

COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 15/CR/Feb07
50/CR/May08

In the matter between:

The Competition Commission

Applicant

and

Pioneer Foods (Pty) Ltd

1st Respondent

Panel : D Lewis (Presiding Member), N Manoim (Tribunal Member), and Y Carrim (Tribunal Member)

Heard on : 17, 18, 19, 22, 23, 24 June 2009 and 9 September 2009

Reasons issued : 3 February 2010

Decision and Order

Introduction

1. This case concerns two complaint referrals brought to us by the Competition Commission against Pioneer Foods (Pty) Ltd, known as the Western Cape complaint and the National complaint, in which Pioneer's bread baking divisions, Sasko and Duens, are alleged to have formed part of bread manufacturers' cartels that fixed prices and divided markets. The Commission alleges that Pioneer Foods had contravened sections 4(1)(b)(i) and (ii) of the Act.

History of the case

2. In December 2006 the Commission received information of an alleged bread cartel operating in the Western Cape. Following a preliminary investigation the Commission initiated a complaint against Premier Foods (whose bread brand is Blue Ribbon), Tiger

Brands (whose bread brand is Albany) and Pioneer Foods (whose bread brands are Sasko and Duens), all of whom allegedly had been involved in a bread cartel. This will be referred to as the Western Cape complaint.

3. During the Commission's investigation into the Western Cape complaint Premier Foods applied for leniency indicating to the Commission its willingness to fully co-operate with the Commission on its role in the bread cartel. It disclosed to the Commission that Premier Foods ('Premier' or 'Blue Ribbon'), Tiger Brands ('Tiger' or 'Albany') and Pioneer Foods ('Pioneer' or 'Sasko') had been operating a bread cartel in the Western Cape by fixing selling prices and other trading conditions.
4. Premier also revealed that a bread cartel had operated in other parts of the country and that they had also entered into agreements which involved the division of markets by allocating territories. Based on this information the Commission proceeded to initiate a second investigation into the allegation that a bread cartel operated in other parts of the country. This will be referred to as the national complaint.
5. On 14th February 2007 the Competition Commission referred the Western Cape complaint against Tiger Food Brands Ltd t/a Albany Bakeries and Pioneer Foods (Pty) Ltd t/a Sasko and Duens Bakeries to the Tribunal. The national complaint against Pioneer Foods (Pty) Ltd and Foodcorp (Pty) Ltd was referred to the Tribunal on 6th May 2008.
6. After filing its answering affidavit in the Western Cape complaint referral Tiger approached the Commission with a view to negotiate a consent order agreement. In doing so it not only provided the Commission with evidence on the bread cartel but also conducted its own internal investigation into the allegations, which it found to be true. On 28th November 2007 the Tribunal imposed a fine of R 98 874 869.90 on Tiger Brands for its role in the bread cartel.¹ Pioneer however, at that stage, denied that it was involved in a Western Cape cartel and therefore remained as the only respondent in the Western Cape referral.
7. Foodcorp, cited as second respondent in the national complaint, subsequent to filing its answering affidavit also proceeded to enter into a consent order agreement with the Commission. On 6th January 2009 the Tribunal confirmed the consent order between the Commission and Foodcorp and imposed a fine of R45 406 359, 82 on Foodcorp.²

¹ This represents 5.7% of its turnover from baking for the financial year 2006.

² This represents 6.7% of its turnover for baking operations for the financial year 2006.

Pioneer also denied its involvement in this complaint and thus remained as the only respondent in the national complaint.

8. On 6th January 2009 the Tribunal, on application by the Commission, consolidated the two complaints for purposes of hearing. The application was not opposed by Pioneer.
9. The Tribunal, on 3rd April 2009, also heard two interlocutory applications brought by Pioneer, one for further and better discovery and the other for further particulars for trial. The Tribunal dismissed the application for further and better discovery after it found that the Commission was entitled to claim litigation privilege in Tribunal proceedings and that the statements by Premier, made in the Western Cape referral in the course of its leniency application, fell within that privilege. Pioneer also requested further particulars in respect of each of the meetings and phone calls mentioned in both referrals, which was also denied. The Tribunal held that Pioneer's demands for greater particularity would be met when the witness statements were filed prior to the commencement of the hearing.
10. The hearing commenced on 15th June 2009 and was argued before the Tribunal on 9 September 2009. Several witness statements were filed by the Competition Commission. However only the following witnesses were called to present oral evidence:³
11. In the Western Cape complaint:
 - 1) Terrence Lavery, Regional Director of the Eastern and Western Cape at Premier Foods
 - 2) David Michael Donovan, Cape Regional Sales Manager at Premier
 - 3) Graham Ford, Regional Operations Manager: Informal Trade at Premier
12. In the National complaint:
 - 1) Willem van der Linde, Customer Service Manager for inland regions at Premier
 - 2) Elmarie, Pieterse, manager of Premier's Blue Ribbon bakery at Potchefstroom in North West.
13. Pioneer Foods filed four witness statements but elected to call only:⁴

³ Witness statements were also deposed to by: Mr William Francis and Mr McCabe, both of Tiger Foods.

⁴ The remaining witness that deposed to statements but did not give evidence in chief were: Hendrik Wilhelm Hollenbach and Jacob Patience

- 1) Andries Charl Goosen, General Manager of Sasko Bakeries at Pioneer Foods
- 2) Prof Johan Willemse, Agricultural Economist, expert witness for Pioneer

Industry Background

14. The bread industry was extensively regulated until 1991. Through legislation a quota system was established, product specifications such as weight, height and width per loaf were prescribed, prices were set and volumes and distribution areas for each producer determined. There were approximately 370 bakeries country wide which included the four largest national bakeries and smaller independent brands.
15. In this regulated context regular meetings took place between bread producers largely, although not exclusively, under the auspices of the Chamber of Baking, to whom all of the bakers belonged. Various issues were discussed including producers encroaching on each other's allocated areas and producers exceeding their volumes and the compensation that those violating the agreements were obliged to pay. Production issues such as the supply and quality of ingredients as well as labour issues were also discussed. A culture of co-operation and information sharing on prices, volume and market allocation was thus entrenched in the industry over many decades.
16. After deregulation the interaction between bread producers continued with regard to common issues such as labour and missing bread crates. The Chamber also continued as a legitimate forum for sharing information on the industry where issues such as deliveries of wheat, quality of wheat, unscrupulous bakers and security concerns were discussed freely and legitimately. However, the admissions made by the leniency applicants and by those who entered into consent orders with the Commission revealed that those parties had also continued, sometimes through auspices of the Chamber of Baking as well as through other less formal forums, to engage in cooperative interactions in contravention of the Competition Act.
17. There are four primary bakeries that between them enjoy a market share of between 50-60% of the domestic bread market in South Africa:
 - 1) Blue Ribbon Bakeries owned by Premier Foods Ltd
 - 2) Albany Bakeries owned by Tiger Consumer Brands Ltd

3) Sasko and Duens⁵ Bakeries owned by Pioneer Foods (Pty) Ltd

4) Sunbake Bakeries owned by Foodcorp (Pty) Ltd

18. The four primary plant bakeries are all vertically integrated, that is they mill their own wheat and use the flour in their respective bakeries to produce bread. Wheat flour is the main ingredient in bread and represents approximately 41% of the cost per loaf of bread. The bakeries' bread recipes are in essence similar since they contain the same ingredients.⁶ The costs of operating a plant bakery are also comparable, as are the costs of distribution which is mainly driven by fuel prices. The bakeries' input costs – essentially comprising wheat flour, fuel and labour - are therefore similar and are subject to the same price fluctuations. Pioneer avers that bread is a very low margin business, operating at a net profit of between 2 - 4%.

19. The remainder of the market is served by smaller independent bakeries of which, avers Pioneer, there are approximately 4000 including stand alone, in-store and franchise bakeries.

20. Customers are divided into the large retail groups⁷, such as Shoprite/Checkers, Pick 'n Pay and Spar, the general trade such as spaza shops, cafes and smaller retailers and the "resellers", the independent distributors and agents briefly referred to above.

21. Although bread can be transported over large distances the primary plant bakeries each divide the country into different geographical sub-regions in which bread is distributed. In the case of Pioneer Foods the regions are divided as follows:⁸

Region	Pioneer's share of the plant bakeries market in each region
Gauteng	18%

⁵ Duens was Bokomo's bakery division in the Western Cape before it merged with Sasko in 1997. Sasko decided to keep the Duens brand name because it is a strong brand in the Western Cape.

⁶ Pioneer has 32 different kinds of bread products, for instance standard bread, English pan loaf, speciality loaves and sandwich loaves, etc.

⁷ The three large retailers purchase approximately 25 – 30% of all plant bakeries' production and are the largest single bread buyers in South Africa.

⁸ According to Pioneer, Tiger and Premier use the same geographical sub-regions in their business models.

Region	Pioneer's share of the plant bakeries market in each region
Central (KZN, Free State, Northern Cape)	30%
Western Cape	46%
Limpopo ⁹ and Mpumalanga	42%
Eastern Cape	50%

22. The plant bakeries set their prices nationally. Pioneer refers to its national price as the PR00 list price¹⁰ and sells its bread to distributors and retailers at a discount or rebate off the list price. The list price is therefore not the actual price paid by the customer. Once the PR00 list price is determined Pioneer, in common with the practice employed by its competitors will inform its various retail customers of the change in price. Pioneer's national sales managers, who are responsible for the actual bread prices for the national key accounts, being the large supermarket chains, forecourts and convenience franchises meet with the respective buyers of these important retailers in order to communicate the price adjustment and, critically, to negotiate discounts before the nett price is loaded on to the large retailers' systems. Increases to the general trade customers and distributors will be communicated per letter usually delivered together with the bread.

23. Pioneer's bakery managers are responsible for determining the actual bread price for smaller customers, local supermarkets, convenience stores and distributors and will take regional competition into consideration when determining the bread price. Pioneer allows its bakery managers to discount off the list price by up to 15%. Beyond that they need approval of one of the two national sales managers, Hendrik Hollenbach for the inland region and Gerhard Louwrens for the coastal regions. If a discount exceeding

⁹ Pioneer's market share in Limpopo is 70%.

¹⁰ Pioneer uses a bread costing system that is driven by input costs.

30% was contemplated then the authority of Mr. Charl Goosen, the General Manager of Pioneer's baking division, Sasko Bakeries, was required.

24. Sasko sells approximately 10% of its total bread sales to independent bread distributors, also referred to as agents.¹¹ Sasko sells bread to the agents either on cash or credit at a discount off the PR00 list price. The agents then re-sell to the informal market. The discount is determined by the value of the purchaser to Sasko taking into account factors such as location, daily sales volumes and transport. Customers may also earn a rebate on their purchases over a period.

Relevant legislation

25. We examine the Commission's evidence in detail later but it behoves us to set out at this stage the relevant provisions of the Act and the guidelines provided to us by our courts and courts in other jurisdictions to matters of this nature.

26. 1. Section 4(1)(b) of the Competition Act provides –

4. Restrictive horizontal practices prohibited

(1) 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 –

.....

(b) it involves any of the following *restrictive horizontal practices* :

(i) directly or indirectly fixing a purchase or selling price or any other trading condition;

(ii) dividing markets by allocating customers, suppliers, territories, or specific types of *goods or services*”

¹¹ Agents are something of an historical anomaly. During the political unrest in 1970 – 1980 Pioneer delivery trucks could not enter townships. To circumvent this problem, agents would collect bread from bakeries and distribute the bread to customers in the townships.

26.2. Section 1(1)(ii) 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.*”

26.3. ‘*Concerted practice*’ is defined in sec 1(1)(vi) as “*co-operative, or co-ordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement.*”

27. In South Africa, price fixing agreements and agreements to divide markets between competitors are considered to be the most egregious offences under the Competition Act. It is for this reason that the South African legislature has sought to create a *per se* offence under section 4(1)(b) and has recently introduced an amendment to the Competition Act which intends to create criminal liability for persons participating in cartel activity.¹²

28. In *American Natural Soda Ash Corp v Competition Commission*,¹³ the Supreme Court of Appeal set out the import of section 4(1)(b):

*“It is clear from its juxtaposition with s 4(1)(a) that s 4(1)(b) is aimed at imposing a ‘per se’ prohibition: one, in other words, in which the efficiency defence expressly contemplated by sub-para (a) cannot be raised. The reason for the blunt terms of sub-para (b) is plain. Price-fixing is inimical to economic competition, and has no place in a sound economy. Adopting the language of United States anti-trust law, price-fixing is anti-competitive per se. All countries with laws protecting economic competition prohibit the practice without more. The fact that price-fixing has occurred is by itself sufficient to brand it incapable of redemption.”*¹⁴

29. Section 4(1)(b), as opposed to section 4(1)(a) defines the prohibited practices by reference to whether or not an agreement contains one or more features set out in the sub-sections of 4(1)(b) rather than by reference to their effect in a relevant market. Section 4(1)(b) constitutes an offence for which no justification grounds are admissible. Once the Tribunal has found that an agreement or concerted practice between or among competitors exists as contemplated in section 4(1)(b) that is the end of the matter. There is no further enquiry as to the effect of the conduct on the market or whether it was

¹² See provisions of section 73A of the Competition Amendment Act which has been signed into law but not yet promulgated.

¹³ [2005] 1 CPLR 1(SCA)

¹⁴ Par 37

justified or not. This approach is confirmed by the Competition Appeal Court and by the Supreme Court of Appeal -¹⁵

“The Tribunal has found that once the conduct complained of is found to fall within the scope of the prohibition that is the end of the enquiry. There is no potential for a further enquiry as to whether the conduct is justified (an enquiry of the kind that is envisaged by s 4(1)(a)), and evidence to that end is not relevant and thus inadmissible. It is this finding that the Competition Appeal Court upheld; and it is clearly correct.”

