

COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 43/CR/Jun11

In the matter between:

The Competition Commission

Applicant

and

The Grain Silo Industry (Pty) Ltd

Respondent

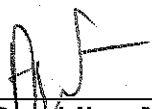
Panel : A Wessels (Presiding Member), M Mokuena (Tribunal Member), and A Ndoni (Tribunal Member)

Heard on : 09 November 2011

Decided on : 09 November 2011

Order

The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondent, annexed hereto marked "A".



Presiding Member
A Wessels

Concurring: M Mokuena and A Ndoni

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
HELD IN PRETORIA

CT Case No. 43/CR/Jun11
CC Case No. 2009Mar4349

In the matter between:

THE COMPETITION COMMISSION

Applicant

and

THE GRAIN SILO INDUSTRY (PTY) LIMITED

17th Respondent

In re:

THE COMPETITION COMMISSION

Applicant

and

AFGRI OPERATIONS LIMITED

1st Respondent

SENWES LIMITED

2nd Respondent

NWK LIMITED

3rd Respondent

OVK OPERATIONS LIMITED

4th Respondent

SUIDWES (PTY) LIMITED

5th Respondent

VRYSTAAT KOÖPERASIE BEPERK

6th Respondent

OVERBERG AGRI (PTY) LIMITED

7th Respondent

DIE HUMANSDORPSE KOÖPERASIE BEPERK

8th Respondent

SENTRAAL-SUID KOÖPERASIE BEPERK

9th Respondent

GWK LIMITED

10th Respondent

KAAP AGRI BEDRYF LIMITED

11th Respondent

MKG BEDRYFSMAATSKAPPY (PTY) LIMITED

12th Respondent

TUINROETE AGRI BEPERK

13th Respondent

MOORREESBURGSE KORINGBOERE (EDMS) BEPERK

14th Respondent

TWK LANDBOU BEPERK

15th Respondent

NTK LIMPOPO AGRIC BEPERK

16th Respondent

THE GRAIN SILO INDUSTRY (PTY) LIMITED

17th Respondent

CONSENT AGREEMENT IN TERMS OF SECTION 49D READ WITH SECTION 58(1)(a)(iii) AND 58(1)(b) OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998), AS AMENDED, BETWEEN THE COMPETITION COMMISSION ("THE COMMISSION") AND GRAIN SILO INDUSTRY (PTY) LIMITED ("the GSI"), IN RESPECT OF AN ALLEGED CONTRAVENTION OF SECTION 4(1)(b)(i) OF THE COMPETITION ACT, 1998 ("THE ACT").



The *Commission* and the *GSI* hereby agree that application be made to the *Tribunal* for the confirmation of this *Consent Agreement* in terms of section 58(1)(a)(iii) read with section 58(1)(b) of the *Act*, on the terms set out below:

1. **Definitions**

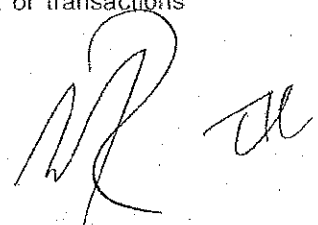
For the purposes of this *Consent Agreement* the following definitions shall apply:

- 1.1. "Act" means the Competition Act, 1998 (Act No. 89 of 1998), as amended;
- 1.2. "Commission" means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Act, with its principal place of business at 1st Floor, Mulayo Building (Block C), the dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;
- 1.3. "Commissioner" means the Commissioner of the *Commission*, appointed in terms of section 22 of the *Act*;
- 1.4. "Complaint" means the complaint under case number 2009Mar4349 initiated by the *Commissioner* on 17 March 2009 and expanded by him on 12 April 2011 pertaining *inter alia* to allegations of price fixing in terms of section 4(1)(b)(i) of the *Act*;
- 1.5. "Consent Agreement" means this agreement duly signed and concluded between the *Commission* and the *GSI*;
- 1.6. "Grain" means wheat, maize, sunflower seed, soy bean and all other grains and oilseeds which the *Silo Respondents* store in their silos from time to time;

"GSI" means the Grain Silo Industry (Pty) Ltd, a company incorporated and registered in accordance with the laws of the Republic of South Africa with its registered office and principal place of business at Grain Building, 477 Witherite Street, The Willows, Pretoria, Gauteng;

It acts not only as a mouthpiece for commercial silo owners but also promotes the interests of the grain industry in general as well as that of the grain consumer and the general public. Briefly put, the *GSI* –

