



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CR162Dec14

In the matter between:

THE COMPETITION COMMISSION

Applicant

and

GIURICICH COASTAL PROJECTS (PTY) LTD

First Respondent

AVENG (AFRICA) LTD

Second Respondent

Panel	:	Norman Manoim (Presiding Member) Yasmin Carrim (Tribunal Member) Imraan Valodia (Tribunal Member)
Heard on	:	24 th and 25 th November 2016, 10 th January 2017 and 20 th January 2017
Last submission received	:	10 February 2017
Order and Reasons Issued	:	22 May 2017

Reasons for Decision

Introduction

- [1] Early in 2008 two executives of rival building companies discussed a proposed construction contract for a customer. The content of this conversation, for which there are no other witnesses is a subject of dispute. On one version, that of the Competition Commission ("the Commission") the conversation formed an integral component of a conspiracy to rig a tender – what is sometimes called 'cover pricing'.

- [2] On the other, that of the first respondent, the contents of the conversation, which we discuss later, would be exculpatory. We have to decide which version of this conversation is more probable. On this turns whether the first respondent is liable for contravening section 4(1)(b)(iii) of the Act which makes it a prohibited practice for a firm to engage in collusive tendering.¹

How the case arose

- [3] On 11 September 2009, the Competition Commissioner initiated an investigation into collusive practices in the construction industry. Amongst the practices mentioned specifically was collusive tendering. Whilst the initiation statement covered a wide range of practices and firms, relevant to this case were the following:

- The initiation had come about in response to corporate leniency applications from seven firms amongst which was Grinaker LTA, a subsidiary of Aveng (Africa) Ltd, the second respondent in this matter.² We will refer to this firm from now on as Grinaker.
- The firms which had been implicated directly in terms of the leniency applications were mentioned and amongst them was the first respondent, Giuricich Coastal Projects Pty Ltd ("Giuricich").
- The Commissioner then mentions Giuricich as one of the firms against which a complaint was to be investigated.³

- [4] This initiation was followed in February 2011 by an invitation the Commission made to the construction industry to settle any contravention through a settlement process. The salient aspect of this process was that a firm which took up the offer, could either apply for conditional leniency in terms of the

¹ Section 4(1)(b)(iii) states: "An agreement between, or a concerted practice by, firms or a decision by an association of firms,, is prohibited if it is between firms in a horizontal relationship and if ... (b) it involves any of the following restrictive horizontal practices: ... (iii) collusive tendering,"

² On the front page of the complaint referral the second respondent is referred to as Aveng (Africa) Ltd. In the body of the referral the second respondent is described as Grinaker LTA a public company which is a wholly owned subsidiary of Aveng (Africa) Limited. See paragraph 8, Bundle A page 16

³ For the initiation statement see Record, Bundle A, pleadings file, pages 1-3.

Commissions' Corporate Leniency Policy (the CLP) or enter into a consent agreement with the Commission to settle the case on more beneficial terms.

- [5] According to the Commission, on 14 April 2011 Grinaker applied for settlement in terms of the settlement process. Giuricich did not, although the Commission alleges that it would have been aware of the settlement process.⁴
- [6] The essence of the case being investigated was that Grinaker and Giuricich had entered into a collusive tendering arrangement in respect of a construction project for Mondi Limited (Mondi) for its plant in Durban known as the Mondi Reel Handling project ("Mondi Reel project").
- [7] The Commission then proceeded to investigate the complaint. Following the investigation the complaint was referred to the Tribunal on 11 December 2014.
- [8] Although both Grinaker and Giuricich are cited as respondents, only Giuricich has opposed the referral. This, according to the Commission, is because Grinaker applied for settlement in terms of the settlement process⁵. By "settlement" we understand this to mean that Grinaker received conditional immunity.
- [9] As we discuss more fully below this case turns on the resolution of certain important disputes of fact between the Commission's version, reliant on the evidence it has obtained from Grinaker and Mondi, and the Giuricich version, for which it relies on the oral testimony of two of its executives.

Case process

- [10] The case commenced on the 24th November 2016 when it ran until the 25th. It resumed on 10 January 2017 and final argument on the merits was heard on 20 January 2017. Written submissions on remedies were received from Giuricich on 3 February 2017 and the Commission on 10 February 2017.

⁴ Complaint referral paragraph 20.2, Bundle A page 20.

⁵ Complaint referral paragraph 20.1. In his opening address counsel for the Commission stated that Giuricich was a leniency applicant for this matter. We assume this was in error and he meant Grinaker. See transcript page 3.

- [11] During the hearing the Commission called the following witnesses: Alastair McNair ("McNair"), Stephen Poorter ("Poorter"), both once of Grinaker, and Rishaal Ramchunder ("Ramchunder") from Mondi.
- [12] Giuricich called two of its executives; Mr Rodney Van der Walt ("Van der Walt") and Mr Vernon Van Wyk ("Van Wyk").

Commission's case in the complaint referral

- [13] In its complaint referral the Commission sets out the essence of its case succinctly. During 2008 Mondi Limited invited three firms, Giuricich, Grinaker and Stefanutti & Bressan ("Stefanutti") (as that firm was known then) to submit a design and construct proposal for the construction of the Mondi Reel project at the Mondi Merebank Mill in Kwa-Zulu Natal. The project involved the design and construction of a truck loading building, floor upgrades for automated vehicle use and the civil works necessary for the installation of reel handling conveyers at the Mondi Merebank Mill.⁶
- [14] According to the complaint referral only Giuricich and Grinaker submitted a tender.
- [15] The deadline for tender submissions was 7 February 2008.
- [16] Alastair McNair (then of Grinaker) had telephonic discussions with Rodney Van der Walt (of Giuricich) where a cover price agreement was reached. The Commission does not date this call. Rather, it states it occurred: "*A few days after Grinaker and Giuricich met with Mondi...*" From the context we assume it was sometime before the submission date. The Commission also does not indicate whether Grinaker and Giuricich met with Mondi together.⁷
- [17] The terms of the agreement were that Grinaker agreed to supply Giuricich with a price for the tender, higher than its own, to ensure that Giuricich did not win

⁶ See witness statement of Rishaal Ramchunder, paragraph 8, Bundle B page 124.

⁷ See paragraph 28 of the complaint referral, Bundle A page 21 and 22. As we explain later, Giuricich denies meeting with Mondi together with Grinaker.

the contract. In accordance with this agreement Giuricich then submitted the higher tender price and the contract was awarded to Grinaker.⁸

Giuricich's case in its answering affidavit

[18] In its answering affidavit Giuricich denies any knowledge of Mondi having invited firms to tender for the construction of the project. Instead it avers that it was requested by Mondi to negotiate a price. Put differently, Giuricich asserts that Mondi wanted to negotiate with an individual contractor and not to go out on tender. Its first knowledge of Grinaker's involvement came when McNair phoned Van der Walt and attempted to persuade him that Giuricich had no chance of getting the work, and that it was being used by Mondi to force a lower price from Grinaker. On the basis of this phone call Van der Walt states that he instructed his subordinate Van Wyk not to do any more work on pricing the project. He says he felt duped by Mondi. Giuricich denies that the conversation concerned cover pricing and denies ever submitting a price to Mondi for the project.⁹

The Relief the Commission seeks

[19] The Commission seeks a declaratory order and the imposition of an administrative penalty of R 8 695 646.48; this amounts to 8% of Giuricich's turnover in 2015. This was its position at the end of the case. Prior to this, in the complaint referral, it had sought the imposition of a 10% penalty which is the maximum permissible amount in terms of the Act.

Commission's case – the evidence

[20] The Commission's case relied on the evidence of three witnesses and some documentary evidence.

[21] The first witness, Alastair McNair, was Grinaker's Business Development director in 2008.¹⁰ McNair's recollection of events is by his own admission, poor. He recalled having a telephone conversation, on an unknown date, with Rodney

⁸ This is set out in paragraphs 26-29 of the complaint referral, Bundle A pages 21-22.

⁹ See answering affidavit paragraph 19 and 21, Bundle A page 63 and 64.

¹⁰ McNair is no longer with the Grinaker group.

Van der Walt, the then managing director of Giuricich, a man he had known previously, albeit not well. He could not recall how the telephone conversation had come about and who had initiated the call. He did recall that the subject matter of the conversation was a discussion about Grinaker providing Giuricich with a cover price. This according to him was his last conversation with Van der Walt. He then speculated about what the events would have been following that call. As he put it, following standard practice in the industry, there would have been a second call on the date that the tender prices had to be submitted, when Grinaker would have given the cover price to Giuricich. He said that he would not have been involved in that call because he would have instructed one of his team to give Giuricich a price when they called. He does not know if this call took place and who might have made it.