30. In this case we are not concerned with the admissibility of evidence as was at issue in the ANSAC case. Nor are we concerned with any justification grounds that Pioneer may wish to advance - for there are none. All we are required to consider is whether the alleged conduct of Pioneer’s employees falls within the prohibition provided in section 4(1)(b)(i) and (ii). The Supreme Court made it abundantly clear that it is for the Tribunal *“to consider, in the manner and in accordance with such procedure as it may decide, to what extent evidence may be admissible to establish whether the Ansac agreement falls within the prohibition contained in s 4(1)(b)”*.¹⁶

31. The attitude in other jurisdictions towards hard core cartels or conduct of the type contemplated in 4(1)(b)(i) and (ii) has been one of utmost repugnance. Cartels are viewed as the most abhorrent anti-trust practices and have been described as a cancer to competition and harmful to consumers and economic development -

*“Fighting cartels is one of the most important areas of activity of any competition authorityOf all restrictions of competition, cartels contradict most radically the principle of a market economy based on competition.”*¹⁷

32. While fighting cartels is viewed as one of the most important areas of activity for competition agencies globally, the ability of agencies to effectively do so is often hampered by the difficulties pertaining to the gathering of direct evidence. This is not surprising given the nature of cartel activity. Competitors engaging in co-ordination rather than competition tend to conduct themselves in secretive and stealthy ways; meeting behind closed doors, ensuring that there is no paper trail, agreeing on signals

¹⁵ *American Soda Ash Corporation and Another v Competition Commission and Others* [2005] 1 CPLR 1 (SCA) at par 37

¹⁶ Par 60

¹⁷ Extract from Mario Monti’s opening speech at the 3rd Nordic Competition Policy Conference in Stockholm, September 2000 “Fighting Cartels – why and how?” Konkurrensverket, 2000.

which they can send to each other and at times cloaking their activities in the guise of normal commercial practices thereby seeking to mislead and divert anti-trust agencies.¹⁸

33. This is why agencies globally have found creative ways by which to secure evidence of cartel activity, the Competition Commission's leniency programme being a case in point. This is also why legislatures have sought to create *per se* offences such as those in section 4(1)(b) and courts have demonstrated their intolerance in the standard of review applied by them to offences of this nature.¹⁹

34. The evidence that a court will have regard to in order to determine whether or not an agreement or understanding between competitors constitutes a restrictive horizontal practice will depend on the nature of the case and the manner in which parties have structured their arrangements. At times cartel arrangements are structured in seemingly acceptable commercial practice, designed specifically to pass muster under *prima facie* anti-trust scrutiny.²⁰ At other times cartel members will seek to disguise their conduct by ensuring that the semblance of price leadership is maintained.²¹ At times the conspiracy is maintained on the telephone, at times in meetings, at times by exchanges of price information. Moreover the nature of a relationship of co-ordination between entities which would otherwise be competitors is not an easy one and would be marked by occasional cheating and absences from meetings, and a court would be careful, without further evidence, to rely solely upon such instances as proof that no such arrangement is in place. Furthermore to find that an agreement of co-ordination exists does not require evidence of daily co-ordination or attendances at each and every meeting.

35. For example the definition of an agreement in Article 81(1) of the EC Competition Law that prohibits agreements, decisions and concerted practices that fix prices or any other trading conditions has been given a wide meaning by the Commission and Courts. The Commission said in the British Sugar case²² that an agreement does not have to be made formally or in writing, and no expressed sanction or enforcement measures need be involved, it is enough that the undertakings in question should have expressed their joint intention to conduct themselves in the market in a specific way. The Court of First Instance, in the *Adalat* case,²³ stated that it was not important what form a cartel

¹⁸ See the discussion of the US *per se* approach to horizontal restrictive practices in *Nutshell* pages 200ff and the approach in the EU in Fox, EM in "*The Competition Law of the European Union*" 2009 West.

¹⁹ *supra*

²⁰ See for example *Toys R Us v Federal Trade Commission*, decided August 1, 2002 in the United States Court of Appeals for the Seventh Circuit, Case No 98 – 4107.

²¹ See for example the evidence of Lavery and Van der Linde in this case.

²² See Commission Decision of 22 March 1999, 1999/210/E (British Sugar) (1999) OJ L 76/1, at par 22.

²³ 1996 ECR 11-381

agreement took on, i.e. whether the agreement was formal, informal or a gentleman's agreement, so long as there was "... *the existence of a concurrence of wills between at least two parties, the form in which it manifested being unimportant so long as it constitutes the faithful expression of the parties' intention.*"

36. The European Competition Commission has also stated that a party is guilty of participating in a cartel regardless of whether that participant actively participated in the day-to-day implementation of the agreement, a concept which is known as the concept of "a single overall agreement". In the *PVC* decision²⁴ the European Commission found that all fifteen firms in the cartel were party to the agreement even though some had not attended every meeting or been involved in every decision made. Nor did the fact that some members intended to deviate from the cartel exclude them from the agreement. Their participation in the overall agreement was sufficient to establish their guilt. This position was upheld by the Court of First Instance.²⁵ The CFI in *Trefileurope v Commission* also held that the fact that an undertaking does not abide by the outcome of meetings which have a manifestly anti-competitive purpose does not relieve it of full responsibility for its participation in the cartel, if it has not publicly distanced itself from what was agreed in the meetings.²⁶ In *Thuysen Steel v Commission* the CFI found that attendance of meetings that involved anti-competitive activities was enough to establish participation in the cartel, in the absence of proof to the contrary.²⁷

37. We turn now to consider the conduct of Pioneer's employees in light of the guidelines provided by courts in other jurisdictions and our own Supreme Court.

Western Cape complaint

38. Pioneer Foods conceded that it has, in respect of the Western Cape complaint, acted in contravention of sec 4(1)(b) of the Act. This concession only came at the end of the hearings during legal argument. It is accordingly within our discretion to impose an administrative penalty on Pioneer and this, following our standard practice in dealing with this, the most egregious of antitrust offences, is precisely what we intend doing. However, there do remain important factual disputes regarding the nature, extent and duration of the offences committed by Pioneer. In essence, Pioneer admits that it co-

²⁴See Commission decision of 27 July 1994 (94/599/EC) PVC (1994) OJL 239/14.

²⁵ *LVM v Commission* (Joined cases T-305/94) [1999] ECR II-931 (known as PVC II) at par 715.

²⁶ Case T- 141/89[1995]ECR II-791.

²⁷ *Thuysen Steel v Commission* [1999] CCR II-347

operated with its competitors in fixing the price of the discount granted to the agents or resellers and in fixing the price of toaster bread. It also admits to certain arrangements that may be understood as market sharing arrangements. It does not however admit to having participated in fixing the price of the standard loaf of bread or the timing of the increase, the most serious of the offences levelled against the Western Cape bread producers. Because this has a bearing on the size of the administrative penalty to be imposed, we are, despite the concessions made required to examine the evidence before us.

39. The primary plant bakeries in the Western Cape, which collectively account for approximately 60% of bread sales in the region, are:²⁸

- 1) Albany Bakery, owned by Tiger Brands
- 2) Sasko and Duens, owned by Pioneer; and
- 3) Blue Ribbon, owned by Premier Foods

40. Up until it was disbanded in 2002 meetings of the local chapter of the Chamber of Baking, took place regularly in the Western Cape. These were chaired by Mr. Louwrens, a senior employee of Sasko. Mr. Lavery, an employee of Premier, testified that it was common practice for the participants from the various bakeries to discuss pricing issues after the conclusion of the official business of the meetings. Lavery also testified that after the local chapter of the Chamber of Baking was disbanded in 2002 informal meetings continued to be convened every 4-5 months to discuss, inter alia, price increases, the timing thereof and discounts to agents. However, according to Lavery agreements that arose from these informal meetings were often not honoured. It appears that the form that the cheating most often took was in the granting, by the individual bakeries, of confidential discounts particularly to the large retailers. This, in the best tradition of competition, then generated a retaliatory response from the other bakeries thus reducing the net margin gained from an agreed increase in the list price. Accordingly even these informal meetings were discontinued after a meeting held in October 2003 broke up in considerable acrimony precisely because of perceptions of cheating on pricing agreements.²⁹

41. However, *ad hoc* contact between representatives of the plant bakery continued even after these informal 'post-chamber' meetings had been terminated. Critically, at least

²⁸ The remainder of the market is served by smaller independent bakeries.

²⁹ Lavery witness statement page 408 of pleadings bundle.

from the perspective of the credibility of the various witnesses, these included, on the version of Mr. Lavery, a meeting between Lavery, a senior Premier employee, and Goosen of Pioneer. Lavery very clearly recalls the purpose of the meeting (to sound out Goosen on the possibility of a price increase), the venue of the meeting (Goosen's office in Paarl) and the outcome of the meeting (Goosen advised that Sasko did not intend to put through a price increase). Goosen, for his part, alternatively has no recollection of the meeting or denies that it ever took place.

42. There is no reason not to accept Lavery's version of the meeting. He has, at this stage, no incentive to mislead the Tribunal and his version of a number of straightforward issues pertaining to the meeting is clear and forthright. Moreover, the likelihood that Lavery and Goosen had met in this period is bolstered by other, unchallenged evidence of contact between senior representatives of the three plant bakeries active in the Western Cape. For example in 2004 Louwrens (Pioneer), Lavery (Premier) and Grobler (Tiger) met to discuss discounts and in 2006 Mr. Bester of Sasko phoned Lavery to discuss the price of toaster bread.³⁰
43. During 2005/06 the escalating theft of plastic bread crates – a critical element of the distribution process and, because of that, of the baking process itself - emerged as a serious problem which affected all the plant bakeries and compelled them to deal with this recurring problem via a number of meetings held during the latter half of 2006. The last of these crate meetings took place on the 23rd November 2006.
44. This period coincided with a significant escalation in key input costs, notably wheat and fuel. In addition Sasko was beset by severe labour problems, including a major strike. These factors all predisposed the bakeries to contemplate a significant price increase. However, the breakdown in relations between the bakers over the preceding 3 years and the persistence of significant unilateral discounting including to their retail customers, suggested that any price increase would be competed away. Indeed much of 2006 is characterised by several abortive attempts on the part of each of the plant bakeries to put through price increases, with each attempt foiled by discounting on the part of their rivals or simply by a refusal to follow their rivals' increases.³¹ Despite the best efforts of the bakeries, competition, probably driven by the imperative on the part of each bakery to maximise volumes sold, had well and truly broken out.

³⁰ Pleadings bundle p 409.

³¹ CC Heads of Argument (HOA) paras 97-107

45. But the unusually large increases in the prices of critical inputs strengthened the efforts to achieve a sustainable increase in the price of bread, one that was not eroded by inconvenience of competition. Indeed Mr. Tertius Carstens himself, the Executive director of the Sasko Division, wrote to Goosen and his two national sales managers in October 2006 emphasising the urgent requirement for an increase in the price of bread indicating that ‘we shall not have the luxury to await another price increase later than Feb 07’ because ‘(input price) increases such as these cannot absorbed within our system’.³²
46. We should at this stage emphasise that although the various plant bakeries experienced identical key cost drivers, there is no reason to expect that they would, in the absence of collusion, contemplate identical price increases. This was confirmed by both Lavery and Goosen.³³
47. However, as already intimated, in the all-important formal trade – that is, the sale of bread to the large grocery chains who accounted for a very large proportion of total sales - the list price was usually the opening gambit in a confidential series of negotiations over the size of the discount that would be extended to these powerful customers. In short it was not enough to agree the increase of the list price; this had to be accompanied by an agreement not to undermine the increase via a process of confidential discounting. As we shall elaborate below Pioneer has attempted – with, in our view, deliberate deceit – to present the discounting issue as one implicating only the discounts granted to the agents, effectively a fee for carrying out a distribution function,. However, although a clear *per se* contravention of the Act, this was a relatively trivial issue for the plant bakeries, if not for the agents themselves. For the bread producers, the critical issue were the discounts extended to the large groceries. Again this is clearly confirmed in Goosen’s testimony before the Tribunal.³⁴
48. Also of importance is the timing of the increase. The evidence is that customers, particularly the large grocers, respond extremely sensitively to changes in the relative prices of the various bread brands and that changes in the relative price (this frequently expressed as a change in the relative discount) impacts rapidly on relative levels of demand. We were not told whether the grocers passed their discounts on to their customers, the ultimate consumers of bread, but several of the witnesses confirmed the

³² CC HOA par 96 and Pioneer’s bundle of documents, page 386

³³ Transcript pages 183 and 348

³⁴ According to Goosen Formal retail constitutes 30% of Sasko’s business and informal trade, informal general trade that is not part of the retail chains about 50% and the balance is represented by independent distributors.

importance of timing, of the serious consequences of an unsynchronised implementation of increases, even if the amount of the net increase had been agreed.

49. The issues confronting those responsible for pricing decisions in the bread market are succinctly summed up in the Commission's heads of argument:

What emerges from the testimony of Lavery and Goosen is that securing sustainable price increases through unilateral conduct was fraught with uncertainty and risk. To be a first mover in increasing prices allowed rivals to maintain price differentials and thereby gain market share at the expense of the first mover. There is ample evidence that the plant bakeries had suffered erosion of their margins in the period 2003 to 2006 (the period of scant co-operation) at least in part because price increases were prone to attrition by aggressive discounting on the part of rivals.³⁵

50. It is against this background that, at the November 2006 crate meeting, Tiger raised the question of pricing as well as the level of discounts granted to agents. Because the Pioneer representatives at the crate meetings, Mr. Bester and Mr. Patience, did not have the authority to represent their firm where pricing issues were concerned – for this the participation of Mr. Louwrens, one of Sasko's national sales managers, was required - a further meeting was arranged for 6th December specifically to discuss pricing. This is explicitly confirmed in the answering affidavit of Goosen himself and no further evidence of the purpose of the meeting of 6th December is required:

28. I am informed by Bester and Patience that, at the meeting of the 23rd November 2006, Willie Marais of Tiger suggested that since all major plant bakeries were present at the crate meetings, they might as well use the opportunity to discuss the pricing of bread in general and commissions paid to distributors. All the bakeries' employees at that meetings saw sense in the proposed course of action...Bester and Patience of Pioneer Foods told Marais that without Louwrens the issue of bread prices could not be discussed fruitfully. A further meeting was arranged for 6 December 2006. This was not a crate meeting.³⁶

51. Note the reference to 'the pricing of bread in general and commissions paid to distributors'. These refer to two different prices. The former refers to the price of bread

³⁵ CC's HOA par 82

³⁶ CC's HOA par 111

to the retail trade and it was this that required authority at a higher level than Bester and Patience. We understand 'the commission paid to distributors' to refer to the resellers fee, possibly something that Bester and Patience may well have had sufficient authority to deal with, but 'the issue of bread prices' certainly required higher authority, hence the decision to convene a further meeting on 6th December 2006, a meeting specifically identified as 'not a crate meeting'.

52. So much for the purpose of the meeting of 6th December 2006 meeting and let us be clear that we are in no doubt that all the pertinent evidence points to this being a meeting convened principally to discuss the price of bread, and also to discuss the secondary issue of discounts to the agents.

53. However, despite the rather clear statement made under oath by the General Manager of their baking division, Pioneer disputes this. Effectively Pioneer, largely through the testimony of Goosen, the very person who signed the affidavit from which the above extract is drawn, argues that its representatives did not determine the extent of its price increase in the company of its competitors at the meeting of the 6th December 2006. Instead it insists that Goosen had unilaterally decided on the extent of the price increase some weeks previously, a decision confirmed at a Sasko national sales meeting held on the 22-23 November 2006. Furthermore Goosen avers that this latter meeting also determined the timing of the increase –15th January 2007 for the general trade and 5th of February 2007 for the national retail chains. On 4th of December 2006, we are told, Goosen decided to bring forward the timing of the increase after receiving market intelligence from Mr. Hollenbach, a national sales manager and a key player in Pioneer's pricing decisions, who informed Goosen that Pioneer's competitors intended increasing their prices on 18th December 2006.

