms could be resolved. Initially this did not transpire as

---

[5] Para 5.5.1 at 1/77-78.
[6] Para 4.3.1 at 1/112. This statement was annexed to Videx's answering affidavit.
[7] 17/1731.
[8] 18/1815.
[9] 18/1756.
[10] 18/1757.
[11] 15/1446-7.

the meetings were acrimonious and representatives of the other firms levelled insults at him. (Since Henson had left RSC to establish DSI and since its early market share had been acquired largely at the expense of RSC, it is entirely plausible that he would have been viewed with hostility, particularly by RSC.)

[31] We have mentioned that in about May/June 2003 Videx had successfully targeted Duraset's Lonmin business with very low prices. Duraset wanted the business back and, according to Bornman, succeeded in forcing Lonmin to issue an open tender in February/March 2004. On 11 March 2004 Josef of Videx sent Bornman an email with prices at which Duraset should cover Videx in the forthcoming tender. Duraset refused to cooperate and tendered much lower prices. Videx again had to drop its prices even further to retain the business.

[32] Cawood of RSC said in his witness statement that all the firms were making losses on their contracts with the mining houses and that the meetings in early 2004 were held to achieve cooperation to rectify the situation. This was confirmed by Henderson, who referred to an important meeting at Bruma Lake Holiday Inn to explore the formation of an 'industry association' (a euphemism, we think, for a cartel). He said that discussion at the meeting moved in the direction of upcoming tenders. Proposals were made about market division to resolve the devastating price wars. Duraset was accused of intruding on the other firms' territories while DSI was accused of attacking RSC's traditional markets. He said that the firms agreed that an accurate market share assessment should be conducted and that they should not target each other's business. Henderson testified that a position emerged where the parties had roughly equal market shares because they were not undercutting each other. He acknowledged in cross-examination that there were various features of the mining roof bolt market which made it very difficult and complex to arrive at an equal allocation.

[33] In his answering affidavit and witness statement for DSI, Henson stated that after the second Amplats tender an attempt was made to allocate market shares between the firms. He was invited to a series of meetings for this purpose. A spreadsheet was tabled by either RSC or Videx 'and the respondents agreed in principle that the market would be divided equally'. However, it was agreed, he said,

that shepherds crooks (grouting rods) would be excluded from the cartel arrangements because so many other suppliers in South Africa had the ability to supply them. Although the second Amplats tender was in May 2005, Henson in his answering affidavit proceeded to refer to a spreadsheet dated 7 September 2004 (see below) and speculated in his witness statement that this may have been discussed at an 'industry breakfast' on 10 September 2004 of which he had a record in his diary. He also, in the answering affidavit, stated that the discussion in question occurred 'in or about 2004.' We thus suspect that Henson's reference to the 'second' Amplats tender is an error and that he must have intended to refer to the first Amplats tender in 2004. He also admitted in DSI's answering affidavit that DSI, together with the other three firms, contravened the Act from at least mid-2004 until approximately mid-2005 'in that it engaged in collusive tendering by allocating tender contract customers for mining bolts between itself, RSC, Duraset and Videx in accordance with an agreed market share and by agreeing prices'. [12] His evidence of a broad agreement in principle accords with what certain of the other witnesses said as to the outcome of the meetings in mid-2004.

[34] In chief Henson initially denied that there had been any agreement regarding the sharing of the market.[13] However, towards the end of his evidence in chief he said that there was ongoing discussion about market shares, even into 2006. There was an agreement in principle to divide the market equally but DSI was 'to a large extent on the outside of this' because it had a limited product range. He also said that for various reasons it was impossible practically to implement the agreement in principle.[14]

First Amplats reverse auction

[35] One of the first occasions the parties had to implement their broad understanding was in relation to a reverse auction conducted by Amplats. The four firms all had some part of the Amplats business. A reverse auction is one in which the suppliers of a product bid prices down, with the lowest bid being the price at

[12] Para 12.4.6 at 1/40.
[13] 12/1201-2.
[14] 13/1288-9.

which the customer (here Amplats) will buy the product from the successful bidder. The auction was to be conducted over the internet in real time. It is obvious that Amplats followed this course because it believed that by way of a reverse auction it could get lower prices than those it was already paying under its existing contracts. (Contracts with the large mining houses appear to have been evergreen though terminable on notice.) Meetings were held among the four firms in the period April-June 2004 in relation to this tender with a view to ensuring that they would each win an agreed share of the business at prices they regarded as reasonable. Although the meetings earlier in the year with DSI had not succeeded in drawing DSI into the cartel, DSI succumbed at this stage. Henson in his evidence offered the explanation that DSI had very rapidly increased its market share and had financing constraints due to the liquidation of its German backer. It suited Henson's agenda to 'catch his breath' and consolidate his existing market share.[15] Duraset, which earlier in the year had failed to regain the Lonmin business from Videx, also cooperated. Spreadsheets were prepared to indicate where the bidding should start and where it should end and which lots were to be won by which firms. The firms remained in contact with each other for the duration of the online auction, which took place on 24 June 2004. It was an elaborate fraud on Amplats. In the event Amplats did not accept any of the bids (because they did not drop as low as Amplats expected), and each firm seems to have retained their existing business at the same prices as before.

Anglo Gold

[36] At about the same time a tender was issued by Anglo Gold. This was not one of the incidents concerning which detailed evidence was led at the trial but that there was collusion, at least between Duraset and Videx on this Anglo Gold tender, is clear from an email of 22 June 2004 which Bornman sent to Avichay Josef of Videx.[16] We quote from the email not so much to establish that there was collusion as to indicate the ease with which the firms communicated with each other on patently illicit arrangements:

---

[15] 14/1445.
[16] 26/2638.

'I am forwarding you the prices to be submitted by yourselves. Please pass it on to Leon [Le Roux] and/or Moshe [Josef].

Please note that these prices include delivery to the mines and exclude VAT. The prices you submit are between 4%-6% above ours. In the tender documents a question relating to the time period of fixed prices to the mines must be stated. We are stating that we will hold prices for as long as we do not receive any price increases from the steel mills of South Africa.

Should you need any more information please contact me.'

[37] This letter does not read as an unexpected proposal. It indicates an easy relationship between competitors in bid-rigging so that a traditional supplier can retain its business. In fact, Le Roux in his evidence said that Videx had presented this particular email as an annexure to its answering affidavit to explain that it was not only Videx that was asking Duraset for cover prices; Duraset also asked Videx for cover prices.[17] The answering affidavit added that there might be other similar emails or faxes of which Videx no longer had a record.

The market share email

[38] Since it is relatively unusual to find cartel members committing their illicit proposals to writing, an email sent a couple of months later, on Tuesday 7 September 2004, by Henderson (RSC) to Le Roux (Videx) and Henson (DSI) assumes considerable importance.[18] Attached to this email was 'the updated roof bolt market share'. Henderson said that they could discuss and verify this at their meeting on 'Friday'. The Friday was 10 September 2004; Henson had a diary entry indicating that an 'industry breakfast' was held on that date. Although the email does not reflect Duraset as an addressee, the attached table included a Duraset market share. The total market shares as estimated in the table were the following: Videx – 25,26%; Duraset – 13,38%; RSC – 29,84%; DSI – 21,67%; others – 9,4%. While there may have been difficulty in finding a uniformly acceptable approach to determining market shares, the sending of this email, with the intention of discussing

[17] 18/1794-5.
[18] 25/2467-2470.

it at a meeting a few days later, is consistent with an earlier general understanding that the parties would aim for roughly equal market shares.

Non-contract business

[39] We shall deal with other mining auctions and tenders presently. However, it is necessary to emphasise at this stage that the cooperation between the firms did not relate only to the big contracts with mining houses but also to small non-contract business. Cawood, who was employed by an unrelated entity by the time he gave evidence, gave entirely convincing testimony on this aspect. He said the following in chief:[19]

'Duraset or some of the other guys, on the day-to-day business, there were numerous transactions or telephone discussions between Neville Henderson and his equals in the various companies. It was not only in regard to the major contracts, but the smaller items, the day-to-day discussions were used to build a level of trust leading up into the tenders and to also gauge whether the other players are playing by the rules that were set out by the various companies… The guys that I was competing against were the Videx sales people and Duraset sales people who have historically been in all of the market segments. So, to list examples from DSI would be difficult. On the Videx side and the Duraset side there were multitudes of examples where customers would tell me that they've received better prices from Videx or from Duraset or someone else has quoted them better or lower prices than what we have. I would then report that matter to Neville Henderson. Neville would say to me, Martin, don't worry, I will get hold of the respective companies and I will sort it out in the next day or a day or two later, when I went back to the office, he would say Martin this issue had been addressed and it's been sorted out and you can continue with your normal business.'

[40] In cross-examination by DSI's counsel he confirmed that he had not personally been at the meetings with the other firms; that was handled by his superior, Henderson. But he explained why he was able to speak so confidently on the matter:[20]

'To the point that the way you stated, it's correct, but also then on those agreements, if those were not in place and those agreements were not as they were discussed and

[19] 10/1023 and 101025.
[20] 11/1047-8.

explained to me by Mr Henderson or Mr Koszewski, there were things that miraculously then disappeared overnight from this customer interfering with my customer over here. I reported to Neville. Tomorrow morning or two days afterwards such a meeting, that problem no longer exists and it is true when you say I cannot give you exact dates.

It is not on the contracts. On the contracts it's easy to go and pull out on records all the dates and the tenders. On the day-to-day issues it's not a case that there were ten or twenty or fifty of them. They were numerous, as in many, many, many of them and if I pull out any ten of them, anyone else would be able to pull out fifty and say why did you not mention these ones? And that's where you determine which are the guys that are playing, if I can call it like that, according to the rules that were agreed in those meetings.'

And later in cross-examination:[21]

'ADV ENGELBRECHT: Yes, and every now and again part of that would be a complaint about another supplier supplying to your customer.

MR CAWOOD: Yes.

ADV ENGELBRECHT: Yes, and you would complain about this.

MR CAWOOD: Yes.

ADV ENGELBRECHT: It was a bit of whingeing why…

MR CAWOOOD: No, no, no, no sometimes it was straight, get up from my desk, walk around to Neville's office and say Neville, someone is quoting at Kroondal, please sort this out. Okay Martin, I will get back to you now. He would be on the phone for 10 or 15 minutes, later come back and say that's sorted out, continue.

ADV ENGELBECHT: And was it always sorted out?

MR CAWOOD: In most of the cases, yes, and not necessarily always in our favour. Sometimes it would have been said we quoted on this place because you quoted somewhere there. Either you go and fix then, then we will fix this. So, there had always been that it wasn't always in our favour.'

He said that he himself was taken to task for approaching certain customers:[22]

'MR CAWOOD: No, I was rapped over the knuckles a few times for going to certain customers and then I had to go back and go and explain to them whatever the reason I could come up with why I made a mistake and why I would not be able to deliver and supply.

---

[21] 11/1104-5.
[22] 11/1053-4.

ADV ENGELBECHT: Okay, and you were told that was because there was an agreement.

MR CAWOOD: There was an agreement between suppliers that these are these [his?] customers, these are your customers. You deal with these customers. What are you doing over here? You are supposed to be here. You know that these customers are Videx, Duraset, DSI customers.'