- 1.6.1.1. provides input in the drafting of legislation and grading regulations (the national Department of Agriculture, Forestry and Fisheries regards GSI as its link to the roll players in the grain industry in general);
- 1.6.1.2. is concerned with aspects of food safety and food security, of great importance to the South African public and for facilitating grain exports (interacts with the Food Safety Forum, PPECB, SABS etc);
- 1.6.1.3. is involved with educational and empowerment initiatives with AgriSETA, GOSA etc;
- 1.6.1.4. engages Spoornet in an effort to optimise grain movement in the country and to resuscitate the use of old railway lines previously used to carry grain from silos;
- 1.6.1.5. interacts with Grain South Africa;
- 1.6.1.6. attends SAFEX committee meetings and assisted SAFEX in setting standards that silos had to meet in order to be registered with SAFEX, important to guarantee the reliability of the trading system;
- 1.7. "*Initial Respondents*" means Afgri, Senwes Limited, Noord-Wes Koöperasie Limited, OVK Operations Limited, Suidwes (Pty) Limited, Vrystaat Koöperasie Limited and the GSI;
- 1.8. "*non-SAFEX rates*" means daily *grain* storage rates charged by Silo Respondents to customers from time to time in respect of transactions concluded in the physical market (ie other than on SAFEX);
- 1.9. "*Respondents*" means the *Initial* and *Subsequent Respondents*;
- 1.10. "*SAFEX*" means the South African Futures Exchange of the Johannesburg Stock Exchange which was established to provide market participants with a price determination mechanism and a price risk management facility through which they could manage exposure to adverse price movements in underlying commodities;
- 1.11. "*SAFEX tariffs*" means daily *grain* storage rates charged by Silo Respondents to customers in a given season in respect of transactions concluded on SAFEX;

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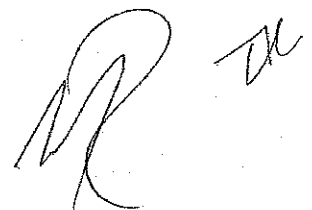
- 1.12. "*Silo Respondents*" means the *Respondents* other than the *GSI*;
- 1.13. "*Subsequent Respondents*" means Overberg Agri (Pty) Limited, Die Humansdorpse Koöperasie Beperk, Sentraal-Suid Koöperasie Beperk, GWK Limited, Kaap Agri Bedryf Limited, MGK Bedryfsmaatskappy (Pty) Limited, Tuinroete Agri Bpk, Moorreesburgse Koringboere (Edms) Beperk, TWK Landbou Beperk, NTK Limpopo Agric Beperk and Villiersdorp Koöperasie Limited; and
- 1.14. "*Tribunal*" means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Act, with its principal place of business at 3rd Floor, Mulayo building (Block C), the dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

2. The *Complaint* and its investigation

- 2.1. On 17 March 2009 the *Commissioner* initiated a complaint against the *Initial Respondents* for alleged contraventions of sections 4(1)(b)(i) and 8(a) of the Act.
- 2.2. The *Commission's* investigation revealed that *SAFEX tariffs* were agreed to not only by the *Initial Respondents* but by all members and shareholders of the *GSI*.
- 2.3. In the circumstances, on 12 April 2011 the *Commissioner* expanded the investigation to include the *Subsequent Respondents*.
- 2.4. The *Commission* conducted its investigation and concluded that:
- 2.4.1. the *Respondents* had contravened section 4(1)(b)(i) of the Act in that the *Silo Respondents*, through their participation in the *GSI*, had fixed *SAFEX tariffs*. The *Silo Respondents* were and are all former cooperatives who own *grain storage silos* and are competitors in the market for *grain storage*;
- 2.4.2. in certain instances *SAFEX tariffs* were used by the *Silo Respondents* as or in order to determine their *non-SAFEX rates* in a manner which amounted indirectly to collusion since such *SAFEX tariffs* had been fixed in contravention of the Act;



- 2.4.3. the *Silo Respondents* had exchanged detailed cost information by providing same to the GSI on an annual basis. The GSI had aggregated the information and provided its members with an annual average cost of conducting a *grain* storage business; and
- 2.4.4. there had been no other contravention of the *Act*.
- 2.5. In reaching such conclusions the *Commission* found that:
- 2.5.1. notwithstanding that they are competitors, the *Silo Respondents* were and are shareholders or members of the GSI. Although the GSI is a private company, it operates as an industry association for members of the *grain* storage industry;
- 2.5.2. SAFEX placed the onus for recommending SAFEX rates on the GSI on the basis that it would canvass its members on acceptable storage rates;
- 2.5.3. GSI complied with SAFEX's request and recommended such tariffs to SAFEX because uniform tariffs were necessary for the proper functioning of SAFEX;
- 2.5.4. in response to requests from SAFEX for proposed SAFEX tariffs, the GSI consulted its shareholders. They were requested to and did submit to the GSI individual proposals. These proposals were collated by the GSI and in some instances the GSI's technical committee (the members of which were representatives of the *Silo Respondents*) decided on what the appropriate recommended SAFEX tariff should be. GSI then submitted to SAFEX such recommended SAFEX tariff. These were accepted and applied by SAFEX;
- 2.5.5. the essence of the conduct complained of is that SAFEX tariffs proposed by the GSI were agreed to by all of the *Silo Respondents* in their capacity as members of the GSI. Given that they are competitors in the provision of *grain* storage services, the joint determination of SAFEX tariffs by means of the GSI amounted to

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prohibited price fixing in the form of an agreement between firms in a horizontal relationship for the direct fixing of *grain* storage prices;

2.5.6. the manner in which *SAFEX tariffs* were determined was restrictive of competition;

2.5.7. until about November 2007, *SAFEX* requested proposed *SAFEX tariffs* from the *GSI* on an annual basis;

2.5.8. since June 2008, as is set out below, the *GSI* declined to provide proposed *SAFEX tariffs* any longer on account of the *Commission's* contentions that the *Respondents* were contravening section 4(1)(b)(i) of the *Act*;

2.5.9. in certain instances *SAFEX tariffs* were used by the *Silo Respondents* as or in order to determine their *non-SAFEX rates* in a manner which amounted indirectly to collusion since such *SAFEX tariffs* had been fixed in contravention of the *Act*; and

2.5.10. the *Silo Respondents* had exchanged detailed cost information by providing same to the *GSI* on an annual basis. The *GSI* had aggregated the information and provided its members with an annual average cost of conducting a *grain* storage business.