54. However it appears that the only publicly available information confirming a decision regarding a price increase came from a letter from Tiger to its customers in the inland region (that is, specifically not in the Western Cape) informing them of its intention to increase its price from 17th December 2006. We agree with the Commission that this did not obviate the necessity, from Goosen's perspective, to confirm his competitors' timing of the increases planned for the Western Cape and, possibly more important, the extent of the actual increase, that is to say, a clear understanding that, in contrast with the experiences of the preceding year, this increase was not going to be competed away by discounting. These critical factors were to be determined at the meeting scheduled for 6th December 2006.

55. We accordingly accept the Commission's contention that the decision to implement, as opposed to consider, the increase in the price of bread in the Western Cape was made by Pioneer, probably by Goosen, not at the earlier meeting of 22-23 November 2006 nor pursuant to the information received from Hollenbach on 4th December 2006, but rather pursuant to the outcome of the meeting on 6th December 2006 attended by Louwrens, a key Pioneer decision maker in pricing matters, as well as senior representatives of Pioneer's competitors in the Western Cape. Expressed differently, Pioneers' agreement with its competitors on 6 December 2006, not its unilateral conduct, was the cause of the increase in the price of its bread in December. Like the Commission we find Goosen's claim that he had neither discussed the purpose of Louwrens' attendance at the meeting of the 6th with Louwrens nor received feedback from Louwrens subsequent to the meeting thoroughly implausible.
56. Indeed we note too Lavery's testimony – which remained unchallenged by Louwrens who Pioneer elected not to call upon to give evidence - to the effect that Louwrens had informed him that Goosen was not comfortable with his, that is Louwrens', participation in the meeting. This evidence speaks to someone, namely Goosen, who is fully aware of the legal implications of the meeting and has attempted to distance himself, conceivably even has instructed Louwrens to distance himself, Sasko's ultimate decision maker, from it, a practice sometimes referred to as 'plausible deniability'. However, regrettably for Mr. Goosen and Pioneer, his denials are, given the surrounding circumstances and to put it as politely as possible, thoroughly implausible.
57. There is then the question of the content of the meeting of the 6th December. Pioneer concedes that certain agreements were indeed reached at this meeting (although Goosen apparently continues to deny any involvement in or even knowledge of the decisions that Pioneer concedes were made). We understand Pioneer to concede that it fixed the price and the date of increase in the price of toaster bread, a value added loaf, again a clear contravention of Section 4(1)(b) of the Act. And it is clearly conceded that the three competing bakeries agreed to cap the discount to agents at 90c per loaf. Goosen's affidavit also refers to several other agreements that effectively amount to forms of market allocation but we will not concern ourselves with these for the present.³⁷
58. However, Pioneer continues to deny that the meeting fixed the price of a standard loaf of bread, or, at least, that Pioneer was party to the fix. This denial is maintained in the face of the extract from Goosen's replying affidavit already cited in which he concedes that

³⁷ CC HOA par 124.4

there had been a proposal at the last crate meeting of the 23rd November to discuss 'pricing of bread in general' and that Pioneers representatives, Bester and Patience, had specifically asked that a discussion of 'the issue of bread prices' be held with Louwrens present, hence the postponement of the discussion until the 6th December.

59. And yet the evidence is incontrovertible. It is worth citing a passage from Goosen's answering affidavit at length:

*"On 6 December 2006, a meeting of certain employees of the three plant bakeries, Pioneer Foods, Tiger and Premier, was held at the City Lodge in Bellville. This meeting was attended by Bester, Patience, Louwrens and Pieter Cilliers of Pioneer Foods, Lavery of Premier, and Marais and Rassie Easmus of Tiger. Marais told the meeting that Tiger intended to increase its standard bread prices by 25c to 30c per loaf on 15 January 2007. Louwrens informed the meeting that Pioneer Foods had initially planned to increase the bread prices during January/February 2007 as well, but pursuant to rumours in the Gauteng area would implement its price increases on 18 December 2006. Louwrens also said that Pioneer Foods increase was between 35c to 45c per loaf on average and that its price for the standard 700g white bread would be increased to R5.10 (VAT included) and that the standard 700g brown bread to R4.35 per loaf. To the best of Louwrens' recollection, Premier stated that it would be increasing its bread prices on 18 December as well. Pioneer Foods' employee did not require any of the other bakeries to align themselves with its price increases and the timing thereof, but merely stated what had already been decided and partially implemented by Pioneer Foods. It was stated by the mentioned employees that it was each bakery's intention to implement its general price increase of about 35 cents per loaf on standard bread during December 2006."*³⁸

60. Goosen then goes on to list a number of other agreements covering, *inter alia*, the price of toaster bread as well as an agreement to cap the discounts to the resellers. The agreements listed in the subsidiary paragraphs to that cited above are essentially conceded by Pioneer.

61. Pioneer clearly seeks to rely on Goosen's averment that:

³⁸ Goosen's answering affidavit (AA) par 29

“Pioneer Foods’ employee did not require any of the other bakeries to align themselves with its price increases and the timing thereof, but merely stated what had already been decided and partially implemented by Pioneer Foods.”

62. But why attend the meeting at all, a meeting that on Lavery’s unchallenged evidence, Goosen told Louwrens that he was ‘uncomfortable’ with Louwrens attending, clearly inferring that he knew it to incriminate his firm in an illegal price fixing conspiracy? The short answer is that Pioneer had to be there to ensure that there was agreement between the competitors and that each of its competitors were committed to stick to an agreed increase and to co-ordinate the timing. Each of the participants in the meeting had attempted increases in 2006 all of which had been undermined by their competitors chasing volume through discounting off the list price. The purpose of this meeting was to ensure that the agreed price stuck.
63. While Lavery of Premier informed the meeting that his company had decided on a 30c increase, it too ultimately effected an increase of 35c, the agreed amount. Bester, Goosens’ and Louwrens’ junior colleague, recorded in his diary note of the meeting 2 *Prysverhoging 35c – 18/12/07*. Pioneer elected not to call any of its representatives who had actually attended the meeting. This despite the fact that the witnesses were available to it. Indeed it was only on the afternoon after Mr Goosen had concluded his testimony that Pioneer elected not to call their further witnesses.
64. Pioneer’s claim to have decided unilaterally to the increase prior to the meeting amounts to an unremarkable averment that it had come to the meeting with a position on the size of the increase and the implementation date, as, indeed, had all of its co-conspirators. This would pertain to any negotiation – be it a negotiation over wage rates or nuclear disarmament. The point of the negotiation, which aptly describes the meeting of the 6th, is to arrive at an agreement, as close as possible to one’s preferred position, with those others whose agreement is necessary to turn a unilateral wish into an agreed upon reality. Unfortunately for Goosen and Pioneer it is also at this point that the Competition Act is contravened. Nor, we should add, is it surprising that each baker arrived at the meeting with a similar ball park figure in mind given the similar nature of the cost drivers that they confronted. The point of the meeting was to fine tune the agreement as to size and timing and, above all, to enable each to assess that its competitors understood the imperative to sustain the agreed price hike. Once this meeting had been satisfactorily concluded, then, and only then, could the fix be properly said to be in place.

65. Indeed, it appears that the meeting of 6th December left a few loose ends, particularly as regards timing, necessitating the convening of a further meeting which was held on 12th December. At this meeting a staggering of implementation dates was agreed, largely it appears for technical reasons³⁹, but it seems also to avoid giving the impression of price leadership.⁴⁰ An exchange between the Tribunal panel and Mr. Van Der Linde, a Premier witness called by the Commission in the hearing of the national complaint, indicates that on other occasions the agreement had been to stagger the implementation dates over several weeks.⁴¹ In this instance however, the implementation appears to have been staggered over three days, a measure, we infer, of the level of mistrust between the parties and of the reluctance to allow any one of the bakeries to receive the volume boost that it would receive from holding back its increase by several weeks.

66. Pioneer, through Goosen's testimony, appears to deny that the meeting of 12th December discussed implementation dates but they have offered no evidence in support of their denial.

67. But we see that, as in so many conspiracies, from Watergate to Breadgate, the most blatant and ludicrous mendacity is reserved for the cover up. In this particular instance an attempted cover up is put in place, firstly, in response to an email communication from a Mr. de Villiers, the Executive Director of the Chamber of Baking. Secondly, we will dissect Goosens' response to a letter from a firm of attorneys instructed, it appears, by certain of the agents, whose commission it will be recalled, was also fixed by the meeting of 6th December.

68. The pertinent paragraph of De Villiers' email of the 14th December reads:⁴²

"I received a call from the Cape Argus today. They received a call from a gentleman in the Cape accusing all the big plant bakers by name to collude in pricing and trade conditions. He accused the big bakers of pushing up the price of bread by 35c and jointly reduced the discounts to the retailers."

69. How did Goosen respond to this serious allegation? Not, it appears, by denying it, not by assuring De Villiers of his lack of knowledge of this serious state of affairs or, at least, of undertaking to ensure that he would immediately ascertain whether any Pioneer employees had, unbeknown to him, been colluding with his competitors. Nor does he

³⁹ It seems that Tiger's computer system only allowed a new price to be implemented from the 19th and not the 18th December. Transcript P143 line 9-13

⁴⁰ Transcript P261

⁴¹ Transcript p285

⁴² Pioneer's bundle of documents page 460

undertake such an investigation. It appears that he makes no contact with Louwrens at all despite knowing, as his affidavit confirms, that he, Louwrens, had participated in a meeting on 6th December to discuss pricing and the agents' commission, precisely the matter into which the Cape Argus is enquiring.

70. Instead he contacts his two bakery managers, Bester and Patience, not to confront them with his knowledge of the allegations or to enquire as to whether they had any knowledge of the allegations. No, he immediately contacts Bester and Patience and instructs them to *'please ensure that your sales staff does not make any such statements as referred to in the attached'*. In fact Goosen's testimony suggests that his brief contact with Bester and Patience centred on the less serious aspect of the conduct referred to in De Villiers' email, namely, the agents' discounts. We infer that this rather unusual approach was adopted because Goosen knew or suspected that the media's source of information were precisely the disgruntled agents and that he thought that he may be able to make the whole matter go away by satisfying their major grievance, the capping of their distribution fee or 'discounts'. Moreover his instruction to Bester and Patience which required them to ensure that their sales staff did not make "any such statements as referred in the attached" – the attached containing allegations of collusion on price increases and agents' commission - clearly demonstrates that Goosen at that time already had knowledge of the agreements on both the bread prices and the agents' commission.

71. Be that as it may the reason for Goosens' anxiety and for his particular instruction to Bester and Patience is patently obvious. Hitherto, upon announcement of a new price list the national sales managers and bakery managers would enter into the process of negotiating discounts. In this instance they had to have been told that, contrary to recent experience and practice, this time the intention was to actually implement the announced increase and that they would not be undercut by their rivals. In other words, the fact of an agreement could not be kept within a small clique of senior staff. In order for it to be effective, others, possibly less familiar with the niceties of competition law, had to be informed. As Goosen himself explains:

"To make this stick, you then have to have your bakery managers, your sales managers, your reps, everyone in the business knowing that they are not allowed to discount to protect volumes. So, you then have to communicate

*this to a lot of people within the organisation not to discount to protect volumes.*⁴³

72. One does not have to be a conspiracy theorist or unduly paranoid to understand that it is one thing for a select group of senior people to conspire secretly, it is quite another thing to maintain the secrecy once the foot soldiers have to be engaged. In short Goosen did not initiate an enquiry into whether or not a cartel was in operation precisely because he knew intimately of the existence of the cartel. Hitherto his actions had consisted in formulating his firm's bargaining position and in ensuring that he, as Pioneer's senior bread executive, was sufficiently distant from the coal face at which the agreement was actually concluded to plausibly deny its existence. But now that the secret was out he had to deal with those who he had sent out into the field and he had to instruct them to ensure that his subordinates and their subordinates knew how to keep a secret. And, as suggested above, we infer from his actions and his limited conversation with Bester and Patience, he was preparing to make admissions that they had set a cap on the agents' fees but he was not yet prepared to concede to have fixed the price of the standard loaf.
73. We have no hesitation in accepting the Commission's contention that Goosen's testimony was false. We shall revisit the consequences of this when we decide the administrative penalty to be imposed.
74. The second evidence of an attempted cover up and a simultaneous attempt at limited damage control is contained in Goosen's response to the letter received from a firm of attorneys, Roup Attorneys. This letter was received on the 20th December, some 6 days after receipt of the email from De Villiers. It contains precisely the same allegations as those referred to in De Villiers' email, namely, that the bakeries have colluded in fixing an agreed increase in the price of bread and an agreed decrease in the size of the agents' fees.
75. His response to Roup Attorneys is, for the most part, substantively the same as his response to De Villiers. He does not make contact with his superiors, nor does he investigate the allocations. Instead it appears that he contacts Mr. Stofberg, Pioneer's General Counsel, and he immediately sends a polite response to Roup Attorneys advising them that he, Goosen, had not been under the impression that his company had contravened the Competition Act and undertaking that '*we will with immediate effect amend our commission structures with our bread distributors.*' On the same day he writes to two relatively junior people in the Tiger and Premier Western Cape

⁴³ Transcript page 765

management structures, namely Mr. Erasmus and Mr. Donovan, advising them that his company will no longer abide by the agreement in respect of the agents' commission. No reference is made to the allegation concerning the fixing of the bread price, nor does he conduct any investigation into this extremely serious allegation, nor does he take steps to advise his superiors that the company stands accused of major antitrust violations. Instead he focuses on his efforts to keep the bread distributors sweet, by being seen to address what he perceives to be their major gripe, and, from his perspective, the least consequential of the antitrust violations alleged.

76. In fact the first time that Goosen acknowledges investigating the allegation is after receiving the Commission's referral of 14th February. And then the investigation is conducted, not for the purposes of eliciting the truth, not in order ascertain whether the meeting held, with his knowledge, to discuss prices way back in December, could be construed as price fixing meetings. The investigation is done for the purpose of preparing for litigation, so much so that litigation privilege is claimed over the fruits of the investigation.

77. We should be clear that we believe that Goosen has lied to the Tribunal. Everything points to him having full knowledge of the purpose and outcome of the December meetings. He thought that he had distanced himself suitably from the decisions made at those meetings, in part by being seen to have made certain of Pioneer's pricing decisions prior to the meeting. This has formed the cornerstone of Pioneer's defence. At worst these 'decisions' were a sham specifically designed to take the senior Sasko decision maker out of harms way, at best they represented the Sasko position which was submitted for agreement to the meetings of the 6th and 12th December. He did not investigate the allegations contained in the De Villiers and Roup letters because he knew them to be true, instead he retreated by admitting to the least serious offence and shored up his defences for the more serious of the allegations.

78. In conclusion, we have no hesitation in finding that the bread division of Pioneer has been involved in a conspiracy to fix the increase of the price of a standard loaf of bread in the Western Cape as well as the timing of this increase. This – in addition to the concession made regarding the fixing of the agents' commissions and those concessions made with respect to the various market allocations – amounts to a comprehensive contravention of Section 4(1)(b)(i) and (ii) of the Competition Act.