[41] Videx's counsel also sought to undermine Cawood's evidence on this aspect, the context being the supply of a particular type of bolt to the Elandsrus mine:[23]

'MR CAWOOD: No, it's not a roof bolt, but it is used in conjunction with the roof bolt in bad ground conditions, but those were the sorts of items that you would quote on and then very quickly it will come back saying, hey, you guys are overstepping the line, don't quote our customers.

MR BUTLER: Mr Cawood, I wanted to put something to you and it might just shorten the cross-examination that is to come. The impression I get is that your memory on this sort of conduct that you are talking about is quite hazy.

MR CAWOOD: I wouldn't say it's hazy. There were a number of instances where it has happened, but it's not something that you try and memorise that I've spoken to Leon [Le Roux] this morning regarding a split set. It's not something that is indelibly imprinted in your mind like something extremely serious where you've just seen somebody killed. That you would remember, but small instances that happened twenty times a week, I don't try and memorise all of those.'

[42] He also did not accept that this type of cooperation only took place in 2004 and 2005. He said such conduct was definitely still occurring in 2006/ 2007. He said that although Videx's Le Roux may not have trusted Koszewski (because of the Harmony tender of October 2005) there was still a fair amount of trust in the later period between Le Roux and Henderson. He said that the relationship of trust between those two was still there when he (Cawood) left RSC in August 2007 and that there was still cooperation on day-to-day business at that time.

[43] DSI called Van der Merwe to undermine Cawood's evidence. Van der Merwe was employed by RSC until November 2010 but was with DSI by the time he gave

[23] 11/1127-8.

evidence. It appears that there was some hostility between himself and Cawood.[24] During his time with RSC, Van der Merwe was involved in the supply of roof bolts for soft rock applications (mainly coal mines) whereas Cawood was responsible for hard rock applications. Van der Merwe, in his evidence in chief, disavowed knowledge of any arrangement in terms whereof customers were recognised as belonging to particular suppliers. He testified that over a ten-year period he was never given an instruction not to quote for particular customers. When asked as to his knowledge about collusion in general, he said there were 'some rumours, you know rumours, the guys meet in coffee shops and the guys, the big shots meet up there'.[25] He said it was possible that market allocation had been implemented without his knowing about it. He also said that he worked from home and was not at the office very much.[26]

[44] A somewhat different picture emerged after the Commission's counsel asked for an adjournment to take instructions on Van der Merwe's evidence (DSI had called him on short notice). During the adjournment the Commission obtained a transcript of the interview which RSC's attorneys conducted with Van der Merwe on 15 July 2008 while he was still employed by RSC. This was in the context of the RSC investigations which led to the leniency application lodged in September 2008. In that interview Van der Merwe said that he often met for breakfast with his counterparts at Duraset, DSI and Videx. He said that they did not discuss their prices though they would talk about the steel price increases they were facing. He made reference to disciplinary action which Henderson had taken against him in mid-2007 for taking away DSI's Dorstfontein customer (though the reason given for the disciplinary action was that he had given the Dorstfontein customer an unauthorised price reduction). He said this followed an angry call from Henson to Henderson and Koszewski. He told RSC's attorneys that he had often been warned about going to other suppliers' mines. He also said that Henson phoned Koszewski on a regular basis to complain that he (Van der Merwe) was 'stirring up' the market (he used a blunter expression which the transcriber, out of delicacy, declined to

[24] See at 15/1475-6.
[25] 15/1482-3.
[26] 15/1484; 15/1510.

type). He agreed that there was an understanding that certain mines were his while others belonged to the other firms.[27]

[45] Under cross-examination Van der Merwe attempted to distance himself from some of the more damaging statements he made during this interview, claiming that he was not fluent in English (which we accept) and that he just wanted to get finished with the interview. However, we reject the notion that he did not understand the import of what he was saying. He was the one who, when asked whether any arrangements existed between RSC and its competitors, volunteered the information about the disciplinary action taken against him. He said that this action was taken against him because he went on to a DSI customer's mine, which he was not meant to have targeted. When asked whether this sort of thing had happened more than once, he said 'well, I've actually been warned every time, Lukas you don't go to other mines, don't go to other mines'. When asked which mines he was told were 'off limits', he replied that it was his competitors' mines, and he then confirmed that there had been an understanding that certain mines were his while others belonged to his competitors. He could not explain under cross-examination how he had come to say this to RSC's attorneys if it were not the truth.[28] His version during the interview is consistent with the testimony of the Commission's witnesses, though we are prepared to accept that Van der Merwe chafed at the restrictions which his seniors at RSC wished to impose on his competitive behaviour (perhaps because it affected his commission income) and that he did not always heed them.

Goldfields

[46] Returning to the big mining contracts, the next large one was the Goldfields online reverse auction. Although the Commission in its referral affidavit placed this incident in September 2005, and although some of the witnesses followed suit, Le Roux of Videx said that it occurred in September/October 2004. This is borne out by the Request for Information issued by Goldfields[29] and by Videx's contemporaneous

[27] See interview notes at 20/1998-2002.
[28] 16/1548-9; 16/1554..
[29] 25/2472-2503.

incident report of the Goldfields auction.[30] We have already mentioned that Duraset was an unstable member of the cartel. Although Duraset had cooperated in the Amplats reverse auction, it was perceived in the second half of 2004 not to be 'playing the game' (Le Roux's words in para 12 of his statement) and to be following an aggressive pricing strategy. Duraset was Goldfields' primary supplier. Le Roux said that for this reason RSC, DSI and Videx agreed, in advance of the Goldfields auction, to collude to make sure that Duraset did not win any of the Goldfields business. Cawood's recollection was that when the other firms tried to get Duraset to cooperate in the Goldfields auction as it had done in the Amplats auction, Duraset refused, and this caused the other three firms to resolve that Duraset be 'taught a lesson'.

[47] The upshot was that the other firms were successful in excluding Duraset, though this could only be achieved at what Le Roux described as 'pathetically low prices'. The three firms were in telephonic contact with each other during the course of the online auction. Cawood agreed that the outcome was very favourable for Goldfields but said that in the greater scheme of things it had been important to discipline Duraset: 'We've shown Duraset that either you guys come to the table or you will not have any of the business and by spreading the losses between three companies made it a little easier than one guy to fight one-on-one.'[31]

[48] Henson testified that there had been no collusion between the parties during the Goldfields reverse auction of October 2004.[32] His evidence is inconsistent not only with that of the Commission's witnesses but also with Le Roux's testimony. We think that this was one of the instances where Henson discreditably attempted to distance DSI from collusion.

[49] Henderson said that there was a twist in this particular tale. DSI was best placed to supply shepherds crooks to Goldfields, this being a significant component of the tender. Indeed, Henson testified that this had traditionally been DSI's

[30] 20/2015.
[31] 10/1027-8.
[32] 12/1233.

business.[33] However, it would have been foolish for the three colluding firms to undercut each other once Duraset fell out of the bidding (and because of their cooperation during the online tender they knew when this occurred). It so happened that Videx was the lowest bidder for shepherds crooks when Duraset ceased bidding, and the price at that particular point was just about at cost. The result was that Videx won the tender but then had to conclude a sub-contract with DSI for the latter to supply Videx with the shepherds crooks. From the exhibits it appears that this sub-contract was formally concluded with an effective date of 1 May 2005 though DSI already started supplying the product to Videx in 2004.

[50] According to Henson, DSI advised Videx in late 2005 that DSI could not continue supplying Videx with the shepherds crooks for Goldfields because it was losing money. Videx then cancelled its supply agreement with Goldfields in early 2006. In his evidence to the Commission during its investigations, Henson said that Videx had agreed (ie with DSI) to give up the Goldfields business 'in the course of the reorganisation of all these market shares and bits and pieces'.[34] Goldfields issued a fresh tender in March 2006 which DSI won, presumably at prices which allowed it to make an acceptable profit. Videx did not submit a bid. Henson also testified in his interrogation by the Commission that when Goldfields went out to tender in March 2006, he spoke with Steeledale or its sister company Duraset to ensure that they would not compete for the business with predatory prices, and that as a result 'there was collusion and the Steeledale group as a whole respected my prices in respect of Goldfields'.[35]

---

[33] 12/1239.

[34] 27/2675 read with 12/1243-13/1244 and 14/1376-7. Henson said in cross-examination that the view he had expressed to the Commission, namely that Videx terminated the contract with Goldfields for the supply of shepherds crooks in the course of the reorganisation of market shares, had been erroneous because it was not borne out by the facts subsequently uncovered by him. The 'subsequent facts' were that DSI had terminated its supply of shepherds crooks to Videx under the sub-contract because DSI was losing money on the deal. However, we do not regard this as inconsistent with what Henson told the Commission, particularly when one has regard to the circumstances in which Videx had originally been awarded the contract by Goldfields in October 2004.

[35] 27/2676 read with 12/1246; see also 12/1239-1240.

March/May 2005 – Anglo Coal

[51] In an RSC executive meeting held on 11 March 2005 it was noted that Duraset was not interested in joining the 'roof bolts forum' consisting of RSC, Videx and DSI. The same minute noted that threats to RSC's business included the fact that Amplats, Anglo Gold, Sasol and Ingwe were all going out on tender.

[52] Despite Duraset's apparent reluctance to join the 'forum', Bornman said that in April 2005 he met with representatives of RSC and DSI at a coffee shop in Secunda. The initial focus of the meeting seems to have been Sasol, because Bornman said that Videx was not represented as it was not a Sasol supplier. Be that as it may, RSC at this meeting requested the other two firms not to be so aggressive. Bornman told Henderson (RSC's representative at the meeting) that Duraset would not undercut RSC in the upcoming Anglo Coal tender (which appears to have been RSC's particular interest – DSI and Duraset, by contrast, were most closely involved in the supply to Sasol). However, Bornman was later countermanded by Smit, who instructed him to price aggressively on the Anglo Coal contract. In the event, RSC succeeded in retaining the Anglo Coal business but only by further reducing its prices – this appears to have been in May 2005. Bornman conceded in his evidence that he had previously given his word to RSC that Duraset would not undercut RSC and that he broke his promise on the instructions of Smit.

[53] This tussle in regard to the Anglo Coal business is not to be confused with the main Anglo Coal incident, which occurred in the first half of 2006. However, the price battle between RSC and Duraset in May 2005 in regard to Anglo Coal is an important precursor to the events of 2006.

Second Amplats reverse auction – May 2005

[54] As to the upcoming Amplats tender mentioned in the RSC minutes of 11 March 2005, representatives of all four firms met in order to rig the online auction as they had done in June 2004. According to Bornman, the meeting to settle these details took place at RSC's Wadeville factory. Videx was represented by Josef and Le Roux. Others present included Henderson, Henson and Smit. According to a

Videx incident report, the auction took place on 21 May 2005.[36] Videx and DSI admitted their participation in this collusion. Once again, the prices, because of the rigging, did not drop to a level which Amplats found acceptable.

[55] In 2004, in similar circumstances, Amplats had simply continued with the pre-existing contracts. On this occasion, however, it engaged each of the firms in negotiation, as a result of which in some instances prices were achieved that were lower than the lowest rigged bids but probably not as low as they would have fallen in a non-fraudulent reverse auction. Henderson's perception was that the firms generally retained their business at the pre-existing prices (which were lower than those they had hoped to achieve in the auction).