[22] He alleged that sometime after the bids were submitted, Mondi called Grinaker for an interview to discuss the specifications in the tender bids and how the bidder intended to go about building the project. He stated that since it was anticipated that Giuricich would also be called into such an interview it sought help from Grinaker to assist in how the project could be completed within realistic time frames and with realistic figures.¹¹ Since Giuricich had got a cover price from Grinaker it did not have the information necessary to explain how it had arrived at its price.¹² He then instructed Steven Poorter, Grinaker's project manager at the time, to assist Giuricich to prepare for its anticipated negotiation with Mondi.

[23] Poorter was the next witness. At the relevant time Poorter, who is now employed elsewhere, was employed in Grinaker's Durban office as a senior projects manager. He stated he was not involved in the tender process itself however if his firm had won a tender he was responsible for its implementation. This meant putting together a team of quantity surveyors, foremen and engineers responsible for executing and building the project.¹³

¹¹ McNair witness statement paragraph 25.

¹² Transcript page 83 and paragraph 25 - 26 of McNair witness statement, Bundle B page 114.

¹³ Poorter witness statement paragraphs 2-3, Bundle B page 116 and 117.

- [24] Around 7th February 2008 Poorter received a call from McNair. At the time McNair was his senior in the company hierarchy. McNair told him that Mondi had called for firms which had submitted bids for the Mondi reel project to a bid clarification meeting. McNair told him that Grinaker had given Giuricich a cover price as it was not interested in tendering for the project. McNair explained to him that he needed to go to Giuricich so he could coach them on how to respond to Mondi at the clarification meeting. The reason for this, as he understood it, was that Giuricich had not been involved in arriving at the price and so would not be sufficiently familiar with the intricacies of the project for the purpose of the clarification meeting. He described the exercise as a means to save face for Giuricich as it would want to be considered the next time Mondi required contractors.¹⁴
- [25] Poorter then contacted Van Der Walt of Giuricich to set up the meeting. He was told who to meet and he then went to Giuricich's office where he met with two of its employees. He does not know their names or their positions. He discussed with them, the scope of the project, the sequence of how things were to be done, things to be built, constraints and difficulties, what services would be required and for what duration.¹⁵
- [26] At the hearing he described how they had soaked up this information "...like a sponge".¹⁶ Since Giuricich disputes that this meeting took place Poorter was cross examined as to whether he had any evidence to prove he had the meeting or whether he knew who he met with. He was unable to do either. He did however describe the building. He did not know what had happened subsequent to the meeting.
- [27] Poorter's evidence is that Giuricich would have been unprepared to answer questions at the anticipated meeting with Mondi as they had not done their homework in calculating its bid since it had taken a cover price. His job was to prep them. The theme of his cross examination was that Giuricich would not

¹⁴ Poorter Witness statement paragraph 20, Bundle B page 121.

¹⁵ Poorter Witness statement paragraph 18, Bundle B page 120.

¹⁶ Transcript 24th and 25th November 2016 page 105.

have needed such a meeting since both given its experience as a contractor and the site inspection it had undertaken, it did not need any help from Poorter.

[28] Poorter conceded that Giuricich would have had the capacity to perform the job, but as they had not done the detail work in pricing the project, his input was needed. He testified that his team had spent about three weeks preparing for the tender.¹⁷

[29] Poorter also confirmed that the project was a design and construct project, or a turnkey project, which meant that the building contractor took full responsibility for all costs including those of design and other subcontractors. Grinaker to this end employed the services of a firm called Campbell Bernstein and Irving or CBI, a prominent firm of civil engineers based in Durban to do the design. He was emphatic that CBI had been employed by Grinaker for the project not by Mondi.¹⁸ He also testified to having met with Mike Hanafey an engineer with CBI prior to Grinaker submitting the bid. He had asked Hanafey to prepare a program to help Grinaker submit its price.¹⁹ He also testified that he had personal knowledge that Grinaker had contracted directly with CBI and that the latter had paid CBI for the work.²⁰ Furthermore when he met with the Giuricich team he did not have the impression that they had had their own drawings done.²¹

[30] Poorter was asked why firms might be willing to submit a cover price and thus lose their chances of winning a bid. He explained that often a firm that had been invited to bid was unable to do so at that time. However, anxious to keep in favour with the customer, it might offer a cover price, which it gets from the competitor that wants to win the tender, that is, a price 5, 10, or 20 % higher.²²

[31] We can summarise the evidence of Poorter and McNair as follows: Both testified that the Mondi Reel project was the subject of a competitive bid and

¹⁷ Transcript 24th and 25th November 2016 page 136 and 138.

¹⁸ Transcript 24th and 25th November 2016 page 108-9.

¹⁹ Transcript 24th and 25th November 2016 page 137.

²⁰ Transcript 24th and 25th November 2016 page 133.

²¹ Transcript 24th and 25th November 2016 page 110.

²² Transcript 24th and 25th November 2016 page 113-4.

that it was a design and construction or turnkey project. In respect of McNair he testified that Grinaker had offered Giuricich a cover price, and in respect of Poorter that he was asked to brief Giuricich's staff, which he then did, because, as he understood it had been given a cover price and had not made an independent bid to Mondi and hence if called in for a negotiation needed assistance to avoid embarrassment. As we shall see Giuricich disputes all these facts.

- [32] The Commission's remaining witness was Rishaal Ramchunder. At the relevant time Ramchunder was an "*in-house civil engineer*" at Mondi which gave him responsibility for civil engineering and construction works at Mondi Merebank.²³
- [33] Two weeks prior to the tender submission date, contractors were invited to submit bids for the Mondi Reel Handling project. This project was initially known as the Golden Acre Building.
- [34] He then says each contractor was invited separately to a clarification meeting so they could examine the scope of the work. He stated that it was then up to each contractor to price the work.
- [35] Ramchunder then provided the Commission with a two page spreadsheet which he had prepared at the time i.e. sometime in 2008.²⁴ His testimony was that the spreadsheet had been prepared after bid submissions had been received and was intended to evaluate the respective bids.
- [36] The first page of the spreadsheet is headed "*Civil consulting services Tender comparison*". This page of the spread sheet then contains an evaluation of bids submitted by three civil engineering firms to design the project. Amongst the three firms who bid was CBI, the same firm mentioned earlier. At the bottom of the spread sheet there is the following remark. "*The traditional Consultant - contractor approach was not used in this contract as: 1. Cost savings could be achieved by reducing the duplication in the Scope of Quantity services to be*

²³ Ramchunder witness statement, paragraph 3, Bundle B page 123.

²⁴ See Ramchunder Spread sheet, Bundle C, Record pages 595-6.

*supplied by both the Consultant and the Contractor. 2 The scope of work has been clearly defined, resulting in a simpler contractual agreement.3 repetitive nature of the design works did not justify the fees proposed."*²⁵

- [37] In his oral testimony Ramchunder explained this remark. Originally Mondri had called for tenders from civil engineering firms (or consultants as he refers to them) separately from the tenders it was going to solicit from the building contractors. However after "*instruction from above*" Mondri opted for calling for contractors to provide turnkey services.²⁶ The civil engineering tender became as a result, in his words, "*redundant*".²⁷ The decision to opt for a turnkey project meant that the building contractor would provide the design services as part of its bid. This meant that the contractor would have to tender to provide both construction and a design service.
- [38] The second page of the spreadsheet is thus headed "*Civil Turnkey Contract Tender comparison*". On this page Ramchunder had performed an analysis of the respective prices purporting to be from Grinaker and Giuricich. Next to the name of Stefanutti and Bressan is reflected the comment "*declined*". In his witness statement Ramchunder states that for reasons he was not aware of Stefanutti had declined to tender.²⁸
- [39] Under cross examination Ramchunder confirmed that the project was put out to tender to the three construction firms mentioned in his spreadsheet. He was not certain of the form of the tender process. He did state it was "*...not the traditional form of tender that we are used (to) in civil engineering. I think it was just a short form that was used*".²⁹
- [40] We do know that Ramchunder emailed what is termed an enquiry document to Rodney Van Der Walt on 28 January 2008 because we have this in the record.³⁰

²⁵ Ramchunder Spread sheet op cit.

²⁶ Transcript 24th and 25th November 2016 page 161.

²⁷ Transcript 24th and 25th November 2016 page 161.

²⁸ Ramchunder witness statement paragraph 12, Bundle B page 124.

²⁹ Transcript 24th and 25th November 2016 page 163.

³⁰ See Bundle A page 72 -82.