79. Accordingly we find that in December 2006, Premier Foods, Pioneer Foods (through its Sasko division) and Tiger Brands contravened section 4(1)(b)(i) and (ii) in that they agreed that–

- 79.1. all three firms would increase the discounted price of toaster bread on 5 February 2007 to realise R4.25 per loaf including tax;
- 79.2. all three firms would increase the price of the standard loaf of bread by 35c per loaf from 18 December 2006;
- 79.3. the dates by which the bread price increases were to be implemented would be staggered so as not to be implemented on the same date;
- 79.4. discounts (commissions) given by all three firms to agents in the Paarl area would be capped at 90c and 75c for agents in the Cape Peninsula;
- 79.5. none of the firms would supply new distributors;
- 79.6. none of the firms would supply each other's former employees; and
- 79.7. none of the firms would make bread deliveries on 25 and 26 December 2006.

National/Inland Complaint

80. We turn now to consider the Commission's national complaint.

81. The Commission submitted that nothing much turns on the geographic definition of the relevant market because each of the respondents has its own sub-regions, with areas of overlap. At issue is the national bread market because co-ordination between the respondents has taken place with the aim of implementing it across all areas of the country. The Commission does not allege that a cartel existed at all times across all areas or regions of the country or that the co-ordination or agreement or understanding related to the same subject matter in all regions.⁴⁴ Rather it alleges that there was an understanding among the respondents stretching back in time, in relation to the national bread industry, and that meetings and discussions between employees of the respondents continued to take place in various regions. Over time this understanding took various forms such as the division of markets by allocating territories, fixing the

⁴⁴ See Commission's referral

selling price and other conditions of trade in contravention of section 4(1)(b)(i) and (ii). However, the cartel was not necessarily equally stable in all parts of the country (in all regions) at all or the same time, with some regions such as the Western Cape experiencing more acrimony for longer periods of time than other regions. Nor was the subject matter of the co-ordination among the respondents the same across all regions. In some regions the co-ordination involved allocating customers, in others price fixing, in some both. The term “national” or “inland” was simply utilised by the Commission as short hand to describe the geographic region of the country other than the Western Cape.⁴⁵ In support of its case that this agreement or understanding extended into regions other than the Western Cape, the Commission relied upon a number of meetings held in the Gauteng and North West regions by employees of the respondents and documents pertaining to the sale of bakeries.

82. Pioneer’s approach to this evidence was, depending on the context, to deny that certain meetings had taken place at all, to admit such meetings had taken place but to dispute the details thereof, to rely on non-attendance by its employees at certain meetings as evidence that it was not party to co-ordination and finally, as a catch-all defence, that the conduct ceased more than three years before the complaint was initiated. The last mentioned defence is equivalent to a plea of prescription and is located in section 67(1) of the Act.

83. Section 67(1) provides that –

“A complaint in respect of a *prohibited practice* may not be initiated more than three years after the practice has ceased”.

84. The provisions of section 67(1) are analogous to provisions under the Prescription Act or similar provisions in other statutes which limit the time within which actions can be instituted against certain respondents.⁴⁶ The ordinary reading of the section suggests that it intends to preclude the initiation of a complaint more than three years after the practice has ceased. Pioneer argued that because the conduct alleged by the Commission under this complaint, notably the agreement to divide markets in 2001 and the subsequent meetings to divide markets and fix prices had ceased three years before the Commission had initiated its complaint, Pioneer could not be prosecuted for that conduct.

⁴⁵ Commission heads, opening statement and final argument

⁴⁶ See sec 3(1) of the Prescription Act 68 of 1969

85. Section 67(1) does not stipulate who is precluded from initiating a complaint. Nor does it clarify what is meant by initiation. However section 49B read together with sections 50 & 51 sets out the following framework for the investigation and referral of complaints. Any person may submit a complaint or information to the Commission (section 49B(2)). However the power to *initiate* a complaint rests solely with the Commission (section 49B(1)). Section 49B(3) confirms that it is the Commission who is empowered to initiate and provides that after initiating or receiving a complaint the Commission must direct an inspector to *investigate* the complaint as quickly as possible and that after it had completed its investigation in accordance with the dictates of section 50, it may *refer* all or parts of the complaint to the Tribunal or non-refer all or parts thereof.⁴⁷ While initiation, investigation and referral could conceivably all happen within the space of 24 hours, the act of referral (or non-referral) is always preceded by an act of initiation and the two are distinct from each other. Section 67(1) addresses itself to the act of initiation and not referral. The Commission referred this matter to the Tribunal on 6 May 2008 but had initiated the national/inland complaint on 14 February 2007.⁴⁸

86. Section 67(1) is silent on the issue of onus. However the position in South African law is abundantly clear. A court shall not of its own motion take notice of prescription.⁴⁹ In other words if a party wishes to rely on prescription then it is required to raise it as a special plea. Moreover it is for a party invoking prescription to allege and prove the date of inception of the period of prescription.⁵⁰ Hence Pioneer, if it wishes to rely on the provisions of s67(1) is required to *allege and prove*, on a balance of probabilities that the conduct complained of by the Commission in its complaint of referral of 2007 ceased three years before this date. Such an approach to section 67(1) is entirely appropriate in the context of the secretive nature of cartel activity, where respondents engage in meetings held behind closed doors, at restaurants, pubs and hotels, keeping virtually no paper trail and where proof of these arrangements lie squarely and solely within the knowledge of co-conspirators.

87. Apart from raising prescription Pioneer placed great emphasis on the second plank in its defence armoury, namely Sasko's absence from a number of meetings relied upon by the Commission in its referral. It adopted a piece-meal approach to each meeting and argued that because Sasko employees were present only in one or two meetings

⁴⁷ Section 51, see also *Glaxosmithkline SA*, Case no 97/CR/Nov04

⁴⁸ Under case number CC/Pioneer and Another, 2007Jan2717, see transcript page 916.

⁴⁹ Section 17(1) of the Prescription Act

⁵⁰ See Harms *Superior Court Practice*. Also see Van Winsen Cilliers & Loots *Civil Practice of the Supreme Court of South Africa*.

referred to in the Commission's referral and that these had taken place more than three years the Commission's initiation, the Tribunal could not rely on evidence of meetings between other respondents to conclude that Pioneer was party to the co-ordination.

Agreement to divide markets in the Southern Gauteng, Free State, North West regions and Mpumalanga

88. The Commission alleged that in 1999, each of Sasko (Pioneer), Blue Ribbon (Premier), Albany Bakery (Tiger) and Sunbake (Foodcorp) concluded a verbal agreement in terms of which they would not compete with one another in certain specified geographic areas of the country. Pursuant to this agreement it was resolved that Sasko would close down its bakery in Welkom on the understanding that this would enable Albany Bakery to expand in the Welkom area. In exchange Albany Bakery agreed to keep out of the wider Free State area for the benefit of Sasko.⁵¹
89. Ms Pieterse, the site manager for Blue Ribbon in Potchefstroom confirmed that a similar agreement had been in place in her region, the North West. She testified that during 1999 an agreement was struck between the principal officers of Albany, Sasko, Sunbake and Premier that the parties would not compete with one another in respect of supplying bread to the informal trade in certain geographic areas. The informal trade consisted of hawkers, spaza shops and the like who would buy bread directly from the bakery. Albany was not entitled to supply the informal trade with bread in the Krugersdorp, Potchefstroom, Stilfontein and Orkney areas. They were however entitled to compete with one another in the formal trade which would include the national retail chain stores, national retail forecourts etc. Pursuant to this agreement Albany closed a bakery in Krugersdorp.⁵² Ms Pieterse claims that the agreement remained in place until 2005 when Albany attempted to enter the area.
90. Documents filed through the discovery process, in respect of which no objection was raised by Pioneer, demonstrate that a similar arrangement was put in place in the Mpumalanga⁵³ region in 2001. Tiger Brands, Foodcorp and Pioneer had concluded written agreements in relation to the purchase and sale of bakeries in Mpumalanga. These included the sale by Albany (Tiger Brands) and Pioneer (each owning 50%) of Ridgeton bakery in Bush Buck Ridge to Foodcorp, the sale by Foodcorp of its bakery business in Groblersdal to Pioneer and the sale by Foodcorp of its 42% share in Ermelo

⁵¹ Commission's referral affidavit paras 60-61

⁵² Witness statement par 4

⁵³ Pioneer treats Limpopo & Mpumalanga as one region

bakery to Albany. The outcome of these agreements was that Albany would own the Ermelo bakery, Pioneer the Groblersdal bakery and Foodcorp the Ridgeton bakery. While these agreements had the semblance of a sale of assets in the ordinary course, three aspects suggest that they were in fact a manifestation of a wider market division agreement between the parties. First all the agreements were conditional upon each other, second they were all in favour of parties who were existing competitors in the bread industry and in two of them the *sellers paid* the purchaser a purchase price.⁵⁴ While the signatories to the agreements are not cited, one would expect that these agreements would have required the sanction of the highest authority in the company, most likely the CEO if not the Board, because they involved the sale and purchase of assets of each company.

91. Ms Pieterse was not party to the original arrangement but she was sufficiently knowledgeable about its intent so as to diligently monitor compliance with it.⁵⁵ So entrenched was the understanding of the “zoning arrangements” amongst the foot soldiers of these respondents, that when a sole Albany truck was sighted entering Wolmaranstad, this was immediately reported to Ms Pieterse who knowing that “they weren’t supposed to be there” reported this to her superior Mr Tomicic.

92. Mr Goosen, the main – and eventually only- factual witness for Pioneer who gave oral testimony states in his answering affidavit that he was aware that such an arrangement had been struck between competitors, implemented some time in 2001, and that it was unlawful.⁵⁶ However he claims that by the time he took over as general manager in 2003 the agreement to divide markets had unravelled and that Sasko no longer took any such demarcations into account. Mr Goosen claims further that on or about 11 March 2005 in a meeting with Dudo Tomicic (Blue Ribbon) and Eugene Beneke (Albany) in Paarl, he and Mr Beneke confirmed that the market division arrangement no longer formed part of their businesses, that any understanding or agreement to that effect had ceased and that no new arrangements would be entered into. Furthermore he pleads that the arrangement ceased “more than three years before the initiation of the complaint”, thus seeking the protection of section 67(1).

93. Let us examine the testimony of Goosen. He claims that the agreement was terminated in 2003. If that was the case why did he deem it necessary to meet with his competitors

⁵⁴ See clause 4 of each of the three agreements at pages 559, 623 and 656 in the Commission’s bundle of documents

⁵⁵ Transcript page 315-7

⁵⁶ See Goosen AA paras 29 -30

in March 2005, some two years after the arrangement had seemingly fallen away. And then why meet at all? Moreover why did he not, when he took office in 2003, distance himself from this arrangement when on his own version he was aware that these arrangements were unlawful? And then why did Pioneer or any of its competitors, under Goosen's watch, simply not re-enter those territories in a sustainable manner from which they had previously exited?

94. When pressed by Mr Unterhalter, under the heat of cross examination, Goosen admitted that he did not in fact know that the arrangements had ceased but had merely "assumed" so.⁵⁷ Once again we see Goosen seeking to mislead this Tribunal. His strident claim that the agreement had come to an end in 2003 was clearly false and cannot be relied upon at all. Given Goosen's admission that he was aware of such agreements and that he had merely assumed that they were no longer in place, the only matter that needs to be decided by us is whether this broad agreement to divide markets had ceased or terminated three years prior to the Commission's initiation.

95. Indeed if Goosen was to be believed at all, which he is not, the meeting of 11 March 2005 was the earliest possible date of termination of the arrangement. This is supported to some extent by Ms Pieterse who recalls that after the sighting of the lone Albany truck was reported to her she called her managing director Mr Tomicic who advised her that there were no more "zoning arrangements" in place since 2005.⁵⁸ She testified further that since 2005 Blue Ribbon, at least in her region, had proceeded on the basis that the zoning arrangements were no longer in place. However a bald claim by members of a cartel that their conduct had ceased - which claim serves only their own interests - is not in our view sufficient proof that it had in fact terminated. More so the case when one has regard to the nature of the agreement.

96. In this instance the agreement among the four bakeries was an agreement to permanently *remove* themselves from a particular territory in favour of their competitors. One manifestation of this agreement was the permanent removal of capacity by the closing down bakeries in favour of each other. Another was to *stay out* of certain areas by not distributing bread in those areas. Hence it was an agreement *not to compete* in identified territories, an agreement to *withhold* supply, to *omit* the territory in their distribution strategy, to *ignore* identified areas across the country. For as long as the respondents stayed out of the territories they had previously been present in, for as long

⁵⁷ Transcript pages 475 and 477

⁵⁸ Transcript page 315-6

as they, in fact, continued not to compete in those areas so did the agreement remain in force.

97. In order for Pioneer to succeed in a section 67(1) defence, *it* and not the Commission was required to prove that the market division agreement had terminated. Other than the questionable testimony of the discredited Goosen and the statement by Ms Pieterse, no evidence demonstrating that the bakeries had, on a *substantial and sustained* basis re-entered territories they had previously exited in favour of their competitors. We see no internal business plans, no management accounts, no correspondence and most importantly no actual distribution or sales figures from *any* of these four bakeries in respect of any of the territories, which were the subject of these market division agreements, to support the claim that the agreements had ended in 2003 or even as late as 2005. Nor were these claims supported by any public or internal statements that they had distanced themselves from this arrangement or had required their employees to do so – this being not entirely surprising given that such public distancing would also constitute an admission that such conduct had indeed taken place. While we do not suggest that evidence of substantial re-entry is to be inferred from only the above mentioned factors, we would certainly expect to see some positive evidence to enable us to conclude that re-entry had taken place on a substantial basis to the extent so as to constitute *actual competition* and not the mere mirage thereof. In order for us to discern that the Albany truck constituted an act of rehabilitation and not an isolated act of betrayal or cheating more needs to be shown. In the absence of any supporting evidence from Pioneer or any other witness that the errant Albany truck was a manifestation of actual and sustained competition we cannot conclude that substantial re-entry had taken place in those territories from which the respondents had removed themselves in favour of each other. Furthermore, Pioneer's case is not helped when it claims that it no longer considered itself bound to the arrangement. As long as its competitors understood the agreement to be in place and on that basis did not compete with Pioneer in designated territories, Pioneer *continued* to benefit from the market division agreement in the form of reduced competition. As long as that competitor abided by the agreement and omitted to compete with Pioneer in an identified territory to any appreciable extent, and not by an occasional act of cheating, so long was the agreement in place. In our view Pioneer has failed to discharge its onus under section 67(1). In the absence of proof to the contrary we can only but conclude that the agreement to divide markets between Pioneer and the other three bakeries is still ongoing and has not yet ceased or at least had not ceased as at date of the hearing.