[56] Videx said that, although it participated in this collusion, it only realistically faced competition in regard to one of the products namely flexible eyebolts. Of the other two products for which it bid, its lacing bolt was a patented product, and it was also the only entity offering combo-coupling bolts. Videx, in the individual negotiations, could hold its price (ie at the rigged levels) on the latter two products. In regard to flexible eyebolts, the price was low due to competition from Duraset, and the price at which Videx got the flexible eyebolts business was as low as Videx was prepared to go. Le Roux also testified that in the negotiations between Amplats and Videx the former used prices allegedly offered by other firms (not necessarily the other respondents) in an attempt to get Videx to drop its prices.

Sasol/Xstrata

[57] At about the same time (mid-2005) there was a collusive discussion between DSI and Duraset regarding supply to Sasol, being an arrangement which was of particular significance to those two firms. At about this time Sasol awarded 25% of its business for the supply of roof bolts in its coal mining operations to Duraset, the balance being with DSI. Sasol intimated to DSI that unless it could match Duraset's prices on the 25% already supplied by the latter, Sasol would award a further 15% of its business to Duraset.

---

[36] 20/2016.

[58] Henson of DSI and Bornman of Duraset had discussions in which Henson agreed that DSI would not resist the awarding of a further 15% of Sasol's business to Duraset by undercutting Duraset's prices, provided Duraset agreed not to bid on an Xstrata tender which was to be issued later in the year. It is common cause that an agreement to this effect was reached. DSI kept its side of the bargain, though according to Henson the agreement was a bluff from his side, in the sense that DSI had in any event not intended to defend the further 15% of the Sasol business with lower prices. According to Bornman's evidence, Duraset also honoured the arrangement. Although he was told by Smit that he should bid on the Xstrata contract, Duraset did not bid aggressively but only for 'appearances' sake'.[37]

[59] An incident of this nature cannot in our opinion be viewed as an *ad hoc* arrangement standing outside the cartel. It is entirely consistent with an overarching agreement in which market shares are respected. It just so happens that in relation to the Sasol and Xstrata business only two firms had a direct interest, so the precise implementation of the broader understanding was worked out among themselves. We would add that there was evidence that Le Roux called Henderson at some stage to ask RSC to provide cover prices for Videx in relation to Xstrata business. Whether this was different to the business that DSI and Duraset were discussing is unclear. Mr Butler for Videx put to Henderson that Le Roux accepted that he might have spoken to Henderson about covering Videx on an Xstrata tender but that this was in November 2005, and not in 2006 (as Henderson had earlier stated).

Harmony – August-October 2005

[60] The next significant tender was the one issued by Harmony. There is some uncertainty as to the date. The Commission alleged that Harmony issued the tender during October 2005. On the other hand there are Videx incident reports relating to the Harmony tender dated 19 August 2005 and 1 September 2005 respectively.[38] Videx had been Harmony's main supplier for several years. The four firms recognised Harmony as being Videx's customer. However, according to Videx, Duraset managed to persuade Harmony to test the market again by going out to

[37] 10/954.
[38] 20/2017-2018.

tender. Bornman of Duraset then phoned Videx's Le Roux to say that Duraset wanted a share of the Harmony business. Josef surmised that this disruptive action by Duraset was in retaliation for the way Duraset had been squeezed out of the Goldfields reverse auction in late 2004. Be that as it may, this 'rocking of the boat' led to further discussions between the firms in which it was agreed that Videx could retain the business and that RSC and Duraset would provide higher cover prices.

[61] In his evidence Cawood confirmed that he was informed by Henderson of this agreement. He was told that historically Harmony had been the business of Videx and was to remain so, and he was given the prices to insert in the tender. This would be consistent with the overarching understanding between the firms. The absence of DSI from these discussions is of no moment, because DSI had no interest in supplying Harmony.

[62] However, there then occurred an event on which Videx was to place great reliance in the Tribunal hearing. RSC cheated and submitted prices for Harmony which were lower than Videx's. (Duraset also cheated but its prices were not the lowest.) Harmony told RSC that it would be getting the business, and supply started. Several weeks later there was an underground failure at Harmony, and Harmony concluded that RSC's product was technically deficient. Harmony offered the business back to Videx but at lower prices. Videx thus regained the business but at prices which it regarded as being close to cost. Videx felt desperate to win the business back because Harmony provided Videx with critical volume.

[63] According to Henderson, RSC decided to renege because it had heard through the grapevine that Duraset was not going to honour the agreement. Koszewski admitted that RSC had gone back on its word. His explanation, given in response to questions from the Tribunal, was the following:[39]

'MR KOSZEWSKI: The industry was in a price war, everybody was bleeding and Videx enjoyed super profits at Harmony and the strategy that was developed was to get the contract away from them or if we weren't successful then at least force the prices down.

CHAIRPERSON: And achieve what by doing that?

[39] 5/518.

MR KOSZEWSKI: Well to bring Harmony, sorry, to bring Videx into a level more consistent with the other respondents in the industry. They were hurting less than the other respondents as a result of the prices at which they – that they had at that point in time with Harmony.

CHAIRPERSON: And if they hurt more what did you think the outcome would be?

MR KOSZEWSKI:That in the event, well that was the precursor to the events that occurred later that we would be able to bring them to the table to talk about trying to stabilise the market and make it less volatile and hostile.

CHAIRPERSON: So are you saying the strategy was then to, if you could hurt them they would come to the table?

MR KOSZEWSKI: Well I would like, we believed that that might be inducive or induce them to be more amenable to talking.'

[64] Cawood confirmed that at the last minute he had been instructed to change the tender by inserting low prices. As he understood it, RSC felt that a statement needed to be made in the industry that RSC would not allow companies like Videx to profiteer. On questioning from the Tribunal, Cawood surmised that the objection to profiteering was that Videx might then be able to undercut the other firms on other contracts.[40]

[65] Videx's contention before the Tribunal was that RSC's conduct in the Harmony tender destroyed all trust which Videx had in RSC. When he gave his oral evidence, Le Roux was plainly aware of the significance of the cut-off date. Regarding the Harmony incident, he said the following:[41]

'The dynamics, everything, whatever changed for us at Harmony. Everything changed for us at Harmony. So, I'm not even going to say up until January 2006. That thing stopped for us, the interest, prices, agreements, understandings, everything was canned at Harmony.'

A short while later, in explaining the difference between the period before and after Harmony, he said this:[42]

'MR LE ROUX: We were involved though and we thought it was a great thing, you know, because everybody was giving this thing lip service.

[40] 10/1030-1; 12/1152-3.
[41] 18/1749.
[42] 18/1752-3.

ADV MOTAU: Of course.

MR LE ROUX: Yes and so I'm not denying that aspect. It's just that the crucial thing is to place in Harmony that shattered the whole thing apart for us, and that was the end of it… If you mention January 2006, I do not want to entertain that date, just as a matter of principle. That was beyond my sell-by date of this whole thing. So, if you refer everything was hunky-dory up until, for instance, October or whatever the Harmony incident was, I will say all things fair, but if you are trying to extend that date, I have a major problem in admitting or denying the question… It is not about a prescription date whatsoever. I'm not saying or coming with smart answers here. I'm just talking straight to you. That was the be-all and end-all for Videx. It was an event. It wasn't a date, which happened to be coinciding with whatever we feel comfortable with.'

[66] Koszewski and Henderson conceded that Videx would have had little reason to trust RSC after this time although, as noted earlier, Cawood emphasised that, while Koszewski was a prickly character, there was still trust between Le Roux and Henderson. Importantly, however, there was no evidence that in consequence of RSC's behaviour in the Harmony incident, Videx informed RSC or the other firms that it was no longer prepared to be part of collusive arrangements.

[67] It is significant that the conduct of RSC did not cause Videx to terminate or withdraw from further meetings and decisions which were taken at these meetings. In other words, the understanding that is evident from the various meetings from at least 2002 continued, Videx's dissatisfaction with .RSC notwithstanding. In *MacNeil supra* this court dealt with the implications of a party's passive attendance at meetings where collusive arrangements are discussed. Reference was made to the duty in such circumstances to speak, the duty being founded on considerations of legal policy. The same duty applies where a firm has made itself party to a collusive agreement. Some clear act of termination or distancing is required before the firm can be held to have extracted itself from the cartel. A loss of trust, even a significant breakdown in trust, is not sufficient if unaccompanied by other actions which clearly signal withdrawal from the cartel. After all, cheating is a common feature of cartels. The level of trust among cartel members may fluctuate significantly over its life. There was no evidence of distancing, even after the trust with RSC was broken .

11 November 2005

[68] I accept on the evidence that, following the Harmony incident in October 2005, trust between Videx and RSC was probably at an all-time low. Yet, as noted, not only did Videx not signal clearly its intention to withdraw from the collusive relationship among the four firms; it proceeded to attend meetings where there were collusive discussions. According to Bornman and Henderson there was a meeting on 14 November 2005 attended by representatives of all four firms. The meeting took place at Duraset's offices. According to Bornman, Koszewski proposed an equal division of the market. Although Bornman used the word 'proposed' in his witness statement, it is clear from other evidence that a broad understanding to this effect had already been reached. It is more probable that Koszewski was attempting to reinforce and refine an existing broad understanding. Smit's response was that while equal market division sounded very attractive, there was no practical way to achieve it, given that the firms' products differed in value and cost.

[69] According to Bornman, Koszewski also urged Duraset to terminate its efforts to increase its market share of the Anglo Coal business. It will be recalled that earlier in the year Duraset had attacked RSC's Anglo Coal business, and RSC had only been able to retain it by dropping its prices. At the meeting of 14 November 2005 Koszewski threatened to attack Duraset's business with Anglo Gold unless Duraset backed off. (As appears from Bornman's email to Avichay Josef of 22 June 2004, Duraset itself had co-opted Videx to provide Duraset with cover prices in relation to the Anglo Gold tender of 2004.)

[70] RSC's anxiety over its Anglo Coal business and the threat posed by Duraset was a principal focus of important discussions which took place in the first half of 2006, with which I shall deal later. What I note here is that Videx did not dispute its attendance at the meeting. What Le Roux said in his witness statement was that although he attended the meeting, Videx had no particular interest in discussions regarding Anglo Gold or Anglo Coal. He did not, on the available evidence, distance himself from the discussions about sharing the market nor did he say that the firms should not collude, as they were proposing to do, on mining contracts such as Anglo Gold and Anglo Coal. There is no suggestion that legitimate arm's length business

was being discussed at the meeting yet Le Roux attended it and apparently remained for its duration. This is not the conduct of a firm which, because of recent cheating by a another member of the cartel, wants nothing more to do with collusive arrangements.

Position at end of 2005

[71] The evidence we have reviewed thus far may well justify a conclusion that by the second quarter of 2004 there was an overarching agreement that the firms would share the market more or less equally among themselves and that they would not disturb their respective market shares by attacking each other's customers with low prices. However, and as explained earlier, it is not necessary to go so far. The evidence at least satisfies us, on a balance of probabilities, that, even if there was no overarching agreement with such specific content, the firms by the second quarter of 2004 had reached an overarching understanding that collusive cooperation between them on tenders, auctions and day-to-day business was in their interests and that they would, with a view to working out details, remain in communication on such matters, ie that their doors would be open for the purpose of arriving at more specific arrangements as and when market circumstances made this appropriate.

