



COMPETITION TRIBUNAL OF SOUTH AFRICA

CT CASE NO:CR133SEP15

In the matter between:

COMPETITION COMMISSION OF SOUTH AFRICA

Applicant

and

CASALINGA INVESTMENTS CC T/A WASTE RITE

1st Respondent

**X-MOOR TRANSPORT T/A CROSSMOOR TRANSPORT
(PTY) LTD**

2nd Respondent

Panel	:	G Budlender (Presiding Member)
	:	A Ndoni (Tribunal Member)
	:	T Vilakazi (Tribunal Member)
Heard on	:	23 and 24 April 2025
Order issued on	:	24 April 2025
Reasons issued on	:	25 June 2025

REASONS FOR DECISION

INTRODUCTION

[1] This matter involves a complaint referral brought by the Competition Commission ("Commission") against two respondents, Casalinga Investments

CC t/a Waste Rite (“Waste Rite”), and X-Moor Transport t/a Crossmoor Transport (Pty) Ltd (“Crossmoor”).

- [2] The Commission alleges that the respondents entered into an agreement to directly or indirectly fix prices, and tender collusively in relation to a tender for the supply, operation and maintenance of plant and equipment at designated landfill, garden sites and depots, in contravention of section 4(1)(b)(i), and (iii) of the Competition Act, No. 89 of 1998 (“the Act”).
- [3] Waste Rite reached settlement with the Commission. The settlement agreement between the Commission and Waste Rite was confirmed as an order of the Tribunal on 28 November 2018.
- [4] The Commission and Crossmoor engaged in settlement discussions, but were unable to finalize terms.
- [5] In this application, the Commission sought an order declaring that:
 - 5.1 Crossmoor contravened sections 4(1)(b)(i) and (iii) of the Act; and
 - 5.2 Crossmoor pays an administrative penalty of 10% of its annual turnover.

FACTUAL BACKGROUND

The Complaint

- [6] In October 2012, Pikitup SOC Ltd, a state owned company (“Pikitup”), issued a tender (PU 298/2012) for the supply, operation and maintenance of plant and equipment at designated landfill, garden sites and depots, and ad hoc rentals around Johannesburg for a period of three years. The closing date was 12 November 2012. Pikitup appointed Gobodo Forensic Investigative Accounting (“Gobodo”) to conduct due diligence and oversee the evaluation process from the closing of the tender until bid finalization.

- [7] The tenders were first assessed by the bid evaluation committees.
- [8] The Tender Evaluation Committee shortlisted five tenders to be assessed by the Bid Adjudication Committee. One of those was a tender by Crossmoor.
- [9] During the evaluation of the bids, Pikitup noticed that the following commonalities emerged between the tenders of the two respondents:
- 9.1 Waste Rite and Crossmoor tendered at prices of R350 million and R351 million respectively;
 - 9.2 Representatives of those two entities collected the tender documents on the same day;
 - 9.3 Their bid documents appeared to have been bound by the same company and in the same manner;
 - 9.4 The fixed price quoted by the two entities was exactly the same to the cent. The only difference between them was as to fuel costs; and
 - 9.5 There appeared to be a similar pattern in completing the tender submission in the way it was signed.
- [10] Gobodo was assigned to conduct a comprehensive investigation into those concerns. On 7 January 2013 and 11 March 2013, Gobodo issued its final report and an addendum report. Gobodo highlighted concerns that the bidders may have engaged in collusive tendering. The Gobodo report further alluded to the fact that the respondents belonged to the same Naicker family, but that there was a family feud that had split the family into two factions.
- [11] Following the Gobodo reports, Pikitup initiated an enquiry by way of letters to the bidders requesting clarification in respect of the commonalities.

- [12] In response, the respondents submitted that the common factors were purely coincidental. Gobodo found this not to be plausible.
- [13] On 06 March 2014, the Commission received a complaint of collusion against the respondents. The Commission referred the complaint to the Tribunal on 16 September 2015.