Price fixing and customer allocation

98. Where there was prolonged acrimony and aggressive competition between the respondents in the Western Cape during certain periods, the inland region seemed to have settled comfortably into conspiracy with sporadic incidents of cheating.
99. Mr Van der Linde and Ms Pieterse of Blue Ribbon testified generally about the entrenched practices of co-ordination in the Gauteng and North West regions, where competitors kept a constant eye on each other's movements to ensure compliance with their agreements and to swiftly deal with occasional acts of rebellion. Neither of them could recall the exact dates of meetings held between competitors because no minutes were kept. However they recalled the content of these meetings and that most of these were related to price increases or enforcement issues. Communications between employees were not limited to meetings but also happened over the phone. Not all competitors were present at all meetings and those that were not were brought or kept up to speed on developments and discussions by those present.
100. Ms Pieterse testified that a gentleman's agreement had been struck at a meeting held sometime in 2003/4 between Pioneer, Blue Ribbon and Sunbake to the effect that during a period of price increases the bakeries would not allow customers to switch suppliers in order to benefit from any differences in the price provided by each supplier. This gentleman's agreement however was struck as a corollary to the price fixing agreement.⁵⁹
101. She testified that she had initiated a meeting between Sasko, Sunbake and Blue Ribbon employees at the Willows Hotel Conference Centre. According to Pieterse Elize van Dyk, Michael Florence and Johan Oosthuizen represented Sasko. The purpose of the meeting was to discuss Blue Ribbon's intended price increase of between 15 and 20c. She could not recall the exact dates of the meeting and that this particular one may have taken place between 2003 and 2004. At the commencement of the meeting she advised those present of Blue Ribbon's increase. All of them agreed on the amount and the dates on which the increases would be implemented. They also agreed to send each other copies of their notices advising customers of their increases ("increase notices") and not to poach each other's customers with large discounts. She explained that the parties had agreed to increase their prices at more or less the same time and had agreed not to offer customers large discounts because -

⁵⁹ See Pieterse witness statement and Van der Linder witness statement

“...if Blue Ribbon is going first with a price increase, we tend to lose volumes, due to the fact that Sasko or Sunbake didn’t go up more or less at the same time, that they would go to our customers and offer a better price, stating that they are not going up with a price increase and then the customers could walk over to the opposition and buying bread from him.”⁶⁰

102. The rationale behind the exchange of the increase notices was to confirm to each other that the increases had been implemented and show their opposition’s letter to customers who may want to switch as a result of the increase. During a price increase when a customer threatened to walk over they would use the increase notices to show the customer that the competitor was also planning a price increase in a week or two.

103. Pieterse also testified that at that same meeting the competitors had agreed not to poach each other’s largest customers. By and large this agreement was adhered to. However, from time to time the arrangement was broken. When that happened they called each other and usually the outcome of those discussions was successful and the defaulting party would return to adherence.⁶¹ She recalled another meeting in 2005 held at the Dros Pub in Potchefstroom over lunch. She, Jaco Kruger (Blue Ribbon), Henning Erich (Sunbake) and Steyn (Sunbake) exchanged information about their price increases and agreed that the increases would take place in November 2005.

104. The Commission at paragraph 51 of its referral places the first meeting referred to by Pieterse in 2004. Pioneer did not dispute that their employees were present at the first meeting or that the agreements had not been struck. However it disputed that the meeting had taken place in 2004 and alleged that it had in fact taken place in May 2003. In support of this it filed a document purporting to be an extract of Johan Oosthuizen’s diary which contained a handwritten reference to a meeting at the Willows Hotel on 22 May 2003. This date was then relied upon by Pioneer to raise a section 67(1) defence. In order for Pioneer to discharge its onus under section 67(1) it was required to *allege and prove* that the conduct alleged by the Commission had ceased three years prior to the Commission’s initiation. Given that it had sought to dispute Ms Pieterse’s recollection by submitting that the meeting had taken place in May 2003, one would expect it to put up the proof thereof. Needless to say, Mr Oosthuizen, was not called to rebut Pieterse’s evidence. Instead Pioneer chose to rely upon the testimony of Goosen, the cross-examination of Pieterse and assertions from the bar to prove its case. In our view this was not sufficient to discharge its onus. Pieterse while admitting that she could not recall

⁶⁰ Transcript page 307

⁶¹ Transcript page 325-6

the exact date of the meeting, still remained a credible witness as to the content of the meetings. Furthermore her testimony that the gentleman's agreement and zoning agreements persisted until 2005 remained unchallenged. But even if, for argument's sake, we were to conclude that Pieterse's testimony in relation to the dates of the meetings was unreliable, Pioneer by seeking to rely on section 67(1) was under an obligation to prove that the conduct had ceased three years prior to February 2007, and had failed to do. Pioneer had every opportunity to call Oosthuizen to the stand but decided against it. We cannot rely on Goosen's testimony as not only is his recall of events hazy but we have also found him to be an unreliable witness. The Commission's version accordingly stands unchallenged.

105. Mr Van der Linde, the financial manager of Blue Ribbon testified to the degree of co-operation between competitors in the industry in the Gauteng region. Van der Linde had been employed at Blue Ribbon since 1999 and had occupied various managerial positions along the way. He testified to a series of meetings held between competitors, which related to price fixing and other trading conditions. While Sasko employees were not present at all these meetings, he testified that they were in constant communication with them either directly or through one or other of the respondents' employees. Sasko employees were however present in some meetings.⁶² He explained that the general practice in the industry was that bakeries all increased their prices at more or less the same time and agreed to send copies of their increase letters to each other. This was to confirm to each other that they had implemented the increase and to prevent customers from switching. In order to secure a price increase they would undertake not to engage in excessive discounting. Aggressive discounting was seen as cheating and he would often get calls from competitors threatening him that unless the discounting stopped Blue Ribbon would face retaliation. While he was not involved in the quantum of the price discussions he was involved in the implementation side. He tried to ensure that everybody increased more or less at the same time. In their meetings they would generally agree on when to increase and which of them would lead with the increase.⁶³ The extent of the co-operation between competitors allowed them to raise complaints about discounting and discuss this on an ongoing basis.

106. In order to demonstrate the depth and breadth of the co-ordination between competitors, Van der Linde testified to a series of meetings held in 2004 at which they discussed inter alia price increases and dealt with complaints from Sunbake about Blue

⁶² Van der Linde witness statement

⁶³ Transcript page 285-6

Ribbon's discounting in the Shoshanguve and Garankuwa. He recalled a meeting in the last quarter of 2004 with Colin McCabe of Albany at Eastwood Pub in Pretoria at which they discussed prices and discounts. At the end of the meeting McCabe undertook to discuss either prices or discounts with Sasko. At another meeting in December 2004, held at Kwalata Game Reserve, convened at the request of Dave Taylor (Sunbake), Sunbake complained about Blue Ribbon's discounts in the Shoshanguve, Garankuwa and Hammanskraal area. Derek Coetzer from Blue Ribbon complained about Sunbake's excessive discounting in Hammanskraal. Taylor denied this and invited Coetzer to inspect his "discount" register. At the end of the meeting they agreed that the sales managers of Sunbake and Blue Ribbon's Temba Bakery should jointly establish the extent of the discounts being offered to that customer.

107. At a meeting held at the Dros pub in Montana around the end of July 2006, attended by Piet Geysler, Helena, Willie Snyders all of Sunbake and Van der Linde, Derek Coetzer, Dudo Tomicic, Coetzer's depot manager from Rustenburg (all of Blue Ribbon) and the Sunbake bakery manager in Rustenburg, discussions were held in relation to the increase of bread prices in Rustenburg. Coetzer informed the meeting that Blue Ribbon would be increasing its prices by 20c a loaf on brown bread and 22c (incl. VAT) on white on 14 August 2006. The Rustenburg bakery manager agreed that he was going to go with a price increase and that while he would check with his principals he had agreed to increase his prices about a week after Derek Coetzer intended increasing Blue Ribbon's prices.

108. Van der Linde also testified about the ease with which competitors in a particular area or region could co-ordinate other trading conditions and met with relative ease in order to ensure compliance. He pointed to a meeting in July 2006 held at Gold Reef City. Present at the meeting were Johan Oosthuizen (Sasko GM Aeroton), Ruan (from Sasko), Mike Vere Russell (BR), Graham Herron (BR) and himself. The meeting was convened specifically to discuss the planned opening of a Sasko depot in Vanderbijlpark. Mike Vere Russell had raised concerns that Sasko would engage in discounting. Oosthuizen assured them that Sasko would not do this and would "compete fairly" – in other words it would not compete on the basis of price. Van der Linde explained excessive discounting was considered to be a form of cheating on their price and zoning agreements –

*“To compete fairly is your service is correct, your time window is correct as well as your quality is correct, but you are not competing on a discount price”.*⁶⁴

109. We have already heard how important price competition was in the industry. A standard loaf of bread is a homogenous product. When a bakery raised its prices it ran the risk of volume attrition to such an extent that the implementation of such an increase could become unprofitable. Customers would switch easily to the cheaper product. This is why employees of the respondents were at pains to ensure that price increases took place at more or less the same time and that they exchanged their increase letters – not only to give them comfort that their agreements were in place – but also to prevent customers from switching to their competitors.

110. Pieterse’s and Van der Linde’s evidence also highlighted the interaction between regional and national levels for all four bakeries. Discussions would emanate among employees of the bakeries in a specific region and this intelligence would be fed back to their principals, who were the people that would determine the quantum of the price increase. The principals would receive information from all regions under their supervision and would thus have a bird’s eye view of the dynamics across the different regions. In Pioneer’s case these discussions would be fed back to Hollenbach, in the case of the inland region and Louwrens in the coastal regions. These were the people who reported directly to Goosen and, despite Goosen’s claims to the contrary, were in fact responsible for recommending when and by how much prices should be adjusted.⁶⁵ This feedback system also ensured an early warning detection of where and when cheating was taking place and to respond swiftly as to protect their volumes.

111. In 2006, price discussions were taking place in various regions and this intelligence was being fed to their “principals”. In November 2006, Van der Linde was mandated to implement a price increase of 30c per loaf from 18 December 2006, which we learnt earlier, was similar in magnitude to the increase being discussed in the Western Cape. Because this was one of the biggest increases ever, he was concerned that if the other bakeries did not increase their prices at more or less the same time as Blue Ribbon, Blue Ribbon might suffer volume attrition. He called Johan Oosthuizen who undertook to enquire from Tiger and Sunbake about their increases. Two days later Oosthuizen called him “confirming that Sasko is going to go on the 18th of December as well as Tiger as

⁶⁴ Transcript page 284-5

⁶⁵ See exchange between Goosen and Mr Manoim on why Louwrens was speaking to the pricing issue at Exco meetings, transcript page 374 onwards. See also Hollenbach email discussed later.

well as Sunbake, also with a 30c increase". Once again, Oosthuizen was not called to testify and Van der Linde's evidence stands unchallenged.

112. Whether or not the Western Cape agreement to implement price increases in 2006 was implemented equally in all regions across the country is not entirely clear from the evidence. However what is clear is that the *nature of the agreement* in the Western Cape to increase prices – namely to do so more or less at the same time and agreeing not to discount aggressively - was reproduced across other regions. Van der Linde was able to confirm that the December 2006 price increase agreement had stuck in Gauteng because they had “not experienced any problems of discounting”.⁶⁶

113. Pioneer, predictably challenged each of those meetings on the basis inter alia that Sasko was not present in those discussions or that the Commission was precluded from prosecuting it under section 67(1). Furthermore under cross examination Mr Newdigate, relying on Goosen's table of Sasko's price increases,⁶⁷ attempted to show that Van der Linde's evidence of the price discussion with McCabe was untrue because Sasko had in fact not increased prices in 2004. Mr Goosen had also claimed this in his answering affidavit.

114. Goosen states, under oath, in paragraph 26. 1 of his answering affidavit which also served as his witness statement –

114.1. *“Sasko did not increase its bread prices during 2004”*

115. Mr Johan Wentzel Oosthuizen (also referred to as Johan Oosthuizen), who at the time of the hearing was the bakery manager of the Aeroton plant, filed a witness statement in which he remained completely silent on the issue of Sasko's bread price increases during 2004.⁶⁸ Recall that this was the same Oosthuizen who had been present in meetings with Pieterse and Van der Linde. Mr Gideon Johannes Oosthuizen, the Sasko depot manager in Klerksdorp from 2002 to 2005, also filed an affidavit in confirmation of Goosen's answering affidavit. Interestingly this Oosthuizen, “confirms” the contents of paragraphs 25.1-25.7 and 27.1 of Goosen's answer, *but not paragraph 26*, of Goosen's answering affidavit.⁶⁹ Michael James Florence, the bakery manager of Pioneer's Olifantsfontein plant also filed a witness statement confirming Goosen's paragraphs 25.1

⁶⁶ Transcript page 271

⁶⁷ Record page 205

⁶⁸ Record page 327A

⁶⁹ Record page 327f

-25.7 and 27.1.⁷⁰ He too omits to confirm Goosen's paragraph 26. Recall that Florence is the person who Pieterse claims was present in a meeting during 2003/2004 in which they agreed on price increases of between 15c and 20c, and on implementation dates. Johan Oosthuizen's silence on the issue, as well as Gideon Oosthuizen's and Florence's non-confirmation of Goosen's paragraph 26 was not at all surprising given what emerged during the course of the Goosen's cross examination.

116. On 5 August 2004 Hendrik Hollanbach addressed an email to regional and/or bakery managers. The list included people such as Bester and Gerhard Louwrens in Cape Town, Johan Oosthuizen in Gauteng, Elize van Dyk in North West, Michael Florence and other unidentified persons. The email is in Afrikaans. Recall that Hollenbach was the national sales manager in charge of the inland region and Louwrens was in charge of the coastal region. Both of them reported directly to Goosen and were involved in the pricing of Sasko bread. In 2004 Hollenbach signs himself off as the sales manager of Sasko Gauteng Bakeries. The email reads as follows:

⁷⁰ Record page 327C

From: Hollenbach, Hendrik
Sent: 05 August 2004 09:24 AM
To: Bester, Louis; Bezuidenhout, Koos; Bothma, Frans; Burger, Leon; Christie, Anton; Florence, Michael; Hoon, Louwrijke; Joubert, Jacques; Kleinsmit, Mike; Louwrens, Gerhard; Oosthuizen, Johan; Schutte, Pieter
Cc: Gilliers, Pieter; Cloete, Steven; Crous, Jacques; Davies, Wayne; Jooste, Hester; Jooste, Wilna; Lubbe, Theo; Oosthuisen, Oosie; Hontball, Ruan; Van Dyk, Etize
Subject: Brood prysverhoging

Hier is die algemene benadering wat gevolg word ten opsigte van die opposisie wat tans besig is met prysverhogings.

- Alhoewel ons nie tans onder druk is om die prys aan te pas nie, sal dit dwaas wees indien die prysverhoging deur die opposisie wel realiseer en ons maak nie ook daarvan gebruik nie.
- In Gauteng het Albany reeds briewe in die mark en hulle beplan om vanaf Maandag 9 Augustus pryse te verhoog.
- Die beginsel van kortings verminder bly egter die eerste opsie - hierdie beginsel moet veral aan die opposisie uitgewys word.
- Die verhoging geld SLEGS vir die ALGEMENE handel en nie vir die Nasionale Klante (Kettingwinkels, forecourts, institusies, ens) nie.
- Sasko sal VOLG sodra ons tevrede is dat die prys aan die Klante wel deur die opposisie verhoog is.
- Elke strek / bakkerij moet self die situasie in sy gebied monitor en evalueer.
- Die PRD0 prys word nie verhoog nie. Waar daar wel pryse verhoog kan word, moet dit op 'n "surcharge" basis gedoen word deur elke bakkerij.