[72] In summary, there was a significant history of collusion among the firms prior to the second quarter of 2004, stretching back into the 1990s. DSI, the new entrant, had originally been isolated but in the months immediately preceding the first Amplats auction came round to the view that its best interests would be served by throwing in its lot with the others. The broad understanding of preserving market shares in roughly equal proportions was articulated in a spreadsheet produced in September 2004 and was discussed at several meetings. In relation to big mining contracts, the firms reached collusive arrangements, consistent with the overarching agreement, in relation to Amplats (in 2004 and in 2005), Anglo Gold, Goldfields, Sasol/Xstrata and Harmony. In the case of the Goldfields auction, RSC, DSI and Videx were disciplining Duraset because of its breaking ranks (the Tribunal itself inferred that this was a 'classic cartel punishment strategy' - para 45 of its

judgment). Koszewski's explanation for RSC's cheating on the Harmony tender also involved action designed to discipline Videx.

[73] Apart from the large mining contracts, there were the frequent communications described by Cawood in relation to non-contract business. These communications, which occurred throughout 2004 and 2005 (and beyond), were aimed at ensuring that one firm did not approach another firm's customers. Given the frequency and ease with which the four firms communicated with each other on all manner of collusive detail over the period 2004-2005, we find it wholly implausible that there was not some overarching agreement of the kind we have described.

[74] In reaching this conclusion, we do not overlook what the Commission's witnesses said in general terms about the state of affairs at the end of 2005. Koszewski, for example, testified that it was clear by the end of 2005 that 'the cartel activities had failed' and that it had also become apparent that the firms, acting on their own or collectively, could hurt each other. There was 'absolute mistrust'. He also said that the collusive agreements 'were very rarely implemented' (though we are by no means not sure that this is borne out by the evidence). Henderson also said, by way of background to the Anglo Coal meeting of 2006, that there was a lot of mistrust in 2005 and that 'the cartel was not really in effect', with various firms attacking different mines. Bornman, when cross-examined by DSI's counsel, said that he did not think that 'at any point in time a cartel existed as in the strict sense of the word', that there was cooperation during tender processes 'but in the sense that we have got a formal agreement amongst parties that now we are going to work together that's going to happen, that never existed', and that it was rather a matter of *ad hoc* cooperation.'[43]

[75] However, and as we previously observed, general statements of this kind which go the application of the law relating to s 4 of the Act need to be viewed with caution. The descriptions given by Koszewski and Henderson regarding the state of play in late 2005 was not that a cartel never existed or that it had terminated but

[43] 10/960-1.

rather that due to non-observance it had not succeeded in delivering the desired results and that trust was low. The whole thrust of their evidence was that new life was breathed into the cartel by the Anglo Coal discussions in 2006. Bornman's summary must be viewed in the context of the known fact that Duraset was the least reliable of the cartel members. Bornman elsewhere explained in some detail the awkwardness he encountered by virtue of the fact that he would give his word to the other firms and then be countermanded by Smit. At the strategy meeting in February 2007, which culminated in Duraset's decision to withdraw from all cooperation with the other firms, Bornman explained to the board that Duraset had been talking to the other firms and had cooperated with them on various tenders. The pros and cons of cooperation were discussed. we do not know quite what he meant by the statement that a cartel never existed 'in the strict sense', as this implies that a cartel existed in some less strict sense. In terms of the law as set out earlier, the absence of a 'formal agreement' is not conclusive of the matter. Bornman's private views, which were no doubt influenced by his internal discussions with Smit and others at Duraset, may not have accorded with the impression he conveyed to the other firms.

[76] If there was a continuing understanding which was manifested by the various meetings and communications during this period then, as I have already explained, Videx did not terminate or withdraw from the collusive understanding in late 2005, even though it had become highly distrustful of RSC because of the latter's cheating in the Harmony tender. Nor did any of the other firms terminate or withdraw from the cartel at that stage.

Cessation of prohibited practice – 2005 Amplats auction

[77] It is convenient at this point, before continuing the chronological survey of events into 2006 and 2007, to address the question whether the Tribunal was correct to hold that the prohibited conduct constituted by the parties' collusion in the Amplats reverse auction of 2005 had 'ceased', for purposes of s 67(1), by the cut-off date of 26 January 2006. The Tribunal considered this question on the basis that each of the acts of collusion associated with the tenders and auctions of 2004 and 2005 were *ad hoc* incidents and not part of a broader cartel agreement. On the view we take of the facts, this was an erroneous approach. If a continuing understanding

existed in 2004 and 2005, of which the various acts of collusion were manifestations, it was not shown by Videx or DSI that they terminated their participation in this arrangement or distanced themselves from it by the cut-off date. This would be a sufficient basis for saying that no time bar operated in respect of the understanding and of the various ways in which it manifested itself in 2004 and 2005.

[78] It is nevertheless desirable to consider the correctness of the Tribunal's application of s 67(1) to the facts as it found them. The onus was on Videx and DSI to establish that each of the acts of collusion, viewed as an *ad hoc* prohibited practice, had 'ceased' for purposes of s 67(1) by 26 January 2006 (see *Paramount Mills Pty Ltd v Competition Commission* [2012] ZACAC 4 paras 37-42). We think the Tribunal was probably correct in holding that, apart from the 2005 Amplats auction, the other prohibited practices had ceased by 26 January 2006, either because the conduct in the event had no prejudicial effects or because those effects were likely to have dissipated by January 2006.

[79] In regard to the 2005 Amplats auction, the Tribunal did not regard the prohibited conduct as ceasing at the end of the auction. The ongoing effects of the collusion were examined. The colluding firms' first prize would have been for each of them to obtain the lots and prices they had arranged among themselves in the rigged bidding. Because Amplats made no award pursuant to the auction, the first prize was not attained. There was, however, a second prize (viewed from the perspective of the colluding firms), constituted by negotiated prices which avoided the very low prices which might have been the outcome of a truly competitive and independent reverse auction. It was second prize which the parties achieved. The prices achieved in individual negotiation with Amplats seem in general not to have been significantly different from pre-existing levels, though not as high as the prices for which they were aiming in the rigged auction.

[80] In our opinion, the Tribunal was correct to examine events beyond the conclusion of the auction. A prohibited practice is generally constituted by initiating conduct followed (if the initiating conduct is successful) by the anti-competitive effects intended by the colluding parties. Section 67(1) envisages that a prohibited

act will be one which continues over a period of time and is thus capable of ceasing. The prohibited act is thus not constituted only by the initiating conduct but also, within appropriate bounds, by its intended ongoing effects. To take a simple example, if two firms collude with each other to fix prices, and if each of them then concludes a three-year supply contract with separate customers at the fixed prices, the prohibited price-fixing is constituted by the initiating act (where the suppliers strike their secret illicit deal) and by the conclusion and performance of the resultant contracts with the customers.

[81] This accords with what this court said in *Paramount Mills supra* para 44:

'Secondly, it is clear, upon a proper reading of para 93.3, that the prohibited conduct which is pleaded and in which Paramount is alleged to have participated is the fixing of the selling prices of maize meal products and the timing of future price increases. As correctly pointed out by Mr Unterhalter, the prohibited conduct does not end or cease with the conclusion of the agreement fixing the selling price. It continues to exist and its effect continues to be felt when the future prices, agreed upon pursuant thereto, are implemented. It is therefore not proper to read the allegations in paragraph 93.3 of the affidavit in support of the complaint referral as if they related to conduct which in terms of time has already ceased to exist.'

[82] If a theoretical foundation is required for treating the conclusion and performance of the resultant contracts as part of the prohibited conduct, it can be found, we think, in the duty to act or speak. Customers are entitled to deal with their suppliers on the assumption that the latter have not colluded to fix prices. A colluding supplier who concludes a contract with an unsuspecting customer at a fixed price is withholding information which would be of importance to the customer, namely that the price has not been arrived at through independent competition. For as long as the suppliers give effect to the contracts with their customers without disclosing the true facts to the latter, they are by their conduct and silence continuing to collude. The prior illicit collusive arrangement between the firms gives rise to an ongoing duty to speak or act so that affected persons may reassess their position. The way in which the prohibited act in our example would cease would be for one or both of the colluding firms to notify the customers that the prices in their contracts were collusively fixed and to invite the customers to renegotiate the contracts on the basis that the suppliers will now act independently rather than

cooperatively. In other words, unless the colluding firms 'come clean' during the course of the resultant commercial dealings with their customers, the prohibited practice continues until those commercial dealings come to an end and the firms who formerly colluded start to deal with their customers independently.

[83] In the present case, the initiating conduct of the colluding firms was their agreement to rig the auction, thus depriving Amplats of prices which would be the outcome of independent competition among the suppliers. They succeeded in thwarting Amplats, although they did not succeed in getting their rigged prices. When Amplats came to negotiate with each of the firms, Amplats was doing so under the misapprehension that an honest auction had not achieved the desired outcome. None of the four firms, in their individual negotiations with Amplats, disabused Amplats of that misapprehension. Instead, they negotiated individual contracts in which they more or less kept their existing business at prices at or near pre-existing levels. These individual contracts would have been struck in about mid-2005, following the failure of the auction. There was no evidence that the resultant contracts, which in this industry tended to be evergreen contracts of indefinite duration but terminable on notice, were not still in force in January 2006. Certainly Amplats did not engage in any further tender or auction process prior to the cut-off date.

[84] Each of the colluding firms, in reaching its supply agreement with Amplats and in giving effect to that supply agreement during 2005 and 2006, knew that it, like its fellow colluders, was reaping the benefit of a contract which might have been on less favourable terms had Amplats not been duped. There was a duty on each of the firms, if they were to act honestly, to inform Amplats of the true state of affairs. That would have enabled Amplats to launch a fresh reverse auction on the basis that the four firms would now bid independently and not collusively.

[85] The Tribunal was thus right to find that the prohibited conduct initiated by the 2005 Amplats collusion had not been shown to have ceased by 26 January 2006.

[86] In Videx's heads of argument counsel submitted that the Tribunal had erred because the negotiations which occurred after the failed auction were not part of the

conduct complained of in the referral. In oral argument, however, Mr Butler did not, as we understand him, contest in principle the contrary reasoning we have set out above. He accepted that the prohibited conduct had not ceased merely because the auction failed and because Amplats then negotiated with the firms individually. His contention in oral argument was that, at least in the case of Videx, the individual negotiations with Amplats resulted in competitive prices and were prices below which Videx would probably not have gone in an independent auction process, and that this made all the difference.

[87] We reject this contention. It is rather too easy for a colluding firm to say, once it has thwarted an independent auction, that the price subsequently agreed with the customer was in any event a competitive price which was not higher than the price which the supplier would have bid at a genuine auction. Amplats was entitled to the outcome of an independent auction. Because of the collusion between the four suppliers, we simply do not know what an independent outcome would have been. We know that on prior occasions firms were willing to bid break-even prices in order to retain or win critical volume. Even if a particular firm was not willing to go below a certain level in a genuine auction, it cannot be known for certain that another firm might not have done so.