[41] The first sentence of the covering email states:

*"Please find enclosed the enquiry document for the Golden Acre Building. This document shall be amended to form the basis of a turn-key contract."*³¹

[42] Ramchunder testified that his use of the use of the term "enquiry" in this covering email was more consistent with there being a tender process than a negotiated tender. However whatever ambiguity there may be in the use of that term there is further terminology in the enclosed documents that accompanied the email tending to support Ramchunder's view that what was being contemplated was clearly a bidding process.

[43] The first page of the accompanying document is a letter. The top part of the letter has a memorandum format. In the top part it is addressed only to "Giuricich Coastal Projects" and it is marked from "R. Ramchunder". The body of the document has a letter format and is addressed not to Van der Walt personally, as is the covering email, but to "Dear Sir". This suggests that the body of the letter was addressed in the same form to more than one recipient.

[44] The content of this letter and the subsequent enquiry document attached to it, contain language consistent with its usage as part of a tender process. For instance the first paragraph of the letter portion states:

*"Mondi ... invites you ...hereinafter referred to as the engineering consultant to submit a bid for the following Contract works as further detailed in the technical specifications enclosed."*³² (Our emphasis) *The enquiry document that follows over the next ten pages is replete with references to the term "tender" as we go on to discuss later in the Analysis section.*³³

[45] Questioned further by the panel, Ramchunder provided a link between the enquiry document and the spreadsheets. He testified that he would have

³¹ Bundle A page 72.

³² Bundle A page 73.

³³ See Bundle A pages 74-75.

populated the spreadsheet with the numbers he had received from the enquiry document.³⁴

- [46] Ramchunder also testified that the price difference between the two bids was 5%. Although this was not apparent from the arithmetic he explained that this is a rounding error caused by the program that is used to prepare the spreadsheet.³⁵ Recall that Poorter had testified that cover bids were often in 5% increments above the price of the firm seeking to win the tender.
- [47] Ramchunder testified that after the bids had been received Grinaker was called in for a negotiation with Mondi as they had submitted the lowest bid. He was present at the negotiation together with others from Mondi. Mondi asked Grinaker for a further price decrease which it then provided.
- [48] Ramchunder denied that Mondi had contracted directly with CBI. Its client in this case would have been Grinaker.³⁶
- [49] Thus on his evidence Grinaker had initially submitted a price of R 32 620 000, which we see in the spreadsheet and Giuricich a price of R33 455 000. Following negotiations Grinaker had discounted its price to R 30 235 000.³⁷

Giuricich's Case

- [50] Giuricich called two witnesses; Rodney Van der Walt and Vernon Van Wyk.
- [51] Both gave consistent evidence on the following background facts.
- [52] A certain Frederick who works for Mondi and whose surname they did not know, had made contact with Giuricich's then chairperson, Robert Giuricich, and asked for a meeting to discuss the Mondi Reel project. Van der Walt, Van Wyk

³⁴ See transcript 24th and 25th November 2016 page 211. "VALODIA: Can I just ask you about page 596? You have got some prices there where did those prices come from?. RAMCHUNDER: That was from the forms of tender submitted by the contractors."

³⁵ Transcript 24th and 25th November 2016 page 214.

³⁶ Transcript 24th and 25th November 2016 pages 212-3.

³⁷ Bundle C page 596. He explained the process leading to this further price decrease at transcript page 160.

and Robert Giuricich then met with Frederick at Mondi. Frederick, who he believed was a Frenchman, was a newcomer to Mondi and interested in finding a firm to carry out the Mondi reel project.³⁸ Frederick had been told that Giuricich had constructed a project in the vicinity which he was impressed with. The discussion revolved around whether Giuricich was able to perform the work and whether it was interested. The reply to both was in the affirmative. A second meeting was held with Frederick at a later stage, but this time only Van der Walt and Van Wyk were present. This second meeting entailed a site inspection. According to Van der Walt no other firm was present during the site inspection.

- [53] The importance to Giuricich's defense of this version was they (i.e. Van der Walt and Van Wyk) were under the impression that this involved a negotiated contract. By this they mean that a single firm is invited by the customer to negotiate a contract with it to undertake a project, as opposed to a bidding or tender process, where a firm knows it is competing with others.
- [54] The second leg of the Giuricich defence was to assert its understanding that the project was not a turnkey project, but that the civil engineering work was already completed and would be provided to the firm undertaking the construction of the project. In one of the more bizarre facts of this case Van der Walt testified that Frederick had instructed them after the site visit to go to the offices of CBI who would give them the drawings. Van der Walt testified that they arrived at the offices (he had never had previous contact with this firm) where they requested the drawings, but there was a degree of awkwardness when they arrived. No one was expecting them and it appeared that phone calls were being made by CBI staff to Mondi to get clarity and eventually, after some time had elapsed, they received the drawings.³⁹ These drawings are no longer in Giuricich's possession. It is therefore not possible to assess whether Giuricich was given the drawings and if they were, which ones they were— i.e.

³⁸Ramchunder explained that Frederick is Frederick van Desemall a foreign engineer seconded to Mondi Merebank at that time who was responsible for the mechanical works of the project. He was not however the project manager. The project manager was Chris Chetty. Transcript page 166.

³⁹Transcript 24th and 25th November 2016 page 243.

ones prepared for Grinaker, or an earlier draft since CBI was Mondi's regular civil engineer.

[55] Van der Walt testified that after receiving the drawings they immediately began work on pricing the job. This task was performed by Van Wyk who although he could have delegated others to do it, did it himself.⁴⁰

[56] Van der Walt described this exercise as a desk top price. What we understand him to mean by this term is a reasonably informed, but still estimate of the final price, which as he put it, may vary between 3 to 10% of the final price eventually quoted.⁴¹

[57] Whilst still performing this exercise Van der Walt testified that "... *out of the blue*" he received a call from Alastair McNair. McNair said he had heard that Giuricich was "*pricing*" the Mondi job. Van der Walt said Giuricich was negotiating the job. McNair told him that Giuricich had no hope as Grinaker had done every job for Mondi in the past. Grinaker he said was still on site working on a job and had received "*tender drawings*".⁴² According to Van der Walt he could not believe that this fact had been concealed from Giuricich by Mondi and he regarded this as unethical. He told this to McNair and put down the phone. He then repeated what had been said in the call to Van Wyk.⁴³ Van Wyk and he discussed whether McNair might be lying or not. They came to the conclusion that as Grinaker had done all the prior work at Mondi that he probably was not lying. Given the size of Grinaker relative to Giuricich, what it could afford to spend on preparing a tender and its past history with Mondi, he came to the conclusion that there was little prospect of Giuricich succeeding.

[58] The next day McNair called again. Van der Walt's testimony about the content of this second call is confusing as he appears to elide the content of the two calls⁴⁴ although he is confident that a second call with McNair took place. The

⁴⁰ Transcript 24th and 25th November 2016 page 245.

⁴¹ Transcript 24th and 25th November 2016 page 246.

⁴² Transcript 24th and 25th November 2016 pages 252, and 254.

⁴³ Transcript 24th and 25th November 2016 pages 247-248.

⁴⁴ See 249 and 252 for instance.

gist of the second call seems to be McNair repeating to Van der Walt that Giuricich would not get the job and that Mondi was just using Giuricich to get a better price out of Grinaker.⁴⁵

[59] After the second call Van der Walt instructed Van Wyk not to do any further work on the bid as he was now convinced that Grinaker would win the bid and that this could result in Giuricich incurring costs of around R50 000 needlessly on preparing a bid.

[60] He then decided that Giuricich would withdraw from the project.⁴⁶

[61] According to Van der Walt he told McNair in the second call that Giuricich would not be putting in a tender.⁴⁷

[62] Van der Walt denied vehemently that he agreed to accept a cover price from McNair in either call. However he stated twice when asked by the Tribunal if he was offered a cover price that McNair was "... heading down that road".⁴⁸

[63] Asked to explain this he stated:

*"What I mean by that is why should he phone me? So I think what he wanted me to do was to take a cover price from him. I think so, but he – the (sic) what other purpose would he have to phone me."*⁴⁹

[64] Later he explained that the reason that Grinaker wanted to offer a cover price was that it could be demonstrated to Mondi that its (Grinaker's) price was reasonable as it was lower than that of Giuricich.⁵⁰

[65] However Van der Walt then stated:

⁴⁵ Transcript 24th and 25th November 2016 page 249.

⁴⁶ Transcript 24th and 25th November 2016 page 263.

⁴⁷ Transcript 24th and 25th November 2016 page 269.

⁴⁸ Transcript 24th and 25th November 2016 page 271 and 273.