Commission's case

- [14] The Commission alleges that the respondents are both in the market for waste management, and that they are in a horizontal relationship for the purposes of the jurisdictional grounds of section 4(1) of the Act.
- [15] The Commission further alleges that the respondents entered into an agreement to tender collusively by discussing or agreeing on the prices of nine items when bidding for Pikitup tender number PU 298/2012. The Commission submits that the alleged discussions or agreement led to the respondents submitting a price schedule to Pikitup that contained similar fixed costs prices for three consecutive years in respect of nine items. Those nine items were Landfill Compactor, Bull Dozer, Excavator, Front End Loader, Articulated Dump Truck, Grader, Tractor Loader Backhoe, Water Tanker and Tipper Truck.
- [16] The Commission contends that Crossmoor and Waste Rite agreed on how to price variable and fixed costs as well as hourly rates in the pricing schedule which they submitted when bidding for the tender.
- [17] The table below compares the variable and fixed costs set out in the respondents' tenders.¹

¹ Trial bundle p 516 – 517. This table appears to be a summary of p510 – 515 of the trial bundle.

Plant and Equipment	Year 1, 2 & 3		Year 1		Year 2		Year 3	
	Variable Costs		Fixed Costs		Fixed Costs		Fixed Costs	
	Croosmoor	Waste Rite	Croosmoor	Waste Rite	Croosmoor	Waste Rite	Croosmoor	Waste Rite
Landfill Compactor	R669.34	R644.34	R745.66	R745.66	R790.40	R790.40	R829.92	R829.92
Bull Dozer	R323.27	R333.27	R331.73	R331.73	R351.64	R351.64	R369.22	R369.22
Excavator	R208.21	R225.21	R254.79	R254.79	R270.08	R270.08	R283.58	R283.58
Front End Loader	R238.16	R242.16	R203.84	R203.84	R216.07	R216.07	R226.87	R226.87
Articulated Dump Truck	R207.95	R209.95	R250.05	R250.05	R265.05	R265.05	R278.31	R278.31
Grader	R287.43	R293.43	R266.57	R266.57	R282.56	R282.56	R296.69	R296.69
Tractor Loader Backhoe	R166.17	R170.17	R135.83	R135.83	R143.98	R143.98	R151.18	R151.18
Water Tanker	R165.12	R167.12	R117.88	R117.88	R124.95	R124.95	R131.20	R131.20
Tipper Truck	R211.31	R214.31	R113.69	R113.69	R120.51	R120.51	R126.54	R126.54

[18] This conduct was alleged to have contravened section 4(1)(b)(i) and (iii).

Crossmoor's case

[19] Crossmoor, the only respondent before us, filed an answering affidavit in which it denied that it had contravened sections 4(1)(b)(i) and (iii) of the Act, and further denied that any agreement had been entered into between the respondents to tender collusively.

The Hearing

[20] The matter was set down for hearing on 23 and 24 April 2025.

[21] The Commission called only one witness, Ms Christa Venter (“Ms Venter”), a former Chief Operations Officer (COO) of Pikitup who sat on the Bid Adjudication Committee (BAC). Although the Commission had settled with Waste Rite on the basis that it admitted liability, the Commission did not call any witnesses from Waste Rite.

[22] At the close of the Commission’s case, Crossmoor applied for absolution from the instance. The Tribunal granted the application, and stated that it would provide reasons in due course. These are the reasons.

Commission’s evidence

[23] Ms Venter testified that she holds a BSc in Operational Research and a Masters of Business Leadership (“MBL”). With a career in local government since 1985, she has specialized in waste management since 1995, complementing her extensive practical experience with numerous waste management courses.

[24] She testified that Pikitup is the official waste management service provider to the City of Johannesburg. Pikitup provides refuse collection services to both private and business residents.

[25] In October 2012, Pikitup issued a tender (PU 298/2012) for the supply, operation and maintenance of plant and equipment at designated landfill, garden sites and depots, and ad hoc rentals around Johannesburg for a period of three years. The closing date of the tender was 12 November 2012. A number of entities submitted tenders.

[26] Ms Venter outlined the procurement process followed in this instance, starting with demand management and proceeding through specification, advertisement, and receipt of tenders. She testified that the Bid Evaluation Committee reviewed all submissions for compliance and prequalification,

including verifying financial documentation. At this stage, Waste Rite's tender was disqualified. Ultimately, the Committee shortlisted five tenders, including that of Crossmoor, for assessment by the Bid Adjudication Committee. Ms Venter testified that the Bid Evaluation Committee observed similar pricing between the respondents. This observation was flagged with the Bid Adjudication Committee.