[88] Furthermore, Videx's argument focuses on the allegedly competitive outcome of its individual negotiations with Amplats. But the collusion in this instance involved four firms, and as a result of the collusion Amplats had to negotiate individually with each firm. Even if Videx's negotiated prices with Amplats were the lowest prices Videx could offer (and even the lowest prices that anyone else would have offered, though we suspect that is unknowable), the same is unlikely to be true for the other three firms. RSC apparently retained its business at pre-existing prices, and Henderson's perception was that this had been the general outcome. For as long as Amplats was kept under a misapprehension by the four colluding firms and for as long as those firms gave effect to the negotiated contracts which Amplats had been compelled to conclude following the unsuccessful auction, the prohibited conduct constituted by the rigged bidding continued. If any one of the firms had gone to Amplats and disclosed the truth, Amplats would have been entitled to terminate the

negotiated contracts on grounds of non-disclosure and to arrange a new reverse auction.

[89] The contention (which we did not understand to be pressed) that the individual negotiations between Amplats and the four colluding firms were not themselves alleged in the referral to be 'tainted' misses the point. It was for Videx to show that the prohibited conduct had ceased in the sense explained earlier. The referral sufficiently alleged that the collusion in the second Amplats auction thwarted the auction. The subsequent individual negotiations were inevitably 'tainted' because Amplats had not wanted to engage in individual negotiations but to conduct a reverse auction. Videx failed to show that the effects of the collusion were not still being felt after the cut-off date.

[90] We do not say that all ongoing effects of prohibited conduct qualify as factors justifying a conclusion that the prohibited conduct has not ceased. Most types of prohibited conduct distort the market. The distorting effects may perhaps be felt even though the colluding firms have ceased to behave cooperatively. Competition theory would hold that, provided firms compete independently, distortions in the market from prior collusion should correct themselves. What is important is that one should have reached a point where market outcomes are being determined by independent competition. That is not the case for as long as contracts which are the outcome of collusion are being enforced.

[91] If there was a continuing understanding in 2004 and 2005, but if one were to conclude (contrary to our view) that it came to an end as a result of the distrust engendered by the Harmony episode, the finding of the Tribunal regarding the ongoing nature of the 2005 Amplats collusion (a finding we regard as correct) would, as previously mentioned, simultaneously justify a finding that the understanding had ongoing effects beyond 26 January 2006, even if only in relation to the act of implementation constituted by the 2005 Amplats collusion; ie if the parties participated in the continuing understanding during 2004 and 2005 until (say) the Harmony tender, then it had at least some ongoing effect beyond the cut-off date (because the second Amplats auction, which was one of the manifestations of the understanding, had ongoing effects beyond that date).

2006 and 2007

[92] We have already foreshadowed our view that the continuing understanding did not terminate at the end of 2005 but continued through 2006 until at least February 2007. An incident which attracted a good deal of attention in the Tribunal proceedings was the termination by RSC of its existing supply contract with Anglo Coal in 2006 and the resultant issuing of a tender by Anglo Coal. We have explained that, because of Duraset's disruptive conduct, RSC had been compelled in mid-2005 to drop its prices in order to retain the Anglo Coal business. At the meeting of 14 November 2005 Koszewski had asked Bornman of Duraset not to seek to increase its market share with Anglo Coal. However, RSC was under internal pressure to improve its financial results and was thus anxious to achieve what it regarded as more sustainable prices with Anglo Coal.

[93] This led to meetings in the first half of 2006 at which, according to the RSC witnesses, it was agreed that RSC would give notice to terminate its contract with Anglo Coal and that the other firms would not attack RSC in the tender which Anglo Coal would inevitably then issue. The RSC witnesses went further, stating that there was general agreement to respect each other's existing contract customers, on the basis that, if any other firm wished to follow RSC's example by terminating an existing contract in order to achieve better prices on tender, the remaining firms would not undercut the incumbent.

[94] The case set out in this regard in the Commission's witness statements and in their subsequent oral testimony went considerably beyond what the Commission alleged in its referral affidavit. In its referral affidavit, under a main heading dealing with collusive tendering in contravention of s 4(1)(b) (iii), the Commission dealt with various specific incidents. The Anglo Coal matter was dealt with in paras 61 and 62, where the Commission's deponent merely said the following:

'61. During May 2006, RSC and Duraset also discussed the supply to Anglo Coal of z-resin bolts.

62. At that meeting, RSC and Duraset discussed the prices at which they were going to bid once Anglo Coal has issued the tender. In particular, it was agreed that they will not go in with low prices thereby undercutting each other.'

[95] It will be observed that this allegation makes no reference to DSI or Videx. In its answering affidavit DSI merely noted these two paragraphs. In its answering affidavit Videx also 'noted' these paragraphs, adding that Videx was not a party to any collusive activity in respect of the Anglo Coal tender.

[96] The referral was made in September 2009. DSI and Videx filed their answering affidavits in October 2009 and January 2010 respectively. The Commission filed its witness statements in mid-2011, and the trial got under way on 31 October 2011. The witness statements were far more expansive regarding the Anglo Coal incident. In the responding witness statements of DSI and Videx, the witnesses noted that the Commission's referral affidavit had not implicated them in the Anglo Coal matter but nevertheless for the avoidance of doubt stated their position (albeit briefly) on the merits.

[97] At the commencement of the Tribunal hearing, and after the completion of the Commission's counsel's opening address, Mr Butler for Videx said that in relation to the Anglo Coal incident one was not dealing with a broad allegation in the referral affidavit on which the witnesses were to elaborate; instead, the Commission had in the referral affidavit committed itself to specific allegations and that Videx was not implicated therein. He continued:

'Perhaps for the moment we confirm that we've indicated to our learned friends that we do not think that that issue is ripe for hearing as a point *in limine*. We submit that the proper approach is just to let the evidence flow and for the parties to make their submissions in argument to be [sic] at the end of the matter, but we do just wish to place it on this marker. At the commencement of this matter Nortons on behalf of Videx wrote a fairly detailed letter, which we will show you in due course, pointing out essentially the complaint that we have just outlined to you now and that complaint was repeated later in this year.

The position taken by the Commission is that they see the complaint and they do not intend amending the referral. So, as it were, they are content to make their bed on the basis of the referral as it stands. They don't intend adjusting their position and we for our part are happy

for this matter to be argued at the end of the hearing before you when appropriate. So, we put [down] this marker that the Commission has committed itself to presenting its case on the basis of the referral as it stands.'

Mr Cilliers for DSI associated himself with this position.

[98] In our view, the Tribunal should not have permitted the matter to proceed on this basis. The Commission quite clearly intended, in regard to the Anglo Coal matter, to present a case which went further than the referral affidavit and which implicated DSI and Videx. The Commission was ill-advised and stubborn in declining to amend the referral. Videx and DSI, for their part, were adopting a tactical position in which they sought no *in limine* ruling to limit the evidence that could be led and subsequently raised no objection to the ambit of the evidence in fact led, but were preserving to themselves a procedural argument in closing if it should transpire that the evidence was against them. Neither side should have been allowed to take these stances. The Tribunal should have required the Commission to articulate the case it wished to present in regard to Anglo Coal and should have required the Commission, if such case did not accord with the pleadings (as it clearly would not), to bring an amendment application and to suffer the consequences (such as a postponement) if there were any. Similarly, the Tribunal should have made it clear to Videx and DSI that if they regarded any particular evidence as inadmissible because it was not covered by the pleadings they would need to object to it, either generally in advance or as the evidence was led. Had the Tribunal followed this course, a lot of the subsequent procedural wrangling would have been avoided.

[99] However, because of the position adopted by the litigants and because of the failure of the Tribunal to take charge of the matter at an early stage, the Commission proceeded to elicit from all its witnesses wide-ranging evidence concerning the Anglo Coal matter. No objection was taken during the questioning of those witnesses. They were fully cross-examined on the matter. Indeed, one is struck, reading the transcript, by how prominent the Anglo Coal matter and ensuing events of 2006 and 2007 were in the leading of the Commission's witnesses and in their cross-examination. This may have been because there was relatively little dispute about the instances of collusion in 2004 and 2005. Another consideration in the

mind of the Commission may have been the importance of establishing that collusion had continued beyond 26 January 2006. Whatever the explanation, our sense is that the larger part of the oral evidence of the Commission's evidence in chief and in cross-examination had to do with the events of 2006 and 2007, including the Anglo Coal tender. DSI and Videx also led their witnesses on the matter and they were fully cross-examined.

[100] There is thus no doubt in our mind that the Anglo Coal matter was fully canvassed in the evidence. Although, in opposing the belated amendment application, Videx and DSI put up various examples of supposed procedural prejudice, we regard them as fanciful. We do not believe that the trial would have unfolded in a materially different way if the Commission had from the outset amended its referral affidavit so as to bring its Anglo Coal allegations broadly in line with the evidence it intended to lead.

[101] We do not propose to determine whether the Tribunal erred in refusing the amendment application. To some extent, that question – raised, as it was, at the end of the whole trial – is rendered academic by the principles laid down by the Constitutional Court in *Senwes supra.* In that matter the Supreme Court of Appeal had found that the decision made by the Tribunal was not open to it because the finding in question was not alleged in the referral. The Supreme Court of Appeal interpreted s 52 of the Act as meaning that the referral constituted the boundaries beyond which the Tribunal could not legitimately travel and that in terms of s 55 the evidence which the Tribunal could receive was limited to matters set out in the referral. In rejecting this view Jafta J, writing for the majority, said the following:

'[48] The fact that section 52(1) expressly states that the Tribunal must conduct a hearing into every matter referred to it does not necessarily mean that the Tribunal has no power to entertain a matter not included in the referral. This section does not define the powers of the Tribunal. Instead it deals with the procedure to be followed when conducting a hearing. The section is located in Chapter Five which is concerned with the investigation and adjudication procedures. In essence, section 52(1) obliges the Tribunal to conduct a hearing whenever a complaint is referred to it. It is clear from the reading of the section as a whole that the Tribunal cannot initiate a hearing. But this does not mean that it cannot determine a complaint brought to its attention during the course of deciding a referral.

[49] While it is true that the Tribunal can exercise only those powers given to it by the Act, the flaw in the approach adopted by the Supreme Court of Appeal, in my respectful view, lies in the fact that it conflates matters of jurisdiction and procedure. As mentioned above, the Tribunal's jurisdiction to adjudicate contraventions of section 8 of the Act is beyond question.

[50] Accordingly, the construction given to section 52(1) by the Supreme Court of Appeal is at odds with the scheme of the Act, including the structure of section 52, when read in its entirety. This section gives the Tribunal freedom to adopt any form it considers proper for a particular hearing, which may be formal or informal. Most importantly, it also authorises the Tribunal to adopt an inquisitorial approach to a hearing. Confining a hearing to matters raised in a referral would undermine an inquisitorial inquiry.'

[102] As a fact, and as a result of the position adopted by the litigants, the Tribunal in this case heard all the evidence relating to the Anglo Coal matter. The case which the Commission intended to present was set out in witness statements. A case of collusion in violation of s 4(1)(b) was referred to the Tribunal, and the Tribunal had jurisdiction to determine such a complaint. Unlike the position in *Senwes*, there were not even objections to the evidence that was led. As we have said, the evidence on the Anglo Coal matter formed a large part of the testimony before the Tribunal. There was to our mind no procedural unfairness in allowing the Anglo Coal matter to feature as one of the acts of collusion in which Videx and DSI were alleged to have been involved.