Die nuwe voorgestelde pryse:

Sasko Sam Wit 600g	= R4.35 inkl	Bruin = R3.70
Sasko Sam Wit 700g	= R4.45 inkl	Bruin = R3.80
Drybreaker en Select Wit	= R4.80 inkl	Bruin = R3.95
Safe en Super Sam WA	= R4.76 inkl	Bruin = R4.00

Die beginsel is dat "standaard" pan brood met ongeveer 10c verhoog en ANGE pan brood met 15c.

Kontak gerus indien daar vrae is.

Groute / Regards

Hendrik Hollenbach
 Verkoopsbestuurder
 Sasko Gauteng Bakkerij

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117. The email advises the recipients of the general approach that was adopted by Pioneer at that time in light of the fact that the "opposition" was busy with price increases and reveals to us several critical things. First that Sasko was able to achieve surreptitious

price increases by reducing the size or level of discount or through a “surcharge” and not necessarily by increasing its list price. Second, it provides us with insight into the degree of co-ordination between Sasko and its competitors regarding price increases of both standard and pan loaves in *both* the Western Cape and inland regions. Bakeries across at least three regions (those that had been identified) were required to monitor and evaluate their own areas. They would wait to see confirmation of price increase from its competitors before following with its own increase. Once they had done that they, *above all else*, had to signal Sasko’s decision to go ahead with a price increase through the reduction of discounts (“*hierdie beginsel moet veral aan die opposisie uitgewys word*”). It also reveals that Goosen’s statement, made under oath in paragraph 26 of his answering affidavit, was a falsehood.

118. Much time was spent by Goosen and his legal team to put the damning provisions of the email into a positive light. In particular much time was spent on alternative interpretations of the line “*Die beginsel van kortings verminder bly egter die eerste opsie – hierdie beginsel moet veral aan die opposisie uitgewys word*”. Goosen attempted to distance himself from the implications of this email by claiming that *inter alia* Sasko did not increase its *list* price but merely improved its net realisation value through the manipulation of discounts and that that is what he meant to say under oath,⁷¹ that he was unaware of the email at the time that he deposed to his witness statement (also the answering affidavit) and that he didn’t know for a *fact* that there had been an actual price increase in the Cape and Gauteng regions and finally that Mr Hollenbach himself should be asked about the email. But what was Hollenbach planning to tell this Tribunal? Nothing much except that the email was an example of information gathering regarding the oppositions’ actions in respect of price increases.⁷² Nowhere do we see in his statement a passage dealing with Sasko’s price increases or planned increases in 2004, nor do we see any confirmation of Goosen’s version of events by Hollenbach, a sales manager clearly endowed with sufficient authority to instruct bakeries to increase their prices. Needless to say Mr Hollenbach was not called to testify.

119. Any speaker of Afrikaans, even a second language one at that, would understand that the words “egter” and “moet veral” are used to connote emphasis. “Egter” means “notwithstanding” and “veral” means especially, particularly, above all things.⁷³ In our

⁷¹ Net realisation value was described by Goosen as: “*you have a list price and from that list price you have a discount and the resultant price that you realise, that you get for the loaf of bread sold, that is your net realisation.*” Transcript page 532

⁷² Par 2.4 Hollenbach witness statement, English version p502

⁷³ See Groot Woordboek Afrikaans/Engels Kritzinger, Shoonees, Cronje, Eksteen

view the sentence, read in its context can only mean “notwithstanding anything else (the circumstances), the reduction of discounts remains the best or first option – above all things, this must be shown (signalled) to the opposition.”

120. We know from all the evidence in this matter that the basis of competition among the bakeries was not the actual list price of their bread but the size of the discount offered to customers. All customers - whether national chains or independent distributors - were considered resellers and the difference in pricing between them was the size of the discount offered. Goosen himself explained to this Tribunal that the net price to customers was achieved through the manipulation of discounts and surcharges. Yet when faced with the fact of this email he attempts to hide, unconvincingly, behind the fact that what he meant to say was that Pioneer did not increase its “list” price in 2004.

121. Goosen’s response, when faced with the fact of this email, that what he had meant to say in his answering affidavit was that Sasko had not increased its “list” price, rings hollow when considered in the context of the proceedings. We know that at the very least Pioneer’s legal team would have been sensitive to the problem created by Gideon Oosthuizen’s and Michael Florence’s confirmatory affidavits. If Sasko had not increased its prices in 2004, as Goosen had maintained, it would have been reasonable to assume that Mr Johan Oosthuizen, the GM of Aeroton and Michael Florence, the manager of the Olifantsfontein bakery, two of the recipients of the email, and Hollenbach the author of the email, all of them endowed with some authority in the pricing decisions of Sasko, would have known this fact and could have confirmed it. Moreover Gideon Oosthuizen, in his position as depot manager and Florence as bakery manager, would also have known for a fact whether or not these price increases had been implemented. Hence there would have been no need for them to specifically exclude Goosen’s paragraph 26 from the ambit of their confirmatory affidavits. Indeed there would have been no need for Johan Oosthuizen and Hollenbach to remain silent on the issue in their witness statements. And there would have been no need for Pioneer’s legal team to keep these witnesses from testifying. Recall that Pioneer had been assisted by lawyers in this matter from as early as the Roup letter and from the commencement of the Commission’s investigation. One can expect that all the witnesses scheduled to testify in the matter had been consulted and assisted by the legal team. The implications of Gideon Oosthuizen’s and Florence’s pointed refusal to confirm Goosen’s paragraph 26 and Johan Oosthuizen’s and Hollenbach’s silence on the issue of price increases in 2004 could not have escaped Pioneer’s legal team or even Goosen himself. The responses of these four men to Goosen’s claim in his paragraph 26 are perfectly

understandable if one has regard to the import of the email. The email clearly deals with an effective price increase and not some vague net realisation strategy put forward by Goosen. Firstly the subject matter of the email is “Brood prysverhoging”. The matter is more clearly spelt out in the first line of the email which refers to Sasko’s approach in the context of the opposition’s price increases. It also contemplates a possible increase of prices by the imposition of a surcharge.

122. We also know that by the time Goosen took the stand he was aware of the email but both he and Pioneer’s legal team chose not to bring this to the attention of the Tribunal. Instead we see that in his evidence in chief, he persisted in the claim, that Sasko had not increased its *prices*, not its list price, in 2004 -

“ADV NEWDIGATE: Mr Goosen we are at paragraph 7 of your witness statement, page 469 of the pleadings, which deals with price increases since 2003. You refer there to a table in your affidavit I take you to that it is at page 204 of the pleadings. And there you set out in table form the increases of Sasko since 2003 and then your understanding of the increases of competitors, whether they did or whether they didn’t act about that time is that correct?”

MR GOOSEN: That is correct yes.

ADV NEWDIGATE: So what you say there speaks for itself, but perhaps I can just ask you this in general terms, it appears from your table that sometimes competitors, which I include Sasko went up at or about the same time and sometimes they didn’t is that correct?”

MR GOOSEN: That is correct that is what...

[Talking simultaneously]

MR GOOSEN: Yes.

ADV NEWDIGATE: So, for example, if you look at September 2004 competitors in your understanding went up but Sasko didn’t?”

MR GOOSEN: That is correct we didn’t have a price increase in 2004.”⁷⁴

⁷⁴ Transcript page 361-2

123. We find Goosen's subsequent explanation - that what he meant to say in his affidavit was that Pioneer did not increase its list price - as another falsehood in the face of his own evidence, and accordingly regard his actions once again as an attempt to mislead the Tribunal.

124. Whether or not Goosen chose to mislead this Tribunal of his own volition or was asked to protect other persons in the organisation is not clear to us. What is clear to us is that Goosen's lack of credibility as a witness was put beyond doubt.⁷⁵ Given this, we place no reliance on his or his counsel's attempts to interpret Hollenbach's words. More so when Hollenbach the author of the email, who was scheduled to testify, and could have explained his own words, was not called. The contents of the email are therefore taken at face value.

125. We now know that Sasko did intend to increase its prices in 2004. We also know how it set out to do so – by reducing discounts and imposing surcharges. We can also infer from Gideon Oosthuizen's and Florence's non–confirmation of Goosen's paragraph 26 that Sasko did in fact increase its prices in 2004. We also know that it did so despite the fact that it was not under pressure to increase its *prices* but agreed to go along with the increases in *co-ordination* with its competitors. This fact puts into serious question Pioneer's assertions that all the bakeries would face similar margin constraints in the face of an increase in the price of input costs. Here is a clear statement by Pioneer that *in spite of* the fact that it was not under pressure to do so, it had *elected to increase its prices in co-ordination with its competitors.* We also know from Pieterse and Van der Linde that Sasko employees engaged in price discussions with them, even where they were not present in meetings, that other bakeries had increased their prices in 2004 and that they were of the view that Sasko had also done the same. But even if, for argument's sake, Sasko had not actually increased its prices in 2004 or was able to do so unevenly across the regions or was not able to implement in all regions at the same time, the fact that it had *intended* to do so in co-ordination with its competitors and had declared itself of that intention is sufficient for us to conclude that an agreement or concerted practice was in existence among the four bakeries for purposes of section 4(1)(b)(i). That Sasko may *in fact* have been able to do so is merely proof of implementation of that agreement.

⁷⁵ See also 495 where he says that the email is addressed to bakery managers in Gauteng and Cape Town. Yet we see that the email is also addressed to Ms Pieterse of the North West region.

126. We also know from Pieterse and Van der Linde, whose evidence stands unchallenged, that Sasko had concluded agreements with the other bakeries in relation to price increases and customer allocation during the period 2003 - 2006.

127. As far as the applicability of section 67(1) to Sasko's conduct in August 2004 is concerned, recall that the Commission had initiated its investigation into the national complaint in February 2007. This would suggest that section 67(1) has no application to this conduct. If however Pioneer wished to rely on it, *it* and not the Commission, was required to allege and prove that this conduct in fact had ceased. No evidence, in the form of documents such as minutes, business plans, sales or distribution figures or even in the form of Mr Hollenbach or Mr Oosthuizen was led by Pioneer to discharge such onus.

Conclusion on inland/national

128. We find that Pioneer, Tiger Brands, Premier and Foodcorp had acted in contravention of section 4(1)(b)(i) and (ii). In the first instance they had done so by agreeing to a division of markets during 1999-2001, which in our view still persists. This agreement extended to at least the Southern Gauteng, Free State, North West and Mpumalanga. On the basis of the evidence put before us we find that the agreement had also extended into the Mpumalanga/Limpopo region. As for the price increases in 2004, Pioneer's own documents show its clear intention to increase its bread prices in 2004 in co-ordination with its competitors. The evidence of Van der Linde and Pieterse support the conclusion that it had in fact done so. The failure of Pioneer's Hollenbach, Johan Oosthuizen, Gideon Oosthuizen and Florence to support Goosen suggests that this was indeed so. In July 2006, Pioneer agreed with its competitors not to compete on price (discounts) in the Vanderbijlpark area. In 2006 Pioneer also agreed to increase its bread prices at the same time and at more or less the same magnitude in co-ordination with its competitors in the Gauteng region. It also agreed to customer allocation with its competitors. Even though Pioneer's employees were not present in all the meetings referred to by witnesses and may not have been present in all the discussions, there was clearly an overall agreement or understanding among Pioneer, Tiger, Premier and Foodcorp in relation to the bread industry in the inland region which led to agreements on price increases, territorial divisions, customer allocation and other trading conditions in contravention of section 4(1)(b). Accordingly we have no hesitation in finding that Pioneer had contravened sections 4(1)(b)(i) and (ii) in the inland region or in that part of

the country excluding the Western Cape, over a period of time from as far back as 1999 to date. The agreement in relation to the Western Cape might have prevailed for a shorter period than the agreement in other parts of the country, but that is a matter of duration, not guilt.

129. Accordingly we make the following findings in relation to the inland/national referral –

129.1. From 1999 to date, Premier Foods, Tiger Brands, Pioneer and Foodcorp were parties to an agreement in terms of which they divided markets amongst themselves in the South Gauteng, Free State, North West and Mpumalanga regions;

129.2. Between 2003 and 2004, Pioneer, Foodcorp and Premier Foods:

129.2.1. fixed the selling price of bread and the dates by which the said prices were to be implemented;

129.2.2. entered into a “gentlemen’s agreement” in terms of which they resolved that during the period of bread price increases, they would not allow customers to switch suppliers in order to benefit from any differences in the prices provided by each supplier;

129.2.3. agreed not to poach one another’s customers;

129.3. During July 2006, Pioneer, Premier and Tiger Brands agreed to fix trading conditions in that they agreed not to compete on price in the Vanderbijlpark area; and

129.4. During November 2006, Pioneer, Premier and Tiger Brands, fixed the selling price of bread by agreeing to increase the said price by 30c per loaf in Gauteng with effect from 18 December 2006.

Relief

130. We turn now to consider the relief sought by the Commission.

131. The Commission in the Western Cape complaint initially requested the Tribunal for the following order against Pioneer Foods:

- A. *Declaring that the respondents have entered into an agreement or engaged in a concerted practice in that their conduct involves the direct and indirect fixing of a selling price and other trading conditions in contravention of section 4(1)(b)(i) and (ii) of the Act;*
- B. *Directing the respondents to desist from such conduct;*
- C. *Levying an administrative penalty on each of the first and second respondents of 10% of their annual turnover for the 2006 financial year in the market for the production and sale of bread in the Western Cape;*
- D. *For such further or alternative relief as the Tribunal may consider appropriate.*

132. With regard to the Inland/National complaint it sought the following:

- A. *For an order declaring that the respondents have entered into an agreement or engaged in a concerted practice in that their conduct involves the direct or indirect fixing of a selling price and other trading conditions in contravention of sections 4(1)(b)(i) and (ii) of the Act;*
- B. *For an order directing the respondents to desist from such conduct;*
- C. *For an order levying an administrative penalty on each of the first and second respondents of 10% of their annual turnover for the 2006/7 financial year;*
- D. *For such further or alternative relief as the Tribunal may consider appropriate.*

133. Pioneer on the other hand asked us to adopt a piece-meal approach and to impose a penalty upon it only in relation to the Western Cape referral arguing that this should not exceed 2.25% of Sasko's (bread division) 2006 turnover for the Western Cape. In the course of the proceedings the Commission indicated that it intended to amend its prayers and would seek a penalty of 10% of Pioneer's total group turnover and not only on its baking division in the Western Cape. The Tribunal issued a directive to the Commission:

1. *If the Commission wishes to amend the terms of prayer A of its pleadings in the Western Cape complaint as well as the National complaint it must file the amended draft by no later than 28 September 2009. The respondent will be entitled to make written submissions in respect of the amended prayers A by no later than 2 October 2009*

2. *If the Commission wishes to amend Prayer C of its Western Cape referral it must bring an application to do so by no later than 28 September 2009. In the event of such an application the respondent must file its answer by no later than 2 October 2009. If the Commission wishes to reply thereto it must do so by no later than 7 October 2009.*
3. *The Tribunal will not require any further hearing unless the parties insist on an oral hearing of the amendment application. Any party may file written legal arguments in respect of the amendment application, provided it does so on or before 10 October 2009 and provided further that such submissions are addressed solely to new issues occasioned by the amendment and not to any issue already traversed already in written and oral argument before the Tribunal .*

134. The Commission did file its amended relief. By way of summary the Commission's amendments sought to stipulate the contraventions in more detail and sought an administrative penalty of 10% of Pioneer's *entire annual turnover* in the Republic, (not only on the production and sale of bread) for the 2006 financial year for *each* complaint. In the alternative it sought a penalty of 10% of Pioneer's *national* bread sales for each complaint.