[27] The Bid Adjudication Committee assessed the tenders, and also concluded that the tenders submitted by the respondents raised suspicions. The matters that the Bid Evaluation Committee noted were the following:

27.1 Representatives of the two entities collected the tender on the same day;

27.2 The bid document submissions appear to have been printed by the same company;

27.3 The fixed price quoted by the two entities is exactly the same to the cent for the entire three-year period, with the only difference being in respect of fuel;

27.4 There appeared to be a similar pattern in completing the tender submission in the way such was signed.

[28] As noted above, the Bid Adjudication Committee recommended that Gobodo be appointed to conduct a comprehensive forensic investigation. On 7 January 2013 and 11 March 2013, Gobodo issued its final report and its addendum report. The reports highlighted concerns that the bidders may have engaged in collusive tendering.

[29] Ms Venter stated that it was highly improbable that two bidders would have identical pricing, unless they had shared exactly the same variables, castings, and an identical markup, right down to the last cent.

[30] Ms Venter stated that variable costs are inherently inconsistent. She used fuel costs as a prime example of this, noting their well-known fluctuations. She

explained that fuel consumption could differ, depending (for example) on the roughness of the terrain of a landfill. Fuel use would also vary depending on how well the waste is compacted, and the travel distances involved. This particular tender included other "yellow plant" (heavy machinery) and equipment, meaning travel times between different locations varied, which would impact on fuel consumption.

- [31] Ms Venter further explained that vehicle age directly impacts on fuel consumption, with older vehicles generally using more fuel. Maintenance is another significant variable, and is also affected by the age of the vehicles. Landfills present challenging, rough terrain where equipment can easily sustain damage, resulting in unpredictable maintenance and repair costs. These costs vary depending on the type of vehicle and whether it is involved in an accident. She stated that maintenance plans differ: some vehicles have a five-year plan, which simplifies cost prediction; others, like those in her workshop, require internal maintenance. She stressed that no two vehicles incur identical maintenance costs.
- [32] Ms Venter stated that tyres are another critical variable. On a landfill, tyres are susceptible to damage, necessitating frequent replacement. Tyre costs are substantial and unique to each vehicle. Normal operating costs also vary, such as security expenses for parked vehicles. Operator wages represent another variable cost, as not all companies pay the same rates. She concluded that these diverse factors result in variation in costs.
- [33] Ms Venter explained that while fixed costs are generally consistent from month to month, they are not uniform across all operations. For instance, fleet repayment costs vary significantly; a brand new vehicle will have different repayment costs from one that is five years old, due to depreciation. She noted that the tender allowed for vehicles as old as 2008. A 2008 vehicle might have no outstanding repayments, while a new one would do so, unless the company had enough upfront capital to purchase the entire fleet outright.

[34] Ms Venter stated that it would be exceptionally unlikely for all fixed costs to be identical. She stated that the Bid Evaluation Committee inspected the respondents' locations and verified the age of the vehicles to be used in this tender, highlighting the inherent differences.

[35] The Commission did not call any other witnesses.

Analysis of the Commission's evidence

[36] The Commission contends that the respondents entered into an agreement to tender collusively by discussion or agreeing on the prices of the tender, in breach of sections 4(1)(b)(i) and (iii) of the Act. The Commission alleged that Crossmoor and Waste Rite agreed on how to price variable and fixed costs as well as the hourly rates in the pricing schedule which they submitted.

[37] The Commission produced no direct evidence of the alleged collusion. It relied on an inference which it contended ought to be drawn from the similarities in the tenders lodged by Crossmoor and Waste Rite.

[38] The trial bundle included witness statements of Ms Lillian Naicker ("Ms Naicker") and Mr Hermanus De Lange ("Mr De Lange"), both of whom were or had been involved with Waste Rite.²

[39] The Commission elected not to call these witnesses. This was not surprising, because if their oral evidence had been consistent with their witness statements, it would have not supported the Commission's case: to the contrary, it would have been destructive of the Commission's case. Counsel for the Commission frankly acknowledged this, stating:

"Although the Commission settled with Waste Rite with admission of liability, Waste Rite stated under oath that they never discussed the tender with Crossmoor. The Commission does not accept this version. The owners of

² Witness bundle, p 6 – 14.