[103] The Tribunal in the present case recognised that this course was, in the light of *Senwes*, potentially open to it. The Tribunal correctly found that there was no procedural prejudice to DSI and Videx in relation to the leading and cross-examining of witnesses. The Tribunal considered, however, that it would not be fair to allow the Commission to press the Anglo Coal complaint against Videx and DSI because the version from the Commission's witnesses did not make out a consistent and coherent case.

[104] Whether the case made out by the evidence was 'consistent' or 'coherent' is a matter to which we shall turn shortly. we must say, though, that we find the Tribunal's reasoning somewhat circular. In order to determine whether the case is

consistent or coherent one needs to analyse the evidence fairly and holistically. Once one has done that, one can determine whether the complaint has or has not been made out on its merits. A complaint which lacks inconsistency and coherence is unlikely to succeed on its merits. Once one has undertaken a full analysis of the evidence on a particular matter, one has effectively done what *Senwes* says the Tribunal is entitled to do, namely investigate a complaint which has been fully canvassed before the Tribunal, even though the complaint was not alleged in the referral affidavit. *Senwes* is not concerned with whether the outcome of the adjudication of such evidence is favourable or unfavourable to a particular litigant but with whether the exercise can permissibly be undertaken by the Tribunal at all with a view to making a finding one way or the other.

[105] We thus consider that the evidence regarding the Anglo Coal matter and the other evidence concerning the events of 2006 and 2007 could permissibly be investigated by the Tribunal, even though it travelled beyond the referral affidavit. In our view, moreover, the evidence, fairly assessed, established that there was collusion between the four firms on the Anglo Coal matter and that this involved a perpetuation of the overarching understanding . The fact that the versions of the various witnesses were not entirely consistent with each other does not mean that one cannot reach a reliable conclusion. The witnesses were testifying about events which had occurred more than five years previously. They were not still in the employ of the relevant firms and did not have access to records beyond those which were discovered. Uncertainty about precise dates is no cause for surprise. We record here that the evidence of the Commission's witnesses reads well. Because they were no longer employed by RSC or Duraset, they had no motive to exaggerate the case against Videx and DSI.

[106] In our respectful view, the Tribunal made somewhat heavy weather of the evidence relating to Anglo Coal. By the end of the trial the picture was to our mind relatively clear. we have already alluded to the meeting of 14 November 2005 where Koszewski of RSC had urged Duraset not to attack RSC's Anglo Coal business and had threatened retaliation if Duraset did not back off. Everyone was agreed that in the first half of 2006 a meeting was held, attended by representatives of all four firms, at which RSC's contract with Anglo Coal was again discussed. The essence

of the discussion, according to the Commission's witnesses, was that RSC, which regarded the prices in its existing Anglo Coal contract as unsustainably low, wished to terminate the Anglo Coal contract, with a view to offering higher prices when Anglo Coal went out to tender. However, RSC was not willing to risk this gambit if it was going to get into a bidding war with the other firms.

[107] The timing of this meeting was regarded as important in the Tribunal proceedings, having regard to the significance of the cut-off date of 26 January 2006. In the event, and as we shall explain in due course, we do not think it matters whether the meeting took place before or after 26 January 2006. The evidence does not enable one to determine the date with precision. However, the evidence as a whole shows that the meeting must have taken place during January or February 2006; the date of May 2006, alleged in the Commission's referral affidavit, cannot be correct. In their witness statements Koszewski and Henderson placed the meeting in February 2006. Bornman in his witness statement said that the meeting was in May 2006 but he explained in oral evidence that he had estimated this date with reference to the date when Anglo Coal issued its tender. As the evidence as a whole reveals, the meeting must have taken place several months before the issuing of the new tender.

[108] Contemporaneous documents permit one to fix certain dates. Representatives of RSC and Anglo Coal met on 16 January 2006 in order to discuss RSC's claim for relief under a hardship clause in the supply contract. This was followed by a formal claim for hardship relief addressed by RSC to Anglo Coal on 23 January 2006.[44] It is self-evident that this letter is not itself a notice of termination; if Anglo Coal had afforded RSC the requested relief, RSC would presumably have continued with the contract.

[109] On 1 March 2006 there was a further meeting between RSC and Anglo Coal. The meeting of this date is mentioned in a letter which Anglo Coal addressed to RSC on 3 April 2006, in which it was confirmed that the supply contract would be

[44] 20/1988.

deemed to terminate on 30 June 2006.[45] If there was a written notice by RSC to Anglo Coal terminating the supply contract (as Koszewski in his evidence thought to be the case), it was not adduced as an exhibit. It seems more probable that Koszewski was confusing the claim for hardship relief with the termination notice. What seems to have happened is that, subsequent to RSC submitting its claim for hardship relief, the parties met and that, when Anglo Coal declined to grant relief, RSC informed Anglo Coal that it wished to terminate this supply agreement on notice. This was probably discussed orally on 1 March 2006 and confirmed in writing by Anglo Coal on 3 April 2006. The termination date of 30 June 2006 mentioned in Anglo Coal's letter was four months as from 1 March 2006, which accorded with Koszewski's recollection that the supply agreement was terminated on four months' notice.

[110] One can thus say with some confidence that the meeting between the four firms took place prior to 1 March 2006, probably during February 2006. It seems less likely that the meeting took place prior to 26 January 2006, because RSC only submitted its hardship claim on 23 January 2006. However, to our mind it would not matter whether the meeting took place before or after 26 January 2006.

[111] The consistent evidence of Koszewski, Henderson and Cawood was that RSC would under no circumstances have risked terminating the Anglo Coal contract unless it was confident of re-winning it on tender. It is common cause that a meeting to discuss a proposed termination of the contract took place at which all four firms were represented. It is also clear from the evidence that RSC did proceed to terminate the contract. Anglo Coal then on 23 May 2006 issued a tender for the same business (involving four of its six collieries, those being the four collieries which RSC historically had supplied – DSI and Duraset each had a separate supply agreement with Anglo Coal in respect of its other two collieries). It is common cause that pursuant to that tender RSC retained the business at higher prices. Koszewski and Henderson said that the higher prices could be seen in RSC's significantly improved financial results. These objective facts render it inherently plausible that at the meeting in January/February 2006 RSC received comfort from the other firms

[45] 20/1898.

that if RSC terminated the Anglo Coal contract the others would not attack that business in the ensuing tender.

[112] It is plain that RSC viewed Duraset as the main risk in its Anglo Coal business. This had been the subject of discussion on 14 November 2005. Duraset had always been the least reliable member of the cartel. The meeting in January/February 2006 was attended by Henderson, Koszewski, Smit, Bornman, Henson, Josef and Le Roux. Koszewski thought it took place at a venue opposite Eastgate Shopping Mall; Henderson and Bornman said it was held at RSC's premises. It appears that there were several meetings between the firms in the first half of 2006. One or other of these witnesses may have been confused as to the venue of the Anglo Coal meeting.

[113] Be that as it may, Henderson described the meeting as highly significant:[46]

[46] 6/569-570.

'Well, the whole thing was the stability in the market and there had been a lot of mistrust going on in the 2004/2005 period where the cartel wasn't always trustful to the parties. So, the 2006 meeting early that year with Anglo Coal was really to… I don't think it's ever happened in the history of roof bolts that a company would give notice to a mining house on their business. So, it was a watershed as far as getting the parties together to agree that we wouldn't be challenged when the new tender came out. We would raise our prices and the other parties would respect those prices and tender at higher prices.

But more importantly what was agreed was that after that period of time, whatever market those four companies were supplying, we would respect them. We wouldn't go and attack other people's markets. So, it allowed each company to go and increase their prices where they felt they had to do without being threatened by one of the other companies attacking them. I think that's the most important feature of that, other than the Anglo Coal contract.'

Later he said:[47]

'In fact, if I remember, handshakes were done by the parties at one of those meetings, which I think was very unusual. So, it unified some sort of trust amongst the players at that stage. Whether it was that particular meeting [February 2006] or one subsequent to it, but at that point in time it was probably the highest level of trust between the cartel that I've ever experienced.'

Henderson remained firm on this description of the meeting and was adamant that RSC would not have terminated the Anglo Coal contract without an assurance from the other firms that they would not attack the business. Duraset and DSI would provide cover bids and Videx indicated that it would not tender at all. He also testified that following the meeting he briefed his sales force regarding the outcome of the meeting.

[114] Henderson testified that when the Anglo Coal tender was subsequently issued in May 2006, he had telephonic discussions with DSI and Duraset and gave them cover prices. He said that they indicated to him that they would bid at those prices. He remembered that they had been a little bit uncomfortable about bidding these cover prices, given that they had other business with Anglo Coal at lower prices. He said that both DSI and Duraset must have bid higher prices than RSC (if they bid at all), otherwise RSC would not have retained the business. He did not recall talking to Videx because they were not really in the market for supplying resin

[47] 6/607.

roof bolts. His understanding from the meeting was that Videx was not going to submit a tender. (In the event Videx did submit a bid, though a non-compliant one.)

[115] Koszewski's evidence was to similar effect. RSC would not have risked giving notice if it did not have the support of the other firms. He said that the other firms agreed to provide cover bids in the anticipated Anglo Coal tender. He viewed the Anglo Coal termination and tender as a 'pilot project' which the other firms could implement on their own contracts in due course if necessary. He said that the firms discussed at the meeting that an appropriate 'contribution margin' would be 30%, aimed at ensuring a reasonable 8% EBIT. (RSC's existing price with Anglo Coal only allowed a 10% contribution margin.) The idea was not to profiteer but to get reasonable prices. He said that trust was re-established at the meeting and that Videx was supportive of RSC. He was categoric and uncompromising when asked by the Commission's counsel to comment on the version put up by DSI and Videx:

'ADV MOTAU: What do you say about that version by the respondents to the effect that at best or at worst their conduct only went up to January 2006 and not beyond that?

MR KOSZEWSKI: In terms of what learned counsel had mentioned, they are acting on the instructions and advice of their clients. So, I can't comment on that and I'm not going to comment on that, but in terms of the respondents themselves, they are perjuring themselves.

MR MOTAU: Why do you say that?

MR KOSZEWSKI: Because factually these people from the respondents were at meetings that related to what is being recorded in para 11 at page 137,[48] from 2006 onwards.

ADV MOTAU: In other words, from February 2006 onwards?

MR KOSZEWSKI: Correct.'

[116] Koszewski only became personally involved in the industry meetings as from early 2006. He said that by the time he got involved in the meetings the entire customer base had largely been rolled out into four equitable shares. There was a 'healthy respect' for the allocation of the customer base. When there were transgressions they were raised, discussed and resolved at meetings – he was

[48] In para 11 of his statement Koszewski dealt with the February 2006 meeting relating to Anglo Coal.

referring to meetings in the period after February 2006.[49] In cross-examination by DSI's counsel he was questioned about his lack of particularity regarding the meetings. He replied as follows:[50]

'MR KOSZEWSKI: I think you're focusing on a period outside of my direct involvement and in respect of the period where I did have direct involvement. And in respect of the period where I did have direct involvement, I have given the evidence that I am able to with regard to the pilot project and what the outcome of that was in terms of the financial benefits that accrued to [RSC] and also what generally was discussed at the meetings. Now this wasn't minuted, formal notes weren't kept, but what I can only tell you what I am able to. I am not going to try and contrive anything.