⁴⁹ Transcript 24th and 25th November 2016 page 273.

⁵⁰ Transcript 24th and 25th November 2016 page 281.

*"He did not offer me a cover price he could not"*⁵¹

[66] The reason for this according to Van der Walt is that Grinaker would not have had a price at that stage.

[67] Giuricich had according to Van der Walt done its desk top price at that stage. Asked pertinently if he could have submitted this price to Mondi he said:

*"Okay firstly I cannot recall ever putting in a price. If we did put in a price it would have been our desktop analysis"*⁵²

[68] Later in his testimony he is more emphatic:

*"I did not submit a price, as far as I, my recollection is that we did not submit any price whatsoever, no price."*⁵³

[69] Van der Walt was asked about the email from Ramchunder and the accompanying documents. He recalled receiving the document but according to him he ignored it as it represented for him "... a very unsophisticated employer from the perspective of building."⁵⁴

[70] He expected that Mondi would send Giuricich another document. However he does not state that they ever did.

[71] Van der Walt then proceeded to deny that he had contacted Poorter and that he knew anything of the visit. According to him Poorter would have had nothing to teach him about construction and he was quite sure that he could teach Poorter a few things.⁵⁵ He testified that there would have been no need to understand more about the project as they had been fully briefed on it during the site visit and they had been given the set of drawings.⁵⁶

⁵¹ Transcript 24th and 25th November 2016 page 274.

⁵² Transcript 24th and 25th November 2016 page 285.

⁵³ Transcript 24th and 25th November 2016 page 291.

⁵⁴ Transcript 24th and 25th November 2016 page 296.

⁵⁵ Transcript 24th and 25th November 2016 page 300.

⁵⁶ Transcript 24th and 25th November 2016 page 304.

- [72] Asked whether he had contacted Mondi to inform them that they were withdrawing he said they had not. Thus on this version although Mondi had invited them to enter into a negotiated contract with it he never informed it, (nor Frederick) that they were no longer going to be involved. Nor on his evidence was there any further contact from Mondi to ascertain if Giuricich was still interested in doing the work. Asked by the Tribunal why he had not contacted Mondi his answer was he was angry with them and " ... *when you're angry sometimes you don't act rationally and my attitude was don't care about Mondi don't care about their business, I don't ever want to do business with Mondi, I don't like the way they operate. I don't like their ethics.*"⁵⁷
- [73] It is common cause that in April of 2008 Giuricich provided Grinaker, at the latter's request, with a cover price to tender on a project for another company Unilever. Grinaker had at the last minute (Van der Walt says it was on the morning that the tender was closing) phoned and asked for a cover price as it did not want the customer to think it was not interested in doing the work and it had not had the opportunity to finish its tender. Van der Walt felt flattered that this large company was asking for his help and he obliged.⁵⁸
- [74] Asked by the Tribunal if he saw anything wrong with providing cover price Van der Walt said "... *Absolutely nothing wrong at all.*"⁵⁹

Analysis of the evidence

- [75] The Commission, it is common cause, bears the burden in this case of showing on a balance of probabilities that (i) Giuricich requested or was offered a cover price from Grinaker (ii) that someone in Grinaker submitted this cover price to Giuricich. (iii) that Giuricich then submitted this cover price to Mondi.
- [76] Mr Marolen for Giuricich sought very eloquently to demolish the Commission's case by isolating each of these steps in turn and then examining the evidence for each one and concluding it had not be proven. Thus the request for the cover

⁵⁷ Transcript 24th and 25th November 2016 page 449.

⁵⁸ Transcript 24th and 25th November 2016 page 450.

⁵⁹ Transcript 24th and 25th November 2016 page 450.

price depended on accepting McNair's vague evidence against the more confident denial by Mr Van der Walt. Taking a careful look at McNair's often hesitant testimony in the transcript he argued that the only time the latter gave a more confident answer was in response to a leading question from Mr Maputla for the Commission.⁶⁰

- [77] Then he argued that no one was able to testify that Grinaker had provided a cover price to Giuricich. McNair did not do so - he presumes someone else did. Nor does the Commission have evidence of whether Giuricich did provide a cover price to Mondì.
- [78] Mr Marolen is of course correct in all these observations. However it is not correct to view the evidence in isolation in this way and to ignore the context in which they occur, and then seek to refute each portion, without regard to what preceded it and succeeded it.
- [79] The correct approach is to examine the Commission's case holistically. Second, given disputes of fact in relation to the oral testimony about events that took place more than 8 years earlier, we place more weight on the documentary evidence. Significantly this documentary evidence was brought into existence in 2008 i.e. at the relevant time when the contravention allegedly took place. Its authenticity is not in dispute. This contemporaneous documentary evidence has greater probative value than the oral testimony of witnesses, who had to testify to events that had occurred eight years earlier. Since the documents constituted the most reliable source of evidence we approached the oral testimony by asking which version was more consistent in accounting for what appears in the documentary record.
- [80] Unusually in this case there is a dearth of documentation. We do not have the tender documents, the drawings submitted, or any other correspondence that might be expected, beyond those referred to earlier. There is, at least in respect

⁶⁰ See Giuricich Heads of Argument page 45 paragraph 114 and Transcript 20 January 2017 page 498.

of Mondi an explanation for this, which is common cause.⁶¹ Mondi had stored its tender documents from that period with a company called Metrofile, which had had a fire at its premises in 2013, during which documentation belonging to Mondi had been destroyed. According to a letter from Mondi's company secretary the firm "...has no electronic copies of the tender documents."⁶²

- [81] The first document we analyse is the spreadsheet which Ramchunder prepared.⁶³ On the second page we find the respective prices which Ramchunder says he entered from the source documents and which contain prices purporting to be from Grinaker and Giuricich. Below the figures appear the following comments:

"The contract should be placed on (sic) Grinaker LTA as (1) their initial offer was lower than Giuricich Coastal Projects (2) Subsequent negotiation has resulted in a further reduced bid"

- [82] The document is headed "*Reel handling Optimisation*"... "*Civil Turn-Key Contract Tender comparison*"

- [83] The spreadsheet although prepared by Ramchunder of Mondi is consistent with the oral testimony of McNair and Poorter in the following respects. There are two prices one from Grinaker and one from Giuricich. The Giuricich price is higher than that of Grinaker. This is consistent with the testimony of the Grinaker witnesses. Indeed the price attributed to Giuricich is approximately 5% higher than that of Grinaker. Recall that according to Ramchunder the arithmetic is not perfect as the spreadsheet program rounds off the numbers. If someone at Grinaker had added 5% to its quote and given this to Giuricich they would have come to this figure. Recall that Poorter mentioned that cover prices

⁶¹In respect of Giuricich Van der Walt in his witness statement says Giuricich was no longer in possession of the plans allegedly collected from CBI as it had moved offices in 2011 and "... any unnecessary documents would have been discarded, which was probably the fate of these plans" Bundle B page 137 footnote 13.

⁶²See Bundle A page 71, letter from P. A Laubscher to Morris Fuller Walden and Williams dated 17 March 2015.

⁶³See Bundle C page 596.

given to a rival might be higher, by 5% increments, than that of the firm seeking to win the bid.

[84] Whilst not too much weight can be put on this coincidence it is another feature of the consistency between the Commission's oral testimony and the documents.

[85] However the most important aspect of Ramchunder's testimony and what is perhaps the most important fact in this entire case as we go on to discuss, is that Ramchunder says he prepared the spread sheet from source documents. The source documents were the tenders submitted. He was not challenged on this. If the source documents existed, then this is entirely consistent with the Commission's case and closes the gaps in its oral testimony, while at the same time it is wholly destructive of Giuricich's version, which cannot explain how a source document from it could have been given to Ramchunder or if there was no source document how he had got this figure in his spreadsheet.

[86] The second feature of the spreadsheet is the observation in the note that there had been a subsequent negotiation with Grinaker that had resulted in a further reduced bid. The word 'bid' of course is more consistent with the language of tendering than negotiations. However what is of greater significance about this observation is that there was a "*subsequent negotiation*". This is entirely consistent with the Commission's version of events and again inconsistent with that of Giuricich.

[87] On the Commission's version, because there was to be a subsequent negotiation with Mondi, the interaction between Grinaker and Giuricich was not limited to the exchange of a cover price. It was because of the possibility of a subsequent negotiation that the intervention from Poorter was required. The spreadsheet confirms that there was a subsequent negotiation. Whilst *ex facie* this document this appears to have only taken place with Grinaker – presumably because they had made the lowest initial offer and then had gone lower still – it does suggest that a subsequent negotiation with tendering parties was contemplated. This increases the probabilities that the episode involving

Poorter happened. The rationale for Poorter's visit to Giuricich was that he needed to brief its team for the purpose of an anticipated subsequent negotiation about price.