Crossmoor and Waste Rite are related by blood, they are a brother and a sister. The Commission has therefore not called Waste Rite as a witness.”

“Because even after admitting liability and settling with the Commission they still stuck to the version that they never discussed the prices with the Second Respondent. And it’s for that reason that we’ve decided not to call them.”³

- [40] At the hearing, we requested the parties to address whether we could rely on a witness statement made by an individual who did not give oral evidence.
- [41] The Commission submitted that the witness statements form part of the record and that the Tribunal can rely on those statements.
- [42] Counsel for Crossmoor submitted, relying on *Competition Commission v Thembekile Maritime Services (Pty) Ltd and 4 others* (“*Thembekile*”),⁴ that the Tribunal has previously relied upon witness transcripts without oral testimony. Counsel pointed out that the Tribunal is empowered by the Act to consider evidence regardless of its admissibility in a court.⁵
- [43] Thembekile also involved an allegation of collusive tendering, in that instance in respect of a tender issued by the Robben Island Museum (“RIM”). The Tribunal had before it the transcript of an interview which the RIM had conducted with a Mr Yacoob. He alleged in that interview that price fixing had taken place. The respondent applied for absolution at the close of the Commission’s case. The Tribunal referred to its powers under section 55(3)(a) of the Act, and found that the transcript of the interview of Mr Yacoob was admissible, even though he had not been called to give oral evidence at the hearing. The Tribunal found that it was entitled to hear whether the respondents’ witnesses would confirm or repudiate this documentary evidence,

³ Transcript, p 137.

⁴ Case No: CR067May17 at para 55.

⁵ Section 55(3)(a) provides that “*The Tribunal may-*
(a) *accept as evidence any relevant oral testimony, document or other thing, whether or not-*
(i) it is given or proven under oath or affirmation; or
(ii) would be admissible as evidence in court;”

which would be relevant to the exercise of its discretion whether to grant absolution.

[44] In this case, the reverse situation arises. The witness statements do not support the Commission's case – they are destructive of that case. The Commission has for this reason elected not to call those persons as witnesses.

[45] In our opinion, we are entitled to have regard to the content of those witness statements, and the position taken up in this regard by the Commission, when we consider whether to exercise our discretion to grant absolution from the instance.

[46] In his witness statement, Mr De Lange stated that at the time in question, he was the head of administration at Waste Rite. He was involved in the preparation of the tender by Waste Rite. He stated that he and an employee of Crossmoor, Mr Perumal, were present at the same time at the premises of Jetline to have the tender documents of their respective employers copied and bound. He confessed that while Mr Perumal went out to buy lunch, he illicitly copied Crossmoor's quoted prices. He said that he did this without the knowledge of Crossmoor. This was unilateral conduct on his part.

Absolution from the instance

[47] At the close of the Commission's case, Crossmoor applied for absolution from the instance. The Commission opposed this application.

The approach to absolution from the instance

[48] The Tribunal Rules do not make express provision for absolution from the instance. Tribunal Rule 55(1)(b) provides that if a question arises as to the practice or procedure to be followed in cases not provided for by the Tribunal's Rules, the chairperson may have regard to the Uniform Rules of the High Court. As appears from *Thembekile*, it is the practice of this Tribunal to permit applications for absolution. The Tribunal's power to grant absolution from the

instance stems from its inherent authority to manage its proceedings and ensure that parties are not unduly burdened by cases where the initiating party has failed to lay a foundational case. The Commission did not contend that the Tribunal did not have the power to grant absolution, but opposed the application on its merits.