ADV CILLIERS: I understand.

MR KOSZEWSKI: It is not where or who I am, I am not going to try and do that.

ADV CILLIERS: I understand, so when you didn't particularise meetings about market allocation in 2007 it's because you couldn't particularise them?

MR KOSZEWSKI: That is not correct. That is not what I am saying. I am saying that there was an allocation of the market between the four respondents and that which we had respected, because what was discussed at the meetings, among other subjects, was to ensure that there wasn't or that those market shares had been respected okay, that that was respected and also to ensure that there was a roll out of the prices, otherwise where would the trust be? There wouldn't be any remaining trust.

ADV CILLIERS: There wasn't much trust was there?

MR KOSZEWSKI: There was trust, of course there was trust.

MR CILLIERS: Was there?

MR KOSZEWSKI: In terms of having allowed RSC to obtain the Anglo Coal contract at what we believed was a fair price and the rolling out of prices to the other customers within the four respondents' customer base that took place and it took place as a result of the trust that had been developed.'

[117] Although Cawood was not present at the meeting, it is apparent from his evidence that he received feedback from Koszewski and Henderson. We have already referred to Cawood's evidence concerning the frequent interactions between

[49] 3/270; 3/287.
[50] 3/328-329.

the firms on non-contract customers. When asked about the period over which these interactions to place, he said:[51]

'It dates back from 2005, after the Anglo Platinum tender and from the Anglo Platinum tender onwards there was almost a trust relationship between the various participants and by feeling and testing the water on the smaller day-to-day issues, the trust was built up to the major big contracts and one of the main contract – although I was not involved with it, but the Anglo Coal contract – that was definitely done on a 100% almost guaranteed basis that it will go according to plan, but the trust was determined by the day-to-day purchases.'

[118] The Tribunal appears to have thought (para 106) that Bornman's evidence was destructive of the proposed amendment which the Commission wished to introduce. We are not sure we entirely follow the difficulty which the Tribunal had but in any event we prefer to put the proposed amendment (which the Tribunal refused) to one side and rather to assess, as *Senwes* permits, the purport of the evidence as a whole. We have already explained why Bornman's evidence as to the timing of the meeting (May 2006) was an understandable error. As to the content of the discussion, he did not express Duraset's position in quite the unequivocal terms that Koszewski and Henderson did. He said that while Duraset did not want to collude or profiteer, it recognised that a war of attrition was unsustainable. He confirmed that Duraset was asked not to upset the market, and that the specific focus of the discussion was RSC's Anglo Coal contract. He said that Duraset was, at the time of this meeting, disenchanted with Anglo Coal because the latter had declined to award Duraset the business in mid-2005 despite the very low prices offered by Duraset. He had no desire to help Anglo Coal erode market value.

[119] He thus told those present that if Anglo Coal went out to tender, Duraset would not go in with 'silly prices' again. Duraset would not tender prices below what it believed to be reasonable market value. However, he added a significant perspective during cross-examination. He said that he knew, when Duraset subsequently tendered for the Anglo Coal contract, that if RSC reverted to the prices it had been charging prior to the mid-2005 price war with Duraset, RSC would win

[51] 10/1026.

the tender.[52] A short while later the following exchange took place between DSI's counsel, Bornman and the Tribunal's chairperson:[53]

'MR BORNMAN: This was a meeting where things were discussed, lots of things were discussed, people got heated and all sorts of things, but the upcoming tender was discussed and what's happening in the industry and so on and then I said well our position is that we are not going to go in with these low prices again, we will go in, because we're not interested, I think I used the words that we are not interested in the Anglo Coal contract any more.

ADV CILLIERS: But you don't tell them what you going in, that's your business?

MR BORNMAN: No.

ADV CILLIERS: Right, so…

CHAIRPERSON: Did you say to them that you weren't interested in the Anglo Coal contract?

MR BORNMAN: I can't, look I was, and this is a long time ago. All I know is the emotions I can remember that, that we were upset as a company that we had gone in, we had offered them [Anglo Coal] low prices, they used us to drive down the prices with the incumbents [RSC] and then I said well you know if this is the game that they [Anglo Coal] are going to play I am not going to assist them with the game, I am not going or we as a company are not aggressively going to compete for this contract, that's what we said. Does that answer your question?

CHAIRPERSON: What would RSC have understood from what you said at the meeting?

MR BORNMAN: They would have understood that they could go back to the old prices.'

[120] Earlier in his evidence in chief, Bornman summarised the significance of the meeting in a manner which resonates with Henderson's 'watershed' description:[54]

'MR BORNMAN: I can remember a general feeling of now we've [Duraset] come to the party, but I can't remember exactly who said what, when and how. If there was an agreement reached between the other parties, that I can't remember… People were tense in those meetings. It was very confrontational.

ADV MOTAU: Yes?

---

[52] 10/965.
[53] 10/968-969.
[54] 9/885.

MR BORNMAN: And I got the impression that they sort of heaved a sigh of relief.

ADV MOTAU: They what?

MR BORNMAN: There was relief. It was body language. It was not words. It was not…

ADV MOTAU: It was not something that was expressed. You are just saying it was the body language.

MR BORNMAN: Yes, people smiled and were happier and so forth, you know. The tension went out of the room.

ADV MOTAU: Why?

MR BORNMAN: Because we had stopped being aggressive on this issue, on the Anglo Coal tender, because we had informed them that we will not attack them again with silly prices.'

[121] Videx's submission that Bornman was 'insistent that no agreement was reached at the meeting' overlooks these aspects of his testimony, which must naturally be assessed in its totality. Having regard to the evidence of Koszewski, Henderson and Cawood and to the objective facts, we consider as a matter of probability that Bornman's participation in the meeting was such as to convey to RSC's representatives (and to DSI and Videx) that RSC could terminate the Anglo Coal contract, confident in the knowledge that it could revert to the earlier higher prices, and that Duraset would tender prices which would enable RSC to retain the business.

[122] In its submissions Videx made reference to Smit's witness statement. Smit was not called as a witness and little if any significance can thus be attached to his statement. Although he was present at the Anglo Coal meeting, he did not deal with it in his statement. It would not be appropriate to speculate as to what he would have said if called.

[123] DSI and Videx both ran the line that they were not really involved in the discussion because they were not viewed as serious contenders for that part of the Anglo Coal business which had historically been held by RSC. However, on the evidence of Koszewski and Henderson there was more to the meeting than just the Anglo Coal contract. RSC wished to protect its own position in the Anglo Coal

contract by offering the other firms similar cooperation if they wished in the future to follow a similar course. As an objective fact, both DSI and Videx were invited to attend the meeting. If RSC thought it only needed to talk with Duraset, there would have been no need to invite the others. DSI and Videx did not say that they attended the meeting under a misapprehension as to what was to be discussed. Le Roux testified that he did not know what the meeting was going to be about. Given the history of collusive meetings among the firms, we find it difficult to accept that he thought the meeting had a legitimate purpose. He certainly did not in evidence say what else he thought was going to be discussed. The representatives of DSI and Videx stayed for the duration of the meeting. Even if Koszewski and Henderson could not, at a distance of five years, remember precisely what had been said, they were clear that the representatives of DSI and Videx did not do or say anything to indicate that they were not in agreement with what RSC was proposing. Although Mr Butler in cross-examination put to Koszewski and Henderson that, in the light of the loss of trust caused by the Harmony incident, Le Roux would have had every reason to have said ‘no’ to RSC’s proposal, the fact is that even on his own version Le Roux did not say ‘no’; somewhat implausibly he claims to have said nothing at all, and certainly did not testify that he expressly rejected RSC’s proposal.

[124] Even though Duraset may have been viewed by RSC as the main threat to the Anglo Coal business, RSC could not know for certain that DSI and Videx might not prove to be a disruptive force. RSC’s representatives would also not have known the precise capacity constraints of DSI and Videx or what ability those firms might have to procure product. If Josef and Le Roux wanted nothing more to do with collusive arrangements following RSC’s cheating in the Harmony tender, they would have declined to attend the meeting or would have walked out when they realised what was under discussion. Yet they did not do so. Josef did not testify. Le Roux portrayed himself as a passive bystander; he did not claim to have displayed anger or annoyance with RSC or to have said or done anything to show disagreement with the RSC proposals.

[125] Henson’s evidence was that Koszewski had sought assurances from the three other firms and wanted their cooperation. Henson claimed to have told the other representatives that DSI did not intend to give notice to Anglo Coal in respect

of the one colliery which DSI supplied. However, and although he testified that he had not agreed at the meeting to support RSC, he did not claim to have done or said anything to indicate that he would compete for the business which RSC currently had with Anglo Coal.[55] It is also revealing that, when asked in chief about Henderson's evidence to the effect that he (Henderson) had later phoned Henson to give him the prices which RSC intended to bid, Henson did not positively deny that the call had been made. He said: 'Whether [Henderson] did or not I'm not in a position to say, but I mean I wasn't going to… it wasn't a DSI matter anyway. So, I mean, that phone call, even if it was made and I cannot recall it, was of no consequence or of no import.'[56]

[126] In the event, Videx submitted a tender for the Anglo Coal contract, a tender which did not have the result of preventing RSC from retaining the business. (According to Le Roux, Videx did not offer the product specified in the tender but a substitute. He said that Videx did not expect to win the tender but wished to remain on Anglo Coal's tender list.)

[127] DSI's counsel put to Henderson in cross-examination that DSI/Mandirk had not responded to the tender.[57] However, when DSI's counsel led Henson he did so on the basis that DSI/Mandirk had indeed submitted a bid, which Henson confirmed.[58] When DSI's counsel asked Henson whether Koszewski was right in inferring that DSI/Mandirk had deliberately provided a cover price for RSC, his response was that he could not really comment on whether or not there was truth in Koszewski's statement.[59] The fact that DSI submitted a bid is important, because it seems unlikely that RSC would have won the business unless its price was the lowest. We know from Henson's evidence that DSI's price to Anglo Coal's Kriel colliery (which was not the subject of the tender) was considerably lower than the price at which RSC won the Anglo Coal tender of May 2006.[60] This tends to support a conclusion that DSI provided a cover bid for RSC in the latter tender.

---

[55] 13/1249-1253.
[56] 13/1253.
[57] 8/765.
[58] 13/1253-4.
[59] 13/1254.
[60] 13/1252. Henson thought that RSC's price in the May 2006 tender was about 30% higher than DSI's price to the Kriel colliery [13/1261].

[128] One can test the matter by asking what would have transpired if, at the meeting, Josef and Le Roux had told the other firms that Videx had no intention of participating in any collusive arrangements and would be competing independently for all business. From the evidence of the Commission's witnesses it is clear that, in the face of such an attitude from Videx, RSC would have reassessed its position and may well not have terminated the Anglo Coal contract. This would not necessarily have been because of the threat Videx would have posed in the ensuing Anglo Coal tender (though we do think that this can altogether be discounted) but because the Anglo Coal understanding rested on a broader acceptance by all four firms that they would not be attacking each other's established customers. If Videx had firmly distanced itself from all future collusion, Duraset and DSI would probably have reacted differently to RSC's proposals, and RSC in any event could have had less confidence that Duraset and DSI would adhere to their undertakings if Videx was a rogue player.