- [88] The sub-heading to the spread sheet is also noteworthy. This states "*Civil Turn-key Contract Tender comparison*." The Giuricich version is that the project was not a tender nor was the contract a turnkey one. But this sub-heading suggests the opposite? Giuricich's version cannot account for this; the Commission's does.

- [89] The next contemporaneous document was also written by Ramchunder. It is an email dated 18 January 2008 addressed to Van der Walt with as its subject "*Mondi Group. Merebank Mill. Reel handling Project: Civil and structural Consulting services Enquiry*." Since it is brief it can be quoted in full.

"Good day Rodney,

Please find attached, enquiry document for Golden Acre Building. This document shall be amended to form the basis of a turn-key contract.

Please note that a formal enquiry document has not been prepared for the WIP Store North and WIP Store South Upgrades, and civil works necessary for the MSB equipment. The terms and conditions and scope of works shall however be similar to the Gold Ace (sic?) Enquiry. The extent of these works has been clarified in our site meeting.

*Please feel free to contact me, should you have any concerns."*⁶⁴

- [90] Ramchunder's email supports the Commission's case on the two key aspects. First it refers to an enquiry. This term, as Ramchunder correctly suggested, is more consistent with a bid process than a negotiated contract. But the matter is brought beyond doubt when one examines the first page of the document where the following is stated:

⁶⁴ Bundle A page 72.

"Mondi Business Paper, hereinafter referred to as the "Employer", invites you, hereinafter referred to as the "Engineering Consultant", to submit a bid for the following Contract Works as further detailed in the technical specifications enclosed.

The Geotechnical Engineering (if required) Design Calculations and Drawings of a Building structure for Truck Loading and WIP Store Area at Mondi Business Paper Merebank Mill.

*Completion of the Enquiry Document shall be in strict accordance with the Enquiry and no deviations will be considered unless specifically recorded by the Engineering Consultant in Annexure B, Qualifications of the Engineering consultant."*⁶⁵

[91] In the document itself appears the following under the heading Price Basis:

*"Tender prices are to be submitted on a fixed price basis"*⁶⁶

And

*"Tender prices should not include Value Added Tax (VAT)"*⁶⁷

[92] Other clauses also mention the word 'tender'. For instance clause 7 warns that incomplete tenders can lead to disqualification. Clause 8 makes clear that there are other tenderers. It states:

*"The response to any query by any tenderer shall be sent to all tenderers."*⁶⁸

[93] It also mentions that the persons whose attention the document had to be addressed to were Ramchunder and Krish Chetty.⁶⁹ No mention is made of Frederick.

⁶⁵ Bundle A page 73.

⁶⁶ Bundle A page 74.

⁶⁷ Bundle A page 74.

⁶⁸ Bundle A page 75.

⁶⁹ Bundle A page 75.

- [94] The covering email and the attachment again support the Commission's version on the two key facts: that there was a call for bids to be submitted and that the project was a turnkey contract.
- [95] Van der Walt was cross examined on these documents. His version was first that he could not recollect seeing them and then that he received them, but it made no sense and so he did not bother to reply to it. The reason it made no sense according to him was that a negotiated contract process was in place with Frederick. Second, the attachment was for a civil engineering tender and not a construction contract. Hence its confusion. Van der Walt is correct that the accompanying 'Enquiry' document which Giuricich was invited to fill in appears to be directed to a civil engineering firm and not a construction firm. However Ramchunder in the covering email explains this because he states: *"This document shall be amended to form the basis of the turnkey project."* Thus understood in this light the document is not inconsistent with the Commission's version. A turnkey project would comprise both a civil and a construction component.
- [96] However even if Van der Walt was surprised by the contents of this email it is strange that he did not contact Ramchunder to get clarity. Ramchunder invites a response in his email. This was after all a potential R33 million contract. For Giuricich this was a very large contract and an opportunity to establish a relationship with a new customer of substance. It is unlikely that the email would have been ignored. The more likely scenario is that Van der Walt knew that this was a tender and so the email came as no surprise and his version on this aspect must be rejected.
- [97] The next curious aspect of this case is the disputed Poorter visit to Giuricich. Poorter was criticized by Mr Marolen because he could offer no documentary proof of his visit nor recall who had met with him.
- [98] However none of these criticisms are sufficient to discount Poorter's evidence. First there is no reason for Poorter to have any documentary evidence. The visit was arranged by phone calls. Second the fact that he could not remember the

names of people he had not previously met eight years later is also not a basis to reject his evidence.

[99] The better question to be asked is if for some reason Grinaker had fabricated a version involving a cover bid, why it should add as a gloss, the visit by Poorter. First, it meant involving another individual at Grinaker in a false version – clearly a risk to both the firm and the individual who in any event no longer works there. There is no reason why Poorter has any motive to fabricate this event. Second, the visit was unusual. It would be a highly risky one to invent if it was pure fiction, as the Giuricich version requires us to accept. On Giuricich's version there can be no visit by Poorter. It is entirely destructive to its case. Yet Poorter's version is consistent with the chain of events and is consistent with the spreadsheet's suggestion that there was a post tender negotiation with Grinaker.

[100] Finally Poorter made a good impression as a witness. The most the cross examination sought to elicit was that the information he said he had imparted to the Giuricich staff was information that they already knew – there was no reason for him to come and tell them this. However Poorter explained that what was required was the kind of detail required to respond to enquiries at the negotiation meeting should it happen. This meant knowledge of the price build-up for the project, something only someone familiar with having priced the project in detail would know. It was, to quote McNair, part of the smoke and mirrors required to disguise the fact of the cover bid.⁷⁰ The fact that Van der Walt and Van Wyk may have attended a site meeting and even had access to a drawing from CBI, did not give them sufficient knowledge to credibly respond to queries in a negotiation. There are various levels of detail and whilst the Giuricich staff had some knowledge of the job, on Poorter's evidence it was not microscopic enough for the purpose of a negotiation and hence his input was needed.

[101] This criticism of Poorter's evidence does not discredit his version.

⁷⁰ Transcript 24 and 25 November 2016 page 40.

[102] Let us now examine which facts may be inconsistent with the Commission's case. The first is the presence of Frederick. The Commission has criticised Giuricich for not calling Frederick as a witness in this case.⁷¹ We do not need to decide whether this criticism of Giuricich is valid. The version of Giuricich at least up to a point is reasonably possibly true. Both Van Wyk and Van der Walt give a plausible explanation as to how they were put into contact with Frederick and their two meetings with him. Although the Commission suggests that Giuricich has been inconsistent about how many meetings there were, between their statements during an earlier interrogation conducted by Commission staff in the course of the investigation, and their testimony at the hearing, nothing seem to turn on this.⁷² What seems plausible, is that Frederick, an outsider, wanted to contact another construction firm to consider them for the work; a project he had a vested interest in as the person responsible for the new machinery. It may well be that at least initially that Giuricich were given the impression by him that they were engaged in a negotiated contract. The visit to CBI at his suggestion whilst strange is like the Poorter visit, too authentic to refute. Ramchunder confirmed the existence of Frederick and confirmed that he was responsible for placing the equipment in the building where the construction was taking place.

[103] Both Van Wyk and Van der Walt were consistent in their evidence up this point.

[104] Does this mean that if this aspect of their evidence is accepted, the Commission's version must be rejected? We do not believe so. It is entirely plausible that Mondi for a period of time may have wanted to consider a negotiated contract or that Frederick was on a frolic of his own. Certainly we know from Ramchunder's evidence that the nature of the project changed from first a construction project with a separate bid for the civil engineering work, to a turnkey project. Whilst Ramchunder never acknowledges that the construction project was ever not going to be done on a tender basis, this may not have been what was conveyed to Giuricich, initially, by Frederick.

⁷¹ Transcript 24 and 25 November 2016 page 328-329.

⁷² Transcript 24 and 25 November 2016 page 382-383.