135. Pioneer Foods' total turnover for 2006 was approximately R7 859 739 593. Its national sales for the bread and baking division (Sasko) in 2006 amounted to R1 981 407 170. We understood that, in effect, the Commission was now seeking a penalty, for the two referrals taken together, ranging from **R1,57bn to R396m.**⁷⁶

136. Pioneer as can be expected opposed the Commission's amended relief.

137. We have decided against adopting the Commission's proposal of a penalty calculated on Pioneer's group turnover. Nor have we adopted the piece meal approach presented to us by Pioneer. Had we followed the latter approach, Pioneer would be facing a maximum penalty of 10% in respect of *each occasion* when it was found to be in contravention of the Act. Because of the approach adopted by us in relation to remedy below, there is no need for us to grant the Commission's application for amendment of its relief. In our view our findings in relation to the contraventions of the Act, and the

⁷⁶ 20% of R7 859 739 593 to 20% of R1981 407 170. In the Tiger and Foodcorp consent orders the Commission requested a single fine based on national bakery turnover.

penalty imposed by us would be appropriate alternative relief under the Commission's original prayer D.

138. By and large the relief sought by the Commission, in both referrals was the same. It sought an order declaring the respondent's conduct to be in contravention of section 4(1)(b)(i) and (ii), sought the imposition of an administrative penalty and sought a cease and desist order.

Section 59

139. Sections 58 – 60 govern the orders that may be granted by this Tribunal. The decision of this Tribunal to impose an administrative penalty is clearly an exercise of its discretion. In terms of section 59(1)(a), this Tribunal *may* impose an administrative penalty on first offences under section 4(1)(b). When imposing such a penalty the Tribunal must however have regard to the factors listed in section 59(3)(a) – (g). In terms of section 59(2), such penalty may not exceed 10% of the firm's annual turnover in the Republic and its exports from the Republic during the firms' preceding financial year. The provisions of section 59(2) limit the percentage of the fine to be imposed to 10%.

140. In order to determine a penalty one must first determine the base turnover to which the relevant percentage is to be applied. While section 59(2) clearly specifies that the penalty may be imposed on the the firm's *annual turnover* in the Republic, including its exports the Tribunal has in practice calculated such penalty on the basis of "affected turnover" ie that portion of the turnover of the firm derived from the product market in which it was found to be act anti-competitively.

141. In *Federal Mogul*⁷⁷ the Tribunal stated that for the purpose of that case it chose to exercise its discretion in favour of the first respondent and based the threshold on the turnover in the infringing line of business only.⁷⁸ This because at times "the restrictive practice may have no relationship to the firm's total annual turnover as the relationship between the contravention and the total business to which that turnover may be attributed may be remote". Conceivably this would be because companies often do business in more than one product market and it would be appropriate to correlate the

⁷⁷ *Competition Commission v Federal Mogul of South Africa (Pty) Ltd and Others* [2003] 2 CPLR 464 (CT)

⁷⁸ Par 172

penalty to that companies' attempts to extend its market power through anti-competitive arrangements in that particular product market.⁷⁹

142. While the Tribunal has followed this approach in all subsequent cases involving administrative penalties, it has cautioned that this does not mean that the statute does not permit of imposing a penalty on the firm's total turnover.⁸⁰ The language of the statute is clear – it includes the firm's total annual turnover in the Republic including its exports and in appropriate cases one can expect that the Tribunal would impose such a penalty. An exercise of the Tribunal's discretion nevertheless must always be rational and justifiable. There is no *numerus clausus* of circumstances in which the Tribunal can be expected to exercise its discretion in favour of a fine calculated on a firm's total annual turnover but one can anticipate that there should be some evidence to show that a firm's monopolisation efforts through anti-competitive conduct in one product market conferred or tended to confer onto it some leverage in another product market which it otherwise would not have had. For example if there was evidence to show that the closure of bakeries, while output limiting in the bread industry, also conferred some advantage to Pioneer in the milling or packaging industry (assuming it had an interest there) it would be permissible to calculate the penalty on the basis of the total turnover. However we have no such evidence in this case and would therefore hesitate to extend the calculation of the penalty beyond Pioneer's bread and bakery division. This is not to say that the offences committed by Pioneer are not considered by us to be the most egregious in anti-trust law.

143. In *Competition Commission v Federal Mogul Aftermarket*,⁸¹ the Tribunal identified deterrence as the primary purpose of the imposition of administrative penalties and that “the deterrence elements must have some relationship to the harm inflicted by the prohibited practice”. In the Tribunal's view:

“By way of example a hard-core cartel in a significant area of commerce and in the investigation of which parties have refused to co-operate with the authorities may well attract the maximum penalty.”

144. In *Competition Commission v South African Airways*,⁸² the Tribunal developed its approach to the imposition of administrative penalties by according relative weightings to

⁷⁹ *Competition Commission v South African Airways* para 273

⁸⁰ *Federal Mogul* par 171

⁸¹ [2003] 2 CPLR 464(T) at 166

⁸² [2005] 2 CPLR 303 (CT)

each of the factors contained in section 59(3).⁸³ The Tribunal allocated for example a relative weighting of 3% to the nature, duration and gravity of the offence, 1% for loss or damage as a result of the contravention, 1% to the level of profit derived, 1% to market circumstances and 1% to previous contraventions. That matter was concerned with an abuse of dominance under section 8 (d)(i) alternatively 8(c) of the Act.

145. However, the Tribunal emphasised that the method employed by it in that case was a guideline and was not intended to fetter the discretion of the Tribunal. Moreover there was a need to draw meaningful distinctions between the various types of contraventions. The purpose of section 59(3) after all was to look for aggravating and mitigating circumstances so as to strike a proper balance between deterrence and over-enforcement. The Tribunal cautioned that while it had attempted to lend rationality to the calculation of the penalty:

“It is our view that the size of the administrative penalty be argued and determined with as much attention to evidence and rational arguments as the merits of the case itself and, to this extent, at least the approach adopted here is intended to act as guideline for the future. However, further experience with the Act may indicate that either the weightings are inappropriate or that we have not exhaustively considered all the factors that may exist.”⁸⁴

146. The Competition Appeal Court in *Federal Mogul (REF)* found that section 59 “sets out the bare fundamentals of a framework for determining the amount of the administrative penalty” and that the Tribunal is expected to exercise its discretion judiciously having regard to the factors in 59(3).

147. In other words, the purpose of section 59(3) is to provide guidelines to the Tribunal when it exercises its discretion in terms of 59(2). The Tribunal must look to see whether there are aggravating and mitigating factors, and assessing those with the view to striking a balance between deterrence and over-enforcement. These factors must be weighed in relation to each other and must be assessed in the specific circumstances of each case and in the context of the nature of the contravention. The provisions of section 59(3) do not require this Tribunal to create a formula by which administrative penalties are to be imposed, nor do they seek to fetter the discretion of the Tribunal. While we must look at all the factors in section 59(3) we are not required to approach these mechanistically. Rather we are required to apply our minds and adjudicate factors

⁸³ Par 341ff

⁸⁴ Par 343

present in a case in relation to each other. This does not mean that every factor will be present in each case or that the same factors will bear the same weight in relation to each other in every case. It may be for example that in a particular section 8 case, the behaviour of the respondent is so outrageous that it requires the highest possible sanction or, perhaps in a resale price maintenance case, that the conduct of the respondents was such as to weigh heavily in mitigation. Each case must be assessed on its own merits.

148. Hence one can anticipate that in hard core cartels, as compared to offences under section 8(c), some factors would weigh much more heavily than others. Hard core cartels, as contemplated in section 4(1)(b) of the Act are *per se* offences. There is no need for the Commission to show any anti-competitive effects and there are no justification grounds available to respondents. So egregious an offence is this, that harm to competition and harm to consumers is presumed by its mere existence. Moreover the extent of loss suffered or damage caused is presumed to be extensive.

149. Furthermore, an agreement or understanding to fix prices or divide markets contains within it so unambiguous an intention that one can infer that respondents knowingly and deliberately participated in these activities. We are not dealing here with case of exclusionary conduct of the kind where a respondent might not have appreciated at the time of its occurrences that it could constitute a contravention section 8(c) or 5 of the Act. This is conduct that has no other objective – namely, through co-ordination with one's competitors, to limit competition, to restrict output and to achieve the highest possible rents.

150. It is trite law in competition jurisdictions and accepted by scholars in economics that:

*“Collusive practices allow firms to exert market power they would otherwise not have, and artificially restrict competition and increase prices, thereby reducing welfare”*⁸⁵

151. Hence our approach to hard core cartel activities is that respondents engaging in such activities, absent any mitigating circumstances, deserve the maximum penalty provided for in the Act. Such an approach would not be in contradiction to that followed by the European Commission. In its guideline on the method of setting fines in antitrust cases⁸⁶

⁸⁵ Motta, *Competition Policy Theory and Practice* page 137

⁸⁶ EC Guidelines published in the Official Journal of the European Union dated 1 September 2006

the EC indicates that its main objective in imposing fines is to deter firms from engaging in anticompetitive conduct and in doing so it will have regard to the value of sales to which the infringement relates and the gravity and duration of the infringement. With regard to cartels the Guidelines also create a mechanism of a so-called “entry fee”. According to this mechanism the simple fact that a company enters into a cartel will cost the guilty company 15-25% of its annual sales in the relevant sector because:

“Horizontal price-fixing, market sharing and output-limitation agreements, which are usually secret, are, by their very nature, among the most harmful restrictions of competition. As a matter of policy, they will be heavily fined. Therefore, the proportion of the value of sales taken into account for such infringements will generally be set at the higher end of the scale.”

152. We turn to consider the factors listed in section 59(3). Because the evidence of the two referrals has been presented to us in one consolidated hearing, for ease of convenience we have considered the factors listed in sec 59(3) together. By and large the considerations, such as market circumstances, gravity of the contravention, behaviour of the respondent, would be the same for both referrals. Where necessary we have differentiated between the two referrals.

Nature, gravity and duration

153. When we consider the evidence placed before us in its totality what we see from all these accounts, is a culture of co-operation so entrenched in the daily operations of these four companies that their employees, in full knowledge of the unlawfulness of these arrangements, had no difficulty in reproducing it all levels. They met regularly, they called each other frequently, they asked the one to call the other, they agreed on implementation dates for their increases, they exchanged increase letters to give each other comfort, they divided markets at both a national level and at a local level, they monitored each other’s compliance and had no hesitation in enforcing their illegal arrangements under the guise of “fairness”. We can infer from their decisions to close bakeries and their adherence to “zoning” arrangements that they intended their co-ordination to extend to all parts of the country. We see that even where they were unable to implement a co-ordinated price increase in a particular region for some or other reason, they continued in their endeavours to co-ordinate rather than compete. While regional differences may have influenced whether or not an agreement would stick over time, such as in the Western Cape, the conduct of the employees of all four bakeries was the same, replicated across all regions We see in the evidence led in both

the complaints, the links between the inland and coastal regions, effected through people endowed with national authority and who brought such intelligence and experience to the discussions.

154. We see for example, that during 2004, price increase discussions and agreements took place in both Gauteng and the North West. During this time attempts were made by Lavery to strike an agreement with Goosen. Hollenbach's email confirms that the intended co-ordination was not limited to one region only. We see the same pattern in 2006 where similar agreements were struck in both the Western Cape and the inland region where bread prices were increased at more or less the same time and by more or less the same amount. We see Dudo Tomicic, of Premier meeting with the inland bakeries and with Goosen in the Western Cape. We see Goosen meeting with Tomicic and Eugene Beneke, all national figures. Furthermore, intelligence of competitors' activities fed up to Goosen was not limited to a specific region – he obtained and requested information from both Hollenbach (inland) and Louwrens (coastal) at the same time.⁸⁷

155. It was common cause that not all of the bakeries were represented at all the meetings. However all of them understood, and demonstrated this unequivocally, that they needed and indeed were required to rely on their competitors for their profits. Both Pieterse and Van der Linde displayed their knowledge of the history of collusion. Both understood this to exist at a national level. This knowledge was shared by Lavery, Ford and Donovan. Even Goosen, as much as he unconvincingly attempted to distance himself from it, had knowledge of national arrangements at the highest level. Not a single employee of these bakeries was shown or heard to act differently.

156. Where did this conduct emanate from? It could only emanate from a culture of co-operation, no doubt inherited from the regulatory history of the industry, among the four bakeries, reaching back in time. An understanding which, because of the nature of the industry with its multitude of resellers required regional and local co-ordination and implementation. A culture known to the highest ranking official with authority to set prices, down to the foot soldiers, passed down from generation to generation, its overall objective being to orchestrate co-ordination wherever possible across the country. Over time it manifested itself in discrete and various forms, from the formalised and permanent division of markets in early 2001, to customer allocation and to several price increases during the period 2003 to 2006. And is the case with all long term relationships, their's

⁸⁷ Transcript pages 581, 583 and 585

was marked by occasional moments of disharmony. Now and then someone cheated and another retaliated, at times the internal profitability objectives of one led it to behave aggressively, at times the desire to satisfy internal performance anxieties or to off-load excess capacity led to a prolonged separation. For example the acrimony in the Western Cape lasted for a longer period of time due to its own supply and/or capacity issues. The Western Cape has its own wheat crop and different considerations were at play in the cartel discussions.

157. However an occasional breach did not dissipate this culture. While they disagreed and the level of acrimony was high, they still endeavoured to repair the relationship. They continued because, despite their differences, they understood that co-ordination rather than competition satisfied their greed for profit and desire for a comfortable life.

158. We have already stated our views on the nature and gravity of the offences under consideration. Section 4(1)(b) violations are the most serious violations of competition law and are condemned across the world. Naked cartel behaviour is not justifiable under our legislation and is presumptively harmful. In this particular case, the offences are more so repugnant because they have affected the poorest of the poor, for whom standard bread is a staple. While its conduct in the Western Cape may have been of short duration, its conduct in the inland region persisted for a much longer period of time. Moreover the closure of bakeries resulted in a permanent removal of capacity in the territories covered by their agreement to divide markets.