- [49] The test for absolution from the instance was set out in *Claude Neon Lights (SA) Ltd v Daniel*,⁶ where the court stated the following:

*“...when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff.”*⁷

- [50] In *GEP abo MML vs MEC for The Department of Health Gauteng Provincial Government*, the court held that:⁸

“ [17] The test to apply in considering an application for absolution is not that the evidence led by the plaintiff established a case that would be sustained if the case was to proceed to its final conclusion. The essential inquiry in determining whether to grant absolution from the instance is whether there is evidence upon which a court, when applying its mind reasonably, could or might find for the plaintiff. In other words, a court would not grant absolution from the instance in a case where the plaintiff has, at the end of his or her case, presented an answerable case or prima facie case. The test, as stated in Supreme Service Station (1969) (Pvt) Ltd v Fox and Goodridge (Pvt) Ltd, is not “what ought a reasonable court to do” at the close of the defendant’s case. Thus the threshold required by the law, which the plaintiff has to satisfy in opposing

⁶ 1976 (4) SA 403 (A).

⁷ Ibid at p 9 -10.

⁸ Case number: 33632/2014) [2023] ZAGJHC 535.

an application for absolution from the instance at the close of his or her case, is very low.” (Emphasis added)

- [51] The plaintiff has to make out a *prima facie* case in the sense of offering evidence for every element of its claim. Without such evidence, no court could rule in its favour.
- [52] We were referred to the decisions of the Tribunal in *Thembekile* and *Competition Commission of South Africa v Afrion Property Services CC & 6 others*.⁹ Crossmoor contended that the governing test to be applied by the Tribunal, deriving from these two cases, is whether the Commission has established a *prima facie* case against the respondent, or a case to be met.
- [53] As we have noted, the threshold for defeating an application for absolution from the instance is a low bar. We are required to assess whether there is any evidence from which a reasonable decision-maker might conclude that the applicant has made a *prima facie* case; put differently, whether the Commission has established a case to be met against Crossmoor.
- [54] This raises two issues: whether an agreement was concluded between Crossmoor and Waste Rite; and whether the undisputed similar pricing constitutes collusion in violation of Section 4(1)(b) of the Act.

Was an agreement concluded?

- [55] Sections 4(1)(b)(i) and (iii) of the Act provide:
- “An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if..... it involves any of the following restrictive horizontal practices:*
- (i) *directly or indirectly fixing a purchase or selling price or any other trading condition;.....*

⁹ *Thembekile* at para 54 and *Competition Commission of South Africa v Afrion Property Services CC & 6 others* Case No: CR245Mar17 at para 12.

- (ii) ;
- (iii) *collusive tendering.*”

[56] The evidence shows that the parties have a horizontal relationship. This is not in dispute.¹⁰

[57] Section 1(1) of the Act provides that “‘*agreement*’, when used in relation to a prohibited practice, includes a contract, arrangement or understanding, whether or not legally enforceable.”

[58] The CAC in *Netstar v Competition Commission* explained as follows:¹¹

*“An agreement arises from actions of and discussions among 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. The parties have reached consensus…….”*¹²

[59] The CAC in *Competition Commission of South Africa v Stuttafords Van Lines Gauteng Hub (Pty) Ltd* defined an agreement under the Act as parties reaching consensus on an arrangement they consider binding.¹³ A fundamental question is whether the parties reached a consensus.

[60] The Commission avers the existence of a bilateral agreement between the parties to fix prices and engage in bid-rigging.

[61] There is no direct evidence before the Tribunal which demonstrates that the parties reached an agreement to tender. There are various possible explanations for two very similar tenders having been submitted. One of them

¹⁰ Para 11 of the Commission’s referral p 94 of the trial bundle; Waste Rite’s answering affidavit para 7 p103 of the trial bundle; Crossmoor’s answering affidavit para 6 at p110 of the trial bundle; and witness statement of Lilian Naicker p10 – 11.

¹¹ *Netstar v Competition Commission of SA* 2011 (3) SA 171 (CAC).

¹² *Ibid* at para 25.

¹³ *Competition Commission of South Africa v Stuttafords Van Lines Gauteng Hub (Pty) Ltd* and Others at para 28 -29; see also *MacNeil Agencies (Pty) Ltd v Competition Commission* [2013] ZACC 3 para 56; *Competition Commission v Primedia (Pty) Ltd t/a Ster Kinekor Theatres* para 38.

is that there was an agreement between the parties. A second is that there was a “mole” inside one of the parties, who leaked information to the other party. A third is that one of the parties obtained access to and unilaterally copied the other party’s tender. Mr De Lange says that he did this on behalf of Waste Rite.