- [105] It is also plausible that Frederick interceded with CBI to supply some drawings to Van der Walt. Indeed Van der Walt's recollection of the awkwardness of this visit suggests that the drawings weren't meant for him but were given over only after someone at Mondi had been contacted. Whether the drawings given over were those commissioned by Grinaker or some earlier version we don't know.
- [106] What matters for this case is whether the project at some stage became subject to a bid and second, a turnkey project and that Van der Walt became aware of this. The correspondence from Ramchunder to Van Der Walt makes it clear that at the very latest, by that date, 18th January 2008, he would have known both. This means that even if for a time Giuricich harboured under the illusion, created by Frederick, that the project was a negotiated contract that correspondence, at the latest, would have dispelled that illusion.
- [107] The probabilities are that the email preceded the call with McNair. McNair puts the call close in time to the deadline submission date of 7 February. If the email was received on 18 January this makes it highly likely it was received some time before the call. This makes it unlikely that Van der Walt, by then, would have been surprised to hear that others might be bidding for the contract.
- [108] Thus even if we are to accept the earlier version of events, as testified to by Van der Walt and Van Wyk, at the crucial moment of the call with McNair, the true facts were already known to Van der Walt from Ramchunder's email viz. that the Mondi reel project was the subject of a bid process and not a negotiated contract.
- [109] What of the phone call with McNair? We know three common cause facts. Giuricich did not believe that it was price competitive with Grinaker. Second, that if Giuricich was to put forward a tender it would have entailed incurring a major expense. Third, both firms testified that construction firms do not lightly decline contracts from customers lest they are not offered work in the future by that customer. This means that they bid for work even if they are in no position to perform it. These facts suggest that it is probable that if Giuricich was offered a cover price at that moment in time it would have been a rational decision to

accept one. Van der Walt even conceded that the conversation with McNair was *"going down that road"*. It seems odd if Grinaker wanted to encourage Giuricich not to compete with it for the project that this offer would not have been made. We know as we discuss later that the two firms exchanged a cover price later that year in April.

[110] We don't know on these facts if Giuricich sought or accepted the offer of cover price as McNair was not certain of this. It may well be that McNair also attempted to persuade Giuricich that Grinaker were likely to get the project. However this does not affect the question of Giuricich's liability. Whether it sought or was persuaded to accept a cover price, section 4(1)(b)(iii) liability is still established. However the issue of who the protagonist was may be relevant in relation to mitigation as we discuss later.

[111] Giuricich's defence thus rests on the credibility of Van der Walt's testimony. Although Van Wyk was led to back up his version he does not take the crucial aspect of the case further. Van Wyk was not party to the conversations with Grinaker nor on his version did he overhear the conversation with Van der Walt.

[112] Van der Walt's version then is crucial and must be evaluated from two aspects. First, his overall credibility as a witness and secondly the plausibility of his version.

Credibility of Van der Walt

[113] Van der Walt was a poor witness. Instead of answering questions directly he embarked on lengthy and irrelevant digressions and questions had to be repeated to get him to focus. His recount of the two conversations with McNair is confusing and it is not entirely clear when his decision to walk away as he put it was taken. In the answering affidavit to which he deposed there was mention of only one conversation. It is highly probable, as McNair testified, that there were two conversations; the first to suggest that there should be an exchange of a cover price and the second to give the price. Van Der Walt appears to have tailored his oral evidence to allow for two phone calls, but his explanation of their respective contents is confusing. The reason his evidence was confusing

is because he had to deny their true content – as per the version of McNair – and in embellishing on the second call he elided the content of the two conversations and became confused as to when the decision to “back off” had been made – after the first or the second call. On this again his version is inconsistent.⁷³

[114] The next criticism is that he put forward explanations that were never part of the case made out in Giuricich’s answering affidavit, to which he deposed, or in his witness statement. The most outrageous being a suggestion that people in Mondi were involved in a conspiracy against their superiors so they could ensure the contract with Grinaker was accepted.⁷⁴ This version was never put to Ramchunder in cross examination and appears to have been an *ad hoc* idea he came up with whilst in the witness box to account for why a price purporting to be from Giuricich appeared in Ramchunder’s spreadsheet.

[115] We find that we cannot rely on his testimony about the content of the conversation with McNair and his disavowal of any discussion of the provision of a cover price.

Plausibility of Van der Walt’s evidence

[116] First we consider the plausibility of Van der Walt’s version in terms of its internal coherence and second we test its plausibility against the objective evidence.

[117] Van der Walt’s version is inherently improbable. Van der Walt was challenged several times as to why after receiving a call from McNair he (1) believed McNair, his competitor, and who was not a man he knew particularly well; and (2) even if he believed him, why he did not take the issue up with Mondi given that he had, on his version, established some sort of relationship with Frederick.

⁷³ Compare the version on page 354 of the transcript, where he states he agreed to back-off during the course of the first call, with the version on page 368 of the transcript, where he states that during the first phone call he told McNair that he was not backing off. The witness statement mentions only one phone call and does not make clear whether Van der Walt mentioned backing off although he told Van Wyk to stop working on the costing after the call. From elsewhere in the transcript it appears that only after the second call was Van der Walt convinced to back off, as in the second call McNair had mentioned that Grinaker had obtained drawings (See transcript at 374 and 376).

⁷⁴ Transcript 24 and 25 November 2016 page 389.

At the very least if he had thought this was a negotiation and not a tender process and he was taken by surprise, he would have queried this given the value of the contract.

[118] Ramchunder offered a plausible reason for why this could not have been a negotiated process. He stated that a project valued at approximately R30 million would normally have gone out by way of tender otherwise the customer would not have any idea of what the price should be.⁷⁵

[119] On Van der Walt's version there was no further contact with Mondi after the calls – he just walked away. Yet this also does not seem plausible. If Mondi were expecting him to come up with a quote how would he explain his reticence if they contacted him. Presumably if they wanted to test the quote of Grinaker they would have – they had gone to the trouble of meeting with him on two occasions and he concedes Ramchunder had sent documents to him.

[120] Indeed it is more plausible, if he had got cold feet about tendering, he would have taken a cover price from Grinaker. Then he would have achieved two things – kept Mondi satisfied that Giuricich was still interested in being considered for work and avoided any awkwardness if he was asked by Mondi why he hadn't come back to them.

[121] Second, the version is implausible when tested against the objective facts. Van der Walt was not able to explain how a price purporting to come from Giuricich got into Ramchunder's spread sheet if he had not sent it. Here his version was contradictory. For the most part he testified that Giuricich did not submit a price. He repeated this several times as did Van Wyk. At the same time there was an attempt to speculate how this price might have got there. The first was that the price was a "... *desk top price*" as he put it. It was explained that a desktop price was an estimate based on a quick calculation without going into greater detail. Van Wyk, he testified, may have done one at the stage of the telephone call. Van Wyk who testified after Van der Walt and never submitted a prior witness

⁷⁵ See transcript page 213. Although Ramchunder refers to 30 bar he explains that by bar he means millions. See page 213.

statement backs this up. But neither could explain how the desk top price got to Mondi. Further neither man mentioned this possibility in their extensive interview with the Commission. Noteworthy the Commission does not appear to have known about the existence of the price in Mondi's records then. Certainly the officials conducting the interrogation never mention it and from a letter in the record from Mondi it appears the Commission only got to know this after the interviews. The desk top price possibility –and it is never put any higher than this by Van der Walt – is a *post facto* reconstruction to attempt to explain why Mondi has a price in its records from Giuricich.

[122] This inability to explain how a price from Giuricich was on the spread sheet renders Giuricich's version implausible. It is unable to account for the most important fact in this case. By contrast the Commission's version can.

[123] Thus the evidence of Giuricich, which is largely dependent on the testimony of Van der Walt, falls to be rejected taking into account the unreliability of the latter's testimony, its inherent plausibility and its inconsistency with the objective facts.

Conclusion

[124] The key objective fact in this case is the price in the Mondi spreadsheet attributed to Giuricich. Its presence is evidence of a collusive outcome. Not because the price itself has any inherent collusive quality to it. Rather, because its presence cannot be sensibly explained by Giuricich but can by the Commission. Once Giuricich had embarked on the defence it did, it could not rely solely on gaps in the chain of evidence to make out a defence. True, the Commission could not fill all the gaps in the narrative through direct evidence. But it has led evidence of important stages, -the phone call, the visit of Poorter that followed and it has evidence of the price in Mondi's records and an invitation to bid contained in Ramchunder's email.

[125] The gaps can be filled by the most obvious inferences being drawn. Some gaps Giuricich has filled itself. Van der Walt testified to two telephone calls with

Grinaker although McNair was only party to the one and had to presume the other.

[126] Once the outcome has been established – the price in the Mondi spreadsheet which Ramchunder testified he filled in from the documents submitted, and its consistency with the version offered – that it was higher than that of Grinaker – the lack of any other explanation for its presence suggests that it is reasonable to infer that the facts speak for themselves.