159. Pioneer accepts that it ought to be sanctioned. However it pleads that the agreement among the four bakeries in the Western Cape was limited in both content and duration. The Commission however argues that the only reason why the agent's commissions agreement was of short duration was because Pioneer had been forced to terminate it once it had received the Roup letter. But for this letter Pioneer would have continued with its conspiracy as evidenced by Goosen's response to the De Villiers email and the attempted cover-up. We see no positive evidence from Pioneer that it had distanced itself from this conduct. We agree with the Commission that Pioneer's conduct suggests that but for the Roup letter and the subsequent investigation by the Commission, Pioneer would have persisted with its conspiracy and had not voluntarily ceased it. This was also not a case where a company was engaging in conduct that it had erroneously believed to be lawful at the time but which subsequently was found to be anti-competitive.⁸⁸ In this

⁸⁸ The European Court of Justice has confirmed that the effect of an anti-competitive practice is not always a conclusive criterion for assessing the proper amount of a fine. Factors relating to the intentional aspect may be more significant than those relating to the effects, particularly where they relate to infringements which are

case Pioneer had pleaded its guilt and the members of the conspiracy all demonstrated that they were aware that their agreements were unlawful. Termination of anti-competitive practices as a result of being found out in such circumstances is not a mitigating circumstance.

Loss or damage as a result of the contravention

160. We have already indicated that the damage to competition by Pioneer's conduct caused harm to consumers in the form of higher prices, less choice and inferior services. Furthermore one must have regard to the fact that the product market pertains to a staple food for millions of South Africans, especially the poorest of the poor and any increases in prices would have a disproportionate impact on this sector. While we cannot determine the total or quantify the extent of the damage accurately, the result of this was that the poorest of all South Africans paid more for their bread than any other person. The fixing of agents' commissions and the agreement not to poach agents in the Western Cape led to higher costs of distribution into the informal sector and eliminated the negotiating power, if any, of these agents. The loss and damage to competition caused by the contravention in the inland region was likely to be greater due to the permanent nature of the bakeries' market division agreement. Moreover the consequences of closing bakeries were not limited to the urban areas but stretched into the rural areas. As stated by Pieterse –

160.1. *“The fact that there wasn't an Albany bakery operating in our area, it means that there wasn't any Albany bread that you could find in the Northwest rural area, the informal trade.”⁸⁹*

161. The level of profit derived by Pioneer has already been alluded to above. While the cartel arrangements differed both in content and location, we have found that the conduct of the respondents in the inland region persisted for a longer period of time. The evidence in relation to the Limpopo/Mpumalanga was scanty but given the history of their behaviour, the likelihood that the bakeries colluded in that region and other inland parts of the country was high.

Behaviour of the respondent

162. There is no question that Pioneer's conduct in this matter leaves much to be desired. When Goosen received the email from De Villiers he did not even bother to enquire from

intrinsically serious, such as price fixing and market sharing.(Case C-194/99 P Thyssen Stahl v Commission [2003] ECR I-10821, PAR 118)

⁸⁹ Transcript page 314-5

Bester and Patience what the allegations were based on nor did he launch an investigation into the allegations. His response that he “did not suspect it at all” rings hollow in the face of his own admission, and his knowledge that the bakeries had been involved in unlawful market division arrangements (National complaint) and his own conduct when he met with senior employees of Blue Ribbon and Albany in 2005. Furthermore even after the Commission’s initiation of the complaint, Pioneer did not conduct a full enquiry or investigation in order to root out this behaviour in its company or to bring to book any of the individuals involved. Up to the date of the hearing no action had been taken against any of the employees implicated in this conduct. When it eventually did conduct an investigation it concealed the outcome of this by cloaking it in the claim of litigation privilege.

Market circumstances

163. The Commission summarised the market conditions at the time of the price increase in December 2006 as very negative. Wheat prices had gone up by 34%, plant bakeries were having difficulty sustaining their price increases because of significant discounting activity that was taking place, Albany bakeries’ two plants were running at substantial losses and Sasko, which was starting to suffer margin contraction as a result of discounting activity by its rivals, was still recovering from an earlier strike in September. All in all as Goosen testified when he received Hollenbach’s email on 4 December 2006:⁹⁰

“... When this was sent to me, I then realised that we can move our price increase forward, because we needed a price increase desperately in terms of our input costs...”

164. Pioneer argued that because bread is a homogenous product any increase in prices of the principal drivers of cost, i.e. flour, fuel and labour would have a similar impact on all producers. Moreover, because bread producers for the most part supply to the same customers who will very quickly inform their suppliers of what competitors are doing the tendency towards similar timing of increases is enhanced. The cost of an ill-considered price increase, and one that does not take sufficient account of the behaviour of competitors, can be high. With this background in mind it argued, partly as denial of the offence and partly in mitigation, that it was understandable why all the producers were increasing their bread prices in December when the wheat price increased dramatically. Furthermore, in light of these sharp increases in input costs, there was a need to reduce

⁹⁰ Transcript page 594

the commission of R1.20 per bread to independent distributors. While we accept that wheat prices may have increased sharply during that time, we do not accept the submission that because all four bakeries have similar input costs such as flour, oil, labour and transport, their overall cost structure was the same or that they were equally efficient rivals. Each bakery was operationally unique with its own internal production and management processes. While all of them may have needed to increase their prices in the face of higher wheat prices, there is nothing to suggest that an increase of more or the less the same magnitude was needed for each of them. In fact Pioneer itself has demonstrated this difference in 2004 when it elected to increase its prices in co-ordination with its competitors in circumstances when it was not under pressure to do so. Moreover one would expect an effective competitor, in the face of these challenges, to embark on a range of cost saving initiatives. It might be true that Pioneer may have needed the increase in order to maintain its margins. However this does not serve to justify it breaking the law by agreeing to do so in co-ordination with its competitors.

The level of profit

165. According to Pioneer there is no evidence quantifying any profit it might have gained from the December agreements. However, the Commission argues that whilst it is not possible to derive the precise level of profit gained by Pioneer Foods from the contravention, Pioneer's own discovered documents suggest that it did make a profit, the main objective in entering into the unlawful agreements and the fixing of trading conditions. In his December 2006 Monthly Report, Goosen reported as follows about the December price increase:⁹¹

“The price increase (average 35c per loaf) in the general trade on 18 December resulted in a net realisation per loaf increase from R3,69 to R3,80...”

and in the same Report:⁹²

“The price increase that was pushed through to the general trade in December helped with Bakeries achieving its profit targets for the month, despite lower than anticipated volumes”

166. Goosen's observations are precisely what cartels are about. As Monti points out in his press statement referred to above:

⁹¹ Trial bundle volume 2 page 484

⁹² Trial bundle volume 2 page 485

“Cartels, therefore, by their very nature eliminate or restrict competition. Companies participating in a cartel produce less and earn high profits, Society and consumers pay the bill.”

167. We agree with the Commission's observations. Firms collude in order to reach an outcome with the highest possible price, a price higher than some competitive benchmark, for no other reason. This pecuniary gain is exactly what is borne out by Pioneer's remarks in its report as quoted.

The degree to which the respondent has co-operated with the Competition Commission and the Competition Tribunal

168. The Commission argues that Pioneer Foods has not co-operated with the Commission, choosing instead to litigate this matter to the last. Pioneer submits that it is entitled to defend itself. That Pioneer Foods is entitled to defend itself is not contentious. However the manner in which a respondent conducts its case and the extent to which it is willing to waste scarce state resources must be taken into account when assessing the degree of its co-operation with the Tribunal. In this case, the entire defence has been mounted on the basis of manifest falsehoods. Moreover, these were no ordinary falsehoods. They did not involve the 'mere' distortion of a particular fact. They rather involved the construction of an elaborate explanation for the manner in which the increase was decided upon, an explanation that was patently false and contrived. Moreover it failed to co-operate with this Tribunal by not leading witnesses who were actually present in those meetings and who had been scheduled to testify, such as Patience. We believe that successive layers of Pioneer's management, reaching up to Goosen at least, were involved in concocting these elaborate falsehoods. Despite the fact that its case was so exposed – and despite Goosen himself admitting to his lying under oath⁹³ to this Tribunal – and even after conceding that it had concluded an agreement in contravention of section 4(1)(b)(i) and (ii) Pioneer persisted with its denial as to the scope of its agreement in the Western Cape. Had the concession of the Western Cape meetings come earlier, valuable time and resources of both the Commission and the Tribunal would have been saved. Had truth followed concession we might have adopted a more sympathetic view of its behaviour. In our view Pioneer's conduct and that of its employees warranted no mitigation. Its attitude towards the Commission and the Tribunal was in respect of the inland region was again one of non-co-operation if not downright disdainful. Once again we see a case constructed on

⁹³ Transcript page 660 and 661

falsehoods uttered by its most senior employee Goosen. Witnesses who could be of some assistance to the Tribunal and who were scheduled to testify such as Mr Hollenbach were not called. As it stands we consider Pioneer's conduct in our proceedings, in the circumstances of this case, as an aggravating and not a neutral factor.

Whether the respondent has previously been found in contravention of the Act

169. The Commission submitted that whilst Pioneer Foods had not previously been found in contravention of the Act, the section 4(1)(b) contravention offends the fundamental and most widely understood tenets of competition law and Pioneer cannot rely on subsection 59(3) as a means of mitigating the penalty. The legislature has made it plain that it regards hard core cartels in so serious a light that it permits of no justification. On Pioneer's own version it had contravened the Act several times. However it had sought, unsuccessfully to rely on a defence under section 67(1).
170. We have given due consideration to the fact that Pioneer has not previously been found in contravention of the Act in relation to the other factors. While Pioneer may not have been previously prosecuted in this forum, on its own version it had contravened the Act on several occasions and over a prolonged period of time. Moreover it had done so in full knowledge of the unlawfulness of its actions. Its conduct, repeated year after year, was deliberate with a clearly articulated purpose. In our view the fact that it has not been prosecuted before this moment, weighed against the gravity and duration of the offence in this case, does not serve as a mitigating factor.

Conclusion on remedy

171. In considering all of the factors listed above together we find that Pioneer has not made out a case for any leniency whatsoever. Arguably we might have reached the same conclusion in respect of Pioneer's conspirators, Tiger Brands and Foodcorp, had they elected to oppose the Commission's referrals. But both Tiger and Foodcorp elected not to do so. Both provided information to the Commission, agreed to a penalty and to the implementation of compliance programmes in their organisations. By doing so they also elected to keep away from the public eye the embarrassing details and duration of their conspiracy. Pioneer on the other elected to place itself in the public spotlight, submitted itself to cross-examination and in so doing revealed for all to see the details of a long standing conspiracy. In this process it also demonstrated its willingness to construct a

case based on falsehoods and misleading tactics. Its lack of co-operation with the agencies and the fact that to date it has not taken disciplinary action against, at date of hearing, a single person involved in these contraventions all count against it.

172. We accordingly believe that the company should be subject to the highest penalty that the Tribunal is entitled to levy. However we accept for purposes of imposing a penalty that the evidence supports a conclusion that the Western Cape contraventions persisted for a shorter period of time than the national/inland contraventions.

Order

173. Given the above, in relation to the Western Cape we order as follows:

173.1. During December 2006, Pioneer, Premier and Tiger Brands, contravened section 4(1)(b)(i) and (ii) of the Competition Act in that they agreed that -

173.1.1. They increase the discounted price of toaster bread on 5 February 2007 to realise R4.25 per loaf including tax;

173.1.2. They increase the price of the standard loaf of bread by 35c per loaf from 18 December 2006;

173.1.3. The dates by which the bread price increases were to be implemented would be staggered so as not to be implemented on the same date;

173.1.4. Discounts (commissions) given by all three firms to agents in the Paarl area would be capped at 90c and 75c for agents in the Cape Peninsula;

173.1.5. None of the firms would supply new distributors;

173.1.6. None of the firms would supply each other's former employees; and

173.1.7. None of the firms would make bread deliveries on 25 and 26 December 2006.

173.2. To the extent that any of the agreements or conduct referred to in 173.1 above still persist, Pioneer is hereby ordered to immediately cease and desist therewith; and

173.3. Pioneer is ordered to pay an administrative penalty of 9.5% of Sasko's 2006 bread turnover for the Western Cape which amounts to **R 46 019 954 (forty six million, nineteen thousand, nine hundred and fifty four rand)**.⁹⁴ The penalty must be paid to the Commission within 20 business days of the date of this order.

174. In relation to the national/inland complaint we order as follows:

174.1. Premier, Tiger Brands, Pioneer and Foodcorp contravened section 4(1)(b)(i) and (ii) of the Competition Act in that –

174.1.1. During 1999 they concluded an agreement, or engaged in a concerted practice in terms of which they divided markets amongst themselves in the South Gauteng, Free State, North West and Mpumalanga regions;

174.1.2. Between 2003 and 2004 they -

174.1.2.1. fixed the selling price of bread and the dates by which the said prices were to be implemented;

174.1.2.2. entered into a "gentlemen's agreement" in terms of which they resolved that during the period of bread price increases, they would not allow customers to switch suppliers in order to benefit from any differences in the prices provided by each supplier;

174.1.2.3. agreed not to poach one another's customers;

174.1.3. During July 2006, Pioneer, Premier and Tiger Brands agreed to fix trading conditions in that they agreed not to compete on price in the Vanderbijlpark area; and

174.1.4. During the last week of November 2006, Pioneer, Premier and Tiger Brands, fixed the selling price of bread by agreeing to increase the said price by 30c per loaf in Gauteng with effect from 18 December 2006.

174.2. To the extent that any of the agreements or conduct referred to in 174.1 above still persist, Pioneer is hereby ordered to immediately cease and desist therewith; and

⁹⁴ 9.5% of R484 420 572, being the Western Cape turnover in par 9.4 of Goosen's witness statement

174.3. Pioneer is ordered to pay an administrative penalty of 10% of Sasko's 2006 national bread turnover less that of the Western Cape,⁹⁵ which amounts to **R 149 698 660 (one hundred and forty nine million, six hundred and ninety eight thousand, six hundred and sixty rand)**. The penalty must be paid to the Commission within 20 business days of the date of this order.

175. Accordingly the total penalty imposed on Pioneer Foods (Pty) Ltd in respect of both complaints is **R195 718 614 (one hundred and ninety five million, seven hundred and eighteen thousand, six hundred and fourteen rand)**.⁹⁶

3 February 2010

Y Carrim and D Lewis

Date

Concurring: N Manoim

Researcher: Rietsie Badenhorst

For the Commission: Adv D N Unterhalter SC with Horace Shozi, instructed by Cheadle Thompson & Haysom Inc

For Pioneer: Adv J A Newdigate SC with E W Fagan SC, instructed by Cliffe Dekker Hofmeyr Inc

⁹⁵Being 10% of (R1 981 407 170 – R484 420 572) = 10% of R 1 496 986 598. See par 9.4 of Goosen's witness statement.

⁹⁶The amount is rounded off.