[62] The Commission asks us to refuse the application for absolution on the basis that if the Tribunal were to refuse absolution, and Crossmoor were then (notwithstanding the absence of any evidence of an agreement) to call a witness or witnesses to say that there was no agreement, it is possible that they may be cross-examined so effectively that the Commission will be able to find by drawing an inference that there was in fact an agreement, notwithstanding the absence of any direct evidence to that effect, and notwithstanding the contents of the witness statement of Mr De Lange.

[63] In *Thembekile*,¹⁴ the Tribunal explained the approach to inferential reasoning. Inferential reasoning requires an evaluation of the evidence in its entirety, and not merely selected parts. The process of inferential reasoning calls for an evaluation of all the evidence and not merely selected parts. The inference that is sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn. There is some debate in our jurisprudence as to whether, and if so, to what extent, a court considering an application for absolution should have regard to the probabilities of various competing inferences. Here, there is direct evidence contradicting the inference which the Commission seeks to draw.¹⁵

[64] It is important to distinguish inference from conjecture or speculation.¹⁶

[65] Crossmoor submitted that Mr De Lange’s witness statement unequivocally demonstrated a unilateral act of theft, and that there was a total absence of any evidence of a collusive agreement between respondents.

¹⁴ Para 50, relying on inter alia *SA Post Office v De Lacy* 2009 (5) SA 255 (SCA) para 35; *R v Blom* 1939 AD 188 at 202-203.

¹⁵ Compare *Du Toit v Vermeulen* 1972 (3) SA 848 (A) at 855.

¹⁶ *Home Talk Developments (Pty) Ltd and others v Ekurhuleni Metropolitan Municipality* 2018 (1) SA 391 (SCA) para 42.

[66] We are aware that in *Thembekile*, the Tribunal refused an application for absolution. The Tribunal pointed out that it was entitled to hear whether the respondents' witnesses would confirm or repudiate the documentary evidence of the RIM's interview with Mr Yacoob. Each case must of course be decided on its own facts. In *Thembekile*, there was some ambiguity in the transcript of Mr Yacoob's interview with the RIM. And there were other identifiable persons who were present at some of the interchanges to which Mr Yacoob referred. They might be called as witnesses for the respondents. The present case is very different on the facts. Mr De Lange's witness statement is unambiguous and emphatic. And there was no suggestion that Crossmoor might (for example) call as a witness some other person who was present at Jetline at the time in question, or some other person who would provide evidence of an agreement between the parties.

[67] The Commission seeks to draw an inference from the familial relationship between Ms Naicker of Waste Rite and Crossmoor's directors. However, there is evidence of serious discord between Ms. Naicker and her brother, indicating a strained familial relationship. There is some evidence that Ms Naicker engaged in business dealings with her brothers on an arm's-length basis. In our opinion, this argument does not take the matter any further, given the absence of any evidence of an agreement to collude.

[68] It is important to note that the Commission reached a settlement agreement with Waste Rite, which included an undertaking by Waste Rite to cooperate in the prosecution against Crossmoor. The Commission therefore had the opportunity to call Ms Naicker as a witness. It deliberately elected not to do so. Crossmoor cannot now be burdened with the obligation of proving the Commission's case.

Does the undisputed similar pricing constitute collusion in breach of section 4(1)(b) of the Act?

[69] We now address whether the fact of similar pricing gives rise to an inference of collusion.