[127] The courts have long recognised that the facts can speak for themselves. In *Goliath*, a medical negligence case, the court held that the presence of an unexplained swab in a patient after an operation, was sufficient to ground a case of negligence even though the actual evidence of how it got there could not be established by the plaintiff. The Court observed the following:

*"In that regard it is important to bear in mind that in a civil case it is not necessary for a plaintiff to prove that the inference that she asks the court to draw is the only reasonable inference, it suffices for her to convince the court that the inference that she advocates is the most readily apparent and acceptable inference from a number of possible inferences (AA Onderlinge Assuransie- Assosiasie Bpk v De Beer 1982 (2) SA 603 (A); see also Cooper & another NNO v Merchant Trade Finance Ltd 2000 (3) SA 1009 (SCA))."*⁷⁶

[128] The explanation put forward by the Commission as to how the price purporting to be that of Giuricich came to be in Mondi's spread sheet is the most readily apparent and acceptable inference in this case. By contrast the version offered by Giuricich in defence fails to account for what appears in the documentary evidence. Furthermore its "walk away" version, an effort to account for the content of the telephone calls with Grinaker over the project, is far less probable than the version offered by the Commission witnesses.

[129] Finally, we take note of the fact that less than three months later – and this fact is common cause – the same two firms were engaged in April 2008 in cover

⁷⁶ *Goliath v Member of the Executive Council for Health, Eastern Cape* (085/2014) [2014] ZASCA 182; 2015 (2) SA 97 (SCA) (25 November 2014 paragraph 19).

pricing – this time with Giuricich giving a cover price to Grinaker in respect of a project for Unilever. This subsequent event indicates a degree of trust and past co-operation between the parties. This fact is again more consistent with the Commission's version on the Mondi project than with Giuricich's. It seems unlikely that if Grinaker had bullied Giuricich off the earlier project, it would have come at the last minute looking for a favour from its victim, and even less likely, given Giuricich's alleged anger with what happened, that a personality as feisty as Van der Walt would have obliged. It is more likely that if the one firm had done the other a favour earlier, the other was happy to return it later. We find therefore that the evidence establishes on a balance of probabilities that -

1. Mondi invited three firms to bid for the construction of its Mondi Reel project;
2. Grinaker, a competitor of Giuricich, and a company that was also invited to bid, at some stage in the process, prior to the submission of the bids, provided Giuricich with a cover price; either at the former's suggestion or the latter's request; and
3. Giuricich having obtained this cover price provided it to Mondi who received it and considered it.

[130] In the circumstances Grinaker and Giuricich engaged in collusive tendering in contravention of section 4(1)(b)(iii) of the Act.

Remedy

[131] We did not have a separate hearing on remedies but instead we asked both parties to furnish us with written submissions on an appropriate remedy.

[132] The parties are far apart on a remedy. The Competition Commission in addition to a declaratory order seeks the imposition of an administrative penalty of R 8 695 646.48 which is 8% of Giuricich's turnover for the financial year ending 2015.

[133] Giuricich urges us not to impose any penalty or if we are inclined to do so, to impose no more than a symbolic penalty. In lieu of a penalty or a harsher

penalty, it recommends the imposition of an obligation on it to run a compliance program.

[134] Despite being so far apart on the quantum of an appropriate remedy the Commission and Giuricich had much in common as to what the important factors were to take into account.

[135] Given that, it is not necessary for us to discuss the respective arguments in detail, but we will indicate only the instances where they diverged.

[136] We approach the remedies analysis in three parts. First, we discuss what type of remedy is appropriate, and since, as will be seen that we conclude that an administrative penalty is appropriate, we then, in the second part, discuss what methodology should be applied to calculating an administrative penalty. Finally, we look at both the aggravating and mitigating facts in order to determine an appropriate penalty.

Is a penalty appropriate?

[137] Giuricich argued that we should not impose a penalty on it or at worst, a purely symbolic one. The Commission was utterly opposed to this.

[138] We cannot agree with Giuricich's approach. No other remedy suggested by it is adequate. A compliance program is hardly likely to be effectual given that the contravention involved the most senior executive of the organisation, who even up to the hearing date seemed to lack an appreciation of any wrong doing.⁷⁷ The only proper remedy on these facts is an administrative penalty. Neither is a symbolic one appropriate; it would not constitute an adequate deterrent.

What methodology should we apply to the penalty calculation?

[139] When assessing the size of a penalty to be imposed, the Act makes it perfectly clear that the penalty must be "*appropriate*." The Competition Appeal Court has

⁷⁷ See transcript 24th and 25th November 2016 pages 450 – 452.

observed that an appropriate penalty is one that takes into account the principle of proportionality.⁷⁸ Although the Act sets out a ceiling on a penalty – it may not exceed 10% of the firm's turnover in the Republic in the preceding financial year - each case must be decided in the light of its factual matrix.

[140] Thus whilst we have made use of a methodology adopted by the Tribunal in past cases and another by the Commission in its guidelines, we have done so not to rigidly determine the final penalty, but to arrive at a range of possible outcomes. The final outcome necessarily entails a fair measure of discretion by the Tribunal to ensure that the penalty remains proportional to the harm caused in the present case.

[141] In most section 4(1)(b) cases recently, the Tribunal has applied the six step approach set out in the *Aveng* case in calculating a penalty.⁷⁹ We will apply this approach first:

Step One

Determine the affected turnover in the relevant year of assessment

In this case given that the rigged bid related to the Mondi Reel project and the bid was awarded at R30 million after the final negotiation with Grinaker, we will adopt that as the affected turnover even though this is reflective of Grinaker's not Giuricich's turnover.

Step 2

Calculation of the base amount being that portion of the turnover relied upon

The approach to the percentage of the base turnover used to calculate the penalty can vary and is discretionary, in this case the percentage should be set at a low amount. We say this for several reasons. Firstly, the bid was won by Grinaker, not Giuricich. This means that the affected turnover is based

⁷⁸See *Reinforcing Mesh and Another v Competition Commission and others* (CAC Case No.:119/120/CAC/May2013) at Paragraph 59 "*In short, and as set out in this court's jurisprudence, the imposition of penalties entails a proportionality exercise.*"

⁷⁹ See *Competition Commission v. Aveng (Africa) Limited t/a Steeleedale, Reinforcing Mesh Solutions (Pty) Ltd, Vulcania Reinforcing (Pty) Ltd and BRC Mesh Reinforcing (Pty) Ltd* Case No.: 84/CR/Dec09

on what Grinaker earned not Giuricich. Second, there is no evidence that Giuricich received any payment for providing a cover price and thus there is no evidence that Giuricich benefited financially from the contravention. Third, there was only evidence of one collusive bid. We explain later why we cannot take into account the Unilever incident in this matter for the purpose of the calculation of the penalty.

We thus determine the base percentage at 3.5 % of R 30 235 000 which is R 1 058 225.00.

Step 3

Where the contravention exceeds one year multiply the amount obtained in Step 2 by the duration of the contravention

Since this was a once-off contravention there is no need to multiply for further years of contravention.

Step 4

Rounding off if this amount exceeds the cap provided for in section 59(2)

It does not, so this step is not necessary.

Step 5

Consider factors in aggravation or mitigating that may lead to a discount or premium on the amount reached in Step 3.

- [142] Bid rigging is one of the most egregious competition contraventions as the collusive outcome is more likely to be effective since the scope for cheating is reduced and hence the harm suffered is greater. In the present case Mondi only had two bids to consider. By providing a cover price which was higher than that of Grinaker, Giuricich's conduct ensured that Grinaker was able to charge a price higher than it would have, had there been a proper competitive bidding process. As the Commission points out had Giuricich simply declined to bid, (which we have found it did not) as did Stefanutti, Mondi may well have approached another firm to bid. Instead the rigged bid gave Mondi the impression, incorrectly, that Grinaker's price was a product of competitive bidding and hence should be accepted, since this was the lowest bid.

[143] Thus although Giuricich did not secure the project for itself, it was responsible with Grinaker for harm to Mondi which had to pay a higher price for the project as a result.

Mitigating factors

[144] The nature and gravity and extent of the contravention: The most significant mitigating factor is that Giuricich did not win the bid nor did it receive any compensation for taking the cover price and hence did not profit from the contravention. This factor has already been taken into account in Step 2 when as explained the base amount was set at 3.5%, which is a significant reduction.

[145] We now consider if there are any other mitigating factors not yet taken into account in Step 2. Unlike in many other cover pricing cases we have had experience of, the cover price in the present case did not constitute the final price that Mondi had to pay. We know that Mondi did not accept the bid prices submitted, but negotiated a lower price. Whilst this must be recognised as constituting slight mitigation, it needs to be seen in perspective. The negotiations concerned what discount Mondi could achieve off the bid prices. If this price was already artificially high, because of the bid rigging, then this set a higher ceiling from which the discounted price was negotiated off, than if there had been no bid rigging.