[129] It is also not without significance, in our view, that it was around the time of the Anglo Coal meeting that, following communication between DSI and Videx, the latter terminated its agreement with Goldfields for the supply of shepherds crooks (business Videx had obtained in the collusive Goldfields online reverse auction of October 2004). As a result, Goldfields issued a tender during March 2006. DSI then regained its 'traditional' business with Goldfields, evidently without competition from Videx and after discussion between DSI and Steeledale/Duraset in which the latter agreed to 'respect' DSI's proposed pricing in the forthcoming tender.

[130] In our opinion, the evidence concerning the Anglo Coal matter, even viewed as an *ad hoc* occurrence, constituted prohibited collusion in which all four firms participated. Whatever the private intentions of the parties may have been, the understanding reached was that none of the other firms would attack RSC if it terminated the Anglo Coal contract and the business was put out to tender. The four firms were competitors in a horizontal relationship. The fact that Videx may not have been seen as a real threat to the Anglo Coal business, and that its buy-in to the arrangement specifically on Anglo Coal was thus less significant than that of Duraset or DSI, does not mean that it was not a party to the collusive arrangement.

[131] In any event, we do not accept that the understanding reached at the meeting was confined to the Anglo Coal contract. RSC could hardly have expected to obtain cooperation from the other three firms unless there was a broader arrangement from which they could all benefit. That broader understanding, in keeping with the earlier history, was that they would respect each other's traditional business and that any firm which chose to follow RSC's suit would not find itself under attack from the others.

[132] It appears that in the event there may not have been any instances where the other firms followed the route of terminating supply contracts. This might have been because during 2006 their contracts were generally at prices they found acceptable. After Duraset's formal withdrawal from the collusive arrangement in February 2007, the other three firms could probably no longer give effect to the broader understanding, because they could not be sure that upon termination of a supply contract they would not be attacked by Duraset. There was also evidence that there were significant steel price increases in 2007 and 2008 which meant that prices on supply contracts were in any event being significantly adjusted. The market conditions were at that time not conducive to tactical terminations.

[133] On the other hand, the evidence indicates that there were further collusive meetings in 2006, and according to Cawood the non-attack understanding continued to be monitored in relation to non-contract customers up to the time he left RSC in August 2007. Henson admitted that the firms continued to meet in 2006 to discuss market sharing though he persisted with his claim that nothing came of these discussions.[61]

[134] The fact that there was an ongoing cartel finds support in the fact that Duraset took the step of formally withdrawing from it in February 2007. Bornman explained that, following the Anglo Coal meeting, his understanding was that Duraset would not try to get market share by 'eroding margins dramatically' whereas Smit would privately tell him to 'keep on attacking with low prices'. This put Bornman in a very difficult position because, as marketing director, he was responsible for

[61] 14/1412-1418.

sales.[62] This came to a head at the Duraset strategic planning meeting in February 2007 where the pros and cons of cooperation were put to the other directors by Bornman and Smit and where the decision to terminate all contact with the other firms was taken.

[135] According to Henderson, the withdrawal decision was announced at a meeting where all four firms were represented. He testified that after this announcement, interaction continued between RSC, DSI and Videx but that by agreement only the managing directors or general managers communicated (ie at a level above him).[63] The remaining three firms still respected each other's markets. When asked in cross-examination what he meant by 'respected', he replied: 'Well, the same terms as before when RSC wouldn't go and attack Videx or wouldn't attack DSI, because we didn't have a problem with those two. It was Duraset that walked out and said they didn't want any part of it.'[64]

[136] Cawood testified that towards the end of 2007 the RSC executives were instructed by the managing director, Mr Noonan, to stop all communications with other firms which were not of an arm's length nature.[65]

[137] As to Le Roux's portrayal of Videx as a passive bystander in the Anglo Coal discussions (he claimed, somewhat implausibly, to have said absolutely nothing at the meeting), we refer to what this court recently said in the *MacNeil* case at paras 58-65. Generally a firm which is present at collusive discussions has a duty to distance itself from those discussions by a firm rebuttal. Videx was invited to the meeting for a purpose, and on the probabilities its representatives' conduct, whether through words or silence, conveyed to the others that it went along with the proposals. It must also be remembered that during 2004 and 2005 Videx had been a willing participant in collusive meetings. There were times when DSI and Duraset were on the outside but Videx, with Josef and Le Roux at the helm, appears always to have been willing to cooperate. Despite Videx's disenchantment with RSC's

---

[62] 9/912.
[63] 6/606.
[64] 8/781.
[65] 12/1147; 12/1153-4.

conduct in the Harmony tender, it is inherently plausible that Videx continued to realise the advantages of cooperation and stability in the market.

[138] These conclusions treat the Anglo Coal incident as a self-contained prohibited practice. However, we have already concluded that there was an overarching understanding during 2004 and 2005 which fell within the scope of 'agreement' in terms of s 1 of the Act. That agreement had not been terminated by any of the firms as at the end of 2005. If this finding is correct, we consider the Anglo Coal discussions to have been a further implementation of that understanding. Although the cartel agreement had not been terminated, trust had been impaired and Duraset's conduct was problematic. The discussions which took place in the context of the Anglo Coal contract re-established trust and affirmed the understanding which in our view had already been in place by the second quarter of 2004, namely that of retaining a roughly equal split of the market between the four firms on the basis that other firms' traditional customers would not be attacked with low prices. In implementation of this understanding, which was re-affirmed, certain details were also agreed in regard specifically to the anticipated Anglo Coal tender, on the understanding that similar details would apply if other firms also wished to terminate supply contracts and re-tender at more sustainable prices.

[139] We think it will be apparent by now why, in relation to prescription (s 67(1)), it does not much matter whether the meeting at which the Anglo Coal contract was discussed took place before or after 26 January 2006. Even if the meeting took place before the cut-off date, the understanding reached at that meeting was implemented after that date, when RSC terminated the Anglo Coal contract and when the parties thereafter, in response to the Anglo Coal tender, either refrained from bidding or submitted bids which ensured that RSC could retain the Anglo Coal business at higher prices.

[140] Moreover, the overarching understanding continued through this period as is evidenced by the repetitive collaboration between the parties. If it is correct that the 2005 Amplats incident was a manifestation of this relationship with continuing effects beyond the cut-off date, none of the manifestations of the overarching understanding were time-barred, because the prohibited conduct in relation to which

s 67(1) had to be considered was the overarching understanding rather than each act of implementation. It matters not, on this basis, that particular acts of implementation in execution of the overarching understanding may not have had effects beyond the cut-off date.

Conclusion on the merits

[141] For the reasons explained above, we consider that the Tribunal should have found that there was an agreement in the form of a continuing understanding between the four firms, which existed from (at least) the second quarter of 2004 until February 2007 and of which each of the individual incidents we have discussed were manifestations.

Remedy

[142] It will be apparent that our conclusion on the merits requires a reconsideration of the penalty imposed on Videx. The material in the appeal record does not enable us to determine an appropriate penalty in accordance with the guidelines laid down by the Tribunal in *Competition Commission v Aveng (Africa) Ltd & others* [2012] ZACT 32, guidelines which this court said in *MacNeil* had been permissibly adopted by the Tribunal. Furthermore, neither side made submissions as to how an appropriate penalty should be computed if we were to find that there was an overarching agreement which rendered all the incidents of collusion justiciable. The Commission's counsel's heads of argument concluded with the unhelpful request that a penalty be imposed of 10% of Videx's annual turnover for the preceding financial year, ie the maximum penalty permitted by s 59(1)(a). Although that request mirrored the Commission's prayer in the notice of referral, it ignores the Tribunal's guidelines in *Aveng*. Although Videx made submissions on penalty which distinguished between various products supplied by it, those submissions were made specifically with reference to the second Amplats auction. It would not be appropriate at this stage to express a view on the merits of those submissions, though arguments of that kind, as applied to the broader finding we have made, may need to be considered in due course.

[143] It will thus be necessary for further argument and perhaps further evidence to be adduced. A question arises as to whether the question of the penalty should be dealt with in this court or whether we should remit the matter to the Tribunal. We did not receive argument as to what procedure would be appropriate.

[144] In our view, therefore, justice requires that the parties should be requested to make written submissions to this court as to the course to be followed. Those submissions should deal *inter alia* with the question whether the matter should be remitted; with the nature and extent of the further evidence which might need to be adduced; and with the manner in which such evidence should be adduced. The parties are encouraged to engage with each other with a view to reaching agreement on the further conduct of the matter.

[145] Of course, it is possible that, in engaging with each other on procedural matters, the parties might even reach consensus as to an appropriate penalty, subject to confirmation by the Tribunal or by this court. We should mention, in that regard, that one of the matters which this court or the Tribunal might need to consider, in the determination of an appropriate penalty, is that the Commission failed to pursue against DSI the cross-appeal on which it has now been successful against Videx. We have already mentioned that this strikes us as unprincipled. It might be regarded as unjust that, whereas RSC obtained corporate leniency, Duraset achieved a settlement (5% of its total 2008 turnover) and DSI was punished on the basis that it only perpetrated an isolated prohibited act in respect of the second Amplats auction, Videx alone out of the four cartel members should receive a much heavier punishment. Although our finding may (depending on a resolution of arguments which brought distinctions between various products) result in a heavier penalty than that imposed by the Tribunal, we have mainly been anxious, in our judgment on the merits, to ensure that the approach to cartel matters and to the concept of continuing agreements should be clarified.

[146] The Commission has been substantially successful in the appeal and cross-appeal and should thus have its costs, including those attendant on the employment of two counsel. (It is noted, though, that due to a personal indisposition the Commission’s senior counsel was not able to be present at the hearing.)

[147] The following order is thus made, operative only as between Videx and the Commission:

[a] The appeal by the appellant ('Videx') against the Tribunal's decision that Videx contravened s 4(1)(b)(i) and (ii) of the Competition Act 89 of 1998 ('The Act') is dismissed.

[b] The cross-appeal of the first respondent ('the Commission') against the Tribunal's decision, that the only prohibited conduct which Videx could be found to have committed was its collusion in the so-called second Amplats auction, succeeds and there is substituted for such decision a finding that Videx, during the period from the second quarter of 2004 until February 2007, was party to a continuing agreement which contravened s 4(1)(b)(i) and (ii) and which manifested itself in the various specific incidents identified in this judgment.

[c] A decision on the appeal and cross-appeal in regard to the penalty imposed on Videx, and on the question whether a revised decision on the penalty should be made by this court or by the Tribunal on remittal, stands over for later determination after receipt of the submissions contemplated in [d] below.

[d] Videx and the Commission shall, within three weeks of this order, deliver written submissions dealing with the matters identified in para 144 of this judgment and with such other matters as the parties or either of them consider appropriate to bring to this court's attention in regard to the further disposition of the case.

[e] Videx is directed to pay the Commission's costs in the appeal to date, including those attendant on the employment of two counsel (where two counsel were engaged).

DAVIS JP, MOLEMELA AJA & ROGERS AJA

APPEARANCES

For Appellant:	Mr John Butler SC Instructed by: Nortons Inc 135 Daisy Street Sandton, Johannesburg
For Respondent:	As K Pillay (heads by Mr T Motau SC and Ms K Pillay) Instructed by: Competition Commission DTI Campus 77 Meintjies Street Pretoria