- [70] The Commission contended that an inference of collusive conduct could be drawn from circumstantial factors, including the simultaneous submission of tender documents to Pikitup, which shared similarities in the manner they were completed and signed, and in being bound and printed by the same company. According to the Commission, these “commonalities” suggested a pre-existing arrangement to submit identical or similar prices.
- [71] Counsel for the Commission correctly acknowledged that parallel pricing, in itself, is not inherently unlawful. He submitted that further evidence, commonly referred to as “plus factors,” is required to demonstrate a violation of competition principles. In support of this contention, he referred to an article by the antitrust scholar William E. Kovacic and others, “Plus Factors and Agreement in Antitrust Law, 2012,” which states: *“In antitrust cases, courts permit the effect of agreement to be established by circumstantial evidence, but they have required that economic circumstantial evidence go beyond parallel movement in price to reach a finding that the conduct of firms potentially violates Section 1 of the Sherman Act.”*¹⁷
- [72] Counsel submitted, quoting Michael K. Vaska, that *“The plus factor most often considered by courts in determining whether parallel behaviour is the result of an agreement, is the business justifications test. Under this test a price fixing agreement may be inferred from parallel conduct if firms cannot show legitimate independent business reasons for engaging in such practices. Once conscious parallelism, sufficient to establish an agreement has been found, the practices are deemed illegal per se, without an inquiry into whether the practices are equally anticompetitive.”*¹⁸ He argued that once conscious parallelism is found to be sufficient to establish an agreement, the practices are then illegal *per se*, negating the need for further inquiry into their anticompetitive effects.

¹⁷ William E. Kovacic, Robert C. Marshall, Leslie M. Marx & Halbert L. White, *Plus Factors and Agreement in Antitrust Law*, 110 MICH. L. REV. 393 (2011).

¹⁸ Vaska, Michael K. (1985) “Conscious Parallelism and Price Fixing: Defining the Boundary,” *University of Chicago Law Review*: Vol. 52: Iss. 2, Article 10. Emphasis added.

- [73] That however begs the question, namely whether there is evidence of conscious parallelism on the part of Crossmoor. There is no such evidence before us. On the papers before us, there was conscious parallelism on the part of Waste Rite, which copied Crossmoor's tender.
- [74] Counsel for Crossmoor acknowledged the identical nature of the pricing. She argued that the Commission presented no evidence to show that the circumstantial indicators manifested an agreement to collude or the subsequent submission of identical prices. In our view these "commonalities" take the matter no further. They are capable of many explanations.
- [75] Counsel placed reliance on *Sutherland and Kemp*, who state that "... *parallel conduct, especially parallel pricing, does not by itself constitute collusive behaviour Examples of parallel conduct are the similar interest rates charged by banks, or similar prices charged for airline tickets by different airlines. A firm may act in the same manner as other firms in the market because it is, independently determined, the best strategy for that firm. In a perfectly competitive market firms will charge the same prices because they are price takers.*"¹⁹ In our view, that does not apply to the present situation. Ms Venter explained in detail, and in our view convincingly, why the practically identical pricing in this matter could not be explained on this basis.
- [76] Relying on *Netstar*, counsel for Crossmoor contended that the mere fact that competitors may have agreed to adopt certain standards does not, by itself, infer the existence of a collusive agreement. In our view, the identical pricing in this matter goes well beyond what was contemplated in *Netstar*. Again, the evidence of Ms Venter demonstrated that convincingly. But for the reasons stated above, this does not necessarily lead to the conclusion that there was an agreement or collusion.
- [77] On a holistic assessment of the evidence, we are not persuaded that the Commission has established an effective answer to the application for absolution. If instead of applying for absolution Crossmoor had simply closed

¹⁹ Sutherland & Kemp, Competition Law of South Africa 5.9.

its case, the Tribunal would have had to find in its favour, and dismiss the Commission's application. That conclusion would have been inescapable.

[78] Under the circumstances, we exercised our discretion in favour of granting absolution from the instance. This does not prevent the Commission from initiating fresh proceedings if it comes into possession of evidence which supports its allegations.²⁰

Signed by:GEOFF BUDLENDER
Signed at:2025-06-25 13:19:43 +02:00
Reason:Witnessing GEOFF BUDLENDE

GEOFF BUDLENDER

Presiding Member
Adv Geoff Budlender SC

25 June 2025

Date

Concurring: Ms Andiswa Ndoni and Prof. Thando Vilakazi

Tribunal Case Manager: Nomkhosi Mthethwa-Motsa

For the Commission: Adv T Vukeya instructed by Maenetja Attorneys

For Crossmoor Transport: Adv R Blumenthal instructed by Daniel Witz Inc

²⁰ *Minister of Police and another v Gasa* 1980 (3) SA 387 (N) p 389.