[146] It is not clear whether the initiative for the cover price came from Giuricich or whether it was persuaded to do so by Grinaker. We accept that at least initially Giuricich had not intended to involve itself in bid rigging and had, due to the representations of Frederick, believed, for a while at least, that there would be a negotiated contract. It may well be that the initiative for the cover price came from Grinaker and we give Giuricich the benefit of the doubt on this point as an aspect of mitigation.

[147] *Loss or damage suffered:* Mondi will have paid more for the project but we do not have any evidence as to the extent that Mondi paid a supra-competitive to Grinaker. Given the sophistication of Mondi as a customer which regularly engages construction firms, we assume in Giuricich's favour that the level of

profitability was not that much higher than it would have been absent the bid rigging.

- [148] *Extent of co-operation with the Commission:* There is some dispute as to whether Giuricich has co-operated with the Commission. On this the two parties were at variance. There was an attempt to negotiate a settlement but this fell through. We are reluctant to hold a failed settlement against a respondent firm. On the other hand Giuricich opposed the referral on the merits and put the Commission to the trouble of prosecuting the matter. Considering both arguments we regard this aspect as neutral. Neither side has made a case that the degree of co-operation should constitute an aggravating or mitigating factor.
- [149] *Level of profit derived:* There is no evidence that Giuricich derived any profit from the contravention. The firm that profited was Grinaker. This factor however has also been taken into account in Step 2 as mentioned.
- [150] *Other factors:* Much of Giuricich's representations concern the fact that it is a medium sized firm and until recently struggled to keep profitable.
- [151] In a supplementary witness statement submitted after the hearing on the merits, Mr. Van der Walt alleged that Giuricich was in a precarious financial state.⁸⁰ Giuricich he states suffered a period of financial decline from 2009 to 2014 and "... has only recently emerged from this decline albeit that its financial position remains precarious still." ⁸¹
- [152] Van der Walt enclosed Giuricich's annual audited financial statements for this period which indicate that the firm suffered losses during all the years in this period bar one, 2011, where the level of profit was nevertheless very low.
- [153] However less convincing was the argument that its financial position remains precarious at this point in time i.e. in the first quarter of financial year 2017 when the statement was provided to us.

⁸⁰ See supplementary witness statement of Mr Rodney Van der Walt undated section D2.

⁸¹ Ibid, paragraph 21.

[154] No financials were given for any period more recent than 2015 and even if the audited financials had not been completed for 2016, at least management accounts could have been furnished. Mr. Van der Walt also submitted board minutes for the period 2010 to 2015. Certainly a reading of these board minutes up till at least mid- 2015, reflects the gloomy financial prospects of the firm at the time. He also states that senior managers were required to give sureties to the bank and this documentation is also disclosed.

[155] However again more current information was not supplied. The last board minute submitted is dated 29 May 2015. We have not been provided with anything more current. Significantly in this minute the following comment is recorded under the heading *State of Economy/ Prognosis: Verbal discussion*

*"Contrary to most of the business analysts reporting that the economy continues to struggle, we find ourselves having secured a large number of projects on a negotiated basis and this augers well for a complete recovery of our business which has been struggling since 2009."*⁸²

[156] This statement is consistent with oral evidence of Mr. Van der Walt during the hearing on the merits. As the Commission pointed out, Van der Walt during his testimony had boasted about the significant projects that his firm was presently engaged in.⁸³ Van der Walt mentions he is doing a project for a client valued at R350 million which he stated was the "...the biggest fridge in Africa." He also mentioned several other engagements which he described as "... major projects".

[157] Thus although there is evidence that Giuricich for a period from 2009 until 2014 was experiencing financial difficulties, no documentary evidence has been presented to suggest that is still the current position. The comments in the minutes and Van der Walt's testimony, which are the only more contemporary

⁸² See Minutes of Directors meeting dated 29 May 2015, page 243 supplementary witness statement bundle

⁸³ See transcripts page 221-222 and Commission's Penalty Written Submissions paragraphs 40 -41.

evidence we have since that period, suggest that the firm's position has improved and can no longer be described as "*precarious*".

[158] Nevertheless we are not without sympathy for the firm. If Giuricich's circumstances have only recently become more favourable, then its cash flow, rather than its overall ability to pay, is more likely to be the problem. We have taken this into account by staggering the period over which the penalty is required to be paid.

[159] Giuricich also submitted that it had spent a considerable amount on paying for its defence in this case. That may be so, but that cannot be regarded as a mitigating factor. By choosing to defend the matter Giuricich voluntarily assumed this risk.

[160] Was there a repeat offence? We know that Giuricich admitted to cover pricing in relation to the Unilever project in a consent agreement with the Commission which was approved by the Tribunal on 03 December 2014 and for which it paid a penalty of R149 429.31. However although the settlement preceded the conclusion of the present matter it related to an event that occurred after (in April 2008) the event that gave rise to liability in the present matter (circa February 2008). For that reason it would be unfair on these facts to regard the offence that occurred first as a repeat offence. This factor is therefore not taken into account as an aggravating factor. We consider for the purpose of this decision that Giuricich had not prior to Feb 2008 contravened the Act. We have also decided that in determining proportionality we should have regard to Giuricich's 2008 annual turnover as this is when the contravention occurred, not the 2015 turnover, which as noted is higher, and the one the Commission had regard to.

- [161] Note that this does not mean we ignore the provisions of section 59(2) of the Act which sets a ceiling for a penalty to not exceed 10% of the firm's annual turnover in the "...preceding financial year".⁸⁴
- [162] In this case the preceding financial year would be 2015. This represents the permissible ceiling for the penalty. However there is nothing in the Act which prevents the Tribunal from having regard to the turnover of the firm in the year of the contravention, particularly when the contravention is not ongoing, but a once-off event as we have to find in this case. Whilst such an exercise might not be required in every case it is a proper approach to applying the principle of proportionality.
- [163] *Conclusion:* On balance the mitigating factors exceed the aggravating factors although they are not compelling. We have discounted the amount of R1 058 225.00 reached in Step 4 to R900 000. This is a reduction of approximately 15%.
- [164] This amount is less than 10% of the annual turnover in the "*preceding financial year*", which is the year ending 2015, and thus does not exceed the permissible ceiling for penalties set out in the Act.⁸⁵ Nor is this amount disproportionate having regard to the approach the Commission has taken in its own Guidelines.⁸⁶ The approach taken there is to provide for penalty at 2% for a firm that settles in what is termed phase 2.i.e not in response to an initial invitation to settle but only later. Given that Giuricich did not settle with the Commission, but contested the merits, not merely the penalty, a premium of 1% would be appropriate, thus both approaches – the *Aveng* and the Commission's guidelines, yield a similar outcome – a penalty that approximates to 3% of the affected turnover in the year of the contravention.

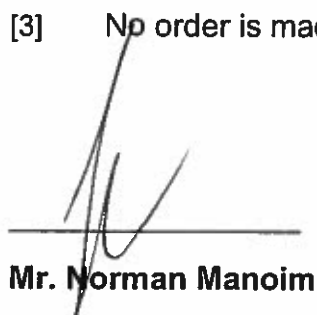
⁸⁴ See section 59(2) of the Act which states: "An administrative penalty imposed in terms of sub-section (1) may not exceed 10% of the firm's annual turnover in the Republic and its exports from the Republic during the firm's preceding financial year."

⁸⁵ Its thus not necessary to have regard to Step 6 of the *Aveng* methodology which provides for rounding off if the amount reached at the end of Step 5 exceeds the 10% annual turnover cap.

⁸⁶ See the Commission's "*Guidelines for the Determination of Administrative Penalties for Prohibited Practices 2014*"

ORDER

- [1] Giuricich and Grinaker are found to have contravened section 4(1)(b)(iii) of the Act.⁸⁷
- [2] Giuricich is ordered to pay an administrative penalty of R 900 000. This amount must be paid in two equal instalments. The first within three months of the date of this order and the second instalment three months thereafter.
- [3] No order is made as to costs.



Mr. Norman Manoim

22 May 2017

DATE

Ms Yasmin Carrim and Prof. Imraan Valodia concurring

Tribunal Case Managers: Karissa Moothoo Padayachie and Busisiwe Masina

For the Commission: Advocate K.K Maputla instructed by Ndobela Lamola Inc.

For the First Respondent: Advocate T.L Marolen instructed by Morris Fuller Williams Inc.

⁸⁷ Note in the Notice of Motion the Commission seeks the declaratory relief against the respondents. Grinaker, although cited as a respondent, did not oppose this.