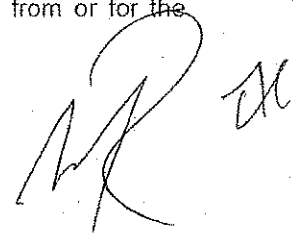
2.6. After concluding its investigation, with which *GSI* had co-operated fully over a series of meetings and in written responses, the *Commission* took a decision to refer the *Complaint* to the *Tribunal*.

3. Statement of Conduct by the *GSI*

3.1. The *GSI* therefore admits that:

3.1.1. it provided the forum for the sharing of detailed cost information by its members, relating to the costs of operating a silo and the storage of grain;

3.1.2. it no longer receives or aggregates cost information from or for the

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Silo Respondents;

3.1.3. at the request of SAFEX, the GSI facilitated the joint determination by the GSI's members of proposed new SAFEX tariffs and further recommended these proposed tariffs to SAFEX;

3.1.4. the conduct of facilitating the joint determination of proposed new SAFEX tariffs could be interpreted as a decision by an association in terms of section 4(1) of the Act.

3.3 The GSI confirms that, to the best of its knowledge and belief there have been no contraventions of section 4 of the Act since July 2008, which were and/or might have been engaged in or facilitated by the GSI.

4. **Administrative Penalty to be Paid by the GSI**

4.1. Having regard to the provisions of section 58(1)(a)(iii) read with sections 59(1)(a), 59(2) and 59(3) of the Act, the GSI accepts that a contravention of section 4(1)(b)(i) of the Act may lead to the imposition of an administrative penalty where the Tribunal deems it appropriate.

4.2. The GSI agrees to pay an administrative penalty in the amount of R 94 556.00 (the "penalty").

4.3. The penalty constitutes 4% (four per cent) of the GSI's total membership levies for the 2009 financial year.

4.4. The GSI will pay the penalty to the Commission within 30 business days of confirmation of this Consent Agreement by the Tribunal.

4.5. The penalty shall be paid into the Commission's bank account, details of which are as follows: revenue

Bank name: Absa Bank

Branch name: Pretoria

Account holder: Competition Commission Fees Account

Account number: 4050778576

Account type: Current Account

Branch Code: 323 345

- 4.6. The *penalty* will be paid over by the *Commission* to the National Revenue Fund in accordance with section 59(4) of the *Act*.

5. **Agreement Concerning Future Conduct of the GSI**

- 5.1. The GSI agrees to fully cooperate with the *Commission* in relation to the prosecution of its referral of the *Complaint* (the "*Referral*"). Without limiting the generality of the foregoing, the GSI specifically agrees:

- 5.1.1. to testify in the *Referral* in respect of alleged contraventions of the *Act* falling within the ambit of this *Consent Agreement*; and

- 5.1.2. to the extent that it has not already done so and that it is in existence, to provide evidence, written or otherwise, which is in its possession or under its control, concerning the alleged contraventions of the *Act* falling within the ambit of this *Consent Agreement*.

- 5.2. The GSI agrees that it will in future refrain from conduct that constitute contraventions of section 4(1)(b) of the *Act*.

- 5.3. The GSI shall develop, implement and monitor a competition law compliance programme incorporating corporate governance (the "*programme*") designed to ensure that its employees, management and directors (excluding GSI directors who are employed by the *Silo Respondents*) do not engage in future contraventions of Chapter 2 of the *Act*. In particular, after confirmation of this *Consent Agreement* by the *Tribunal*, the GSI shall:

- 5.3.1. formulate and implement the *programme*;

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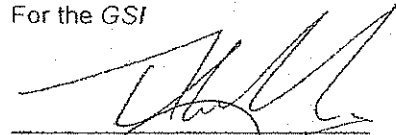
- 5.3.2. as part of the *programme*, provide training on relevant competition law compliance to all relevant persons and/or officials employed by the GSI; and
- 5.3.3. review (and update where necessary) the *programme* annually to ensure the GSI's continued compliance with the *Act*.
- 5.4. The GSI shall submit a copy of the *programme* to the *Commission* within 60 business days of the date of confirmation of this *Consent Agreement* by the *Tribunal*.

6. **Full and Final Settlement of *Complaint* against the GSI**

- 6.1. This *Consent Agreement*, upon its confirmation by the *Tribunal*, shall be in full and final settlement of and conclude all proceedings between the *Commission* and the GSI relating to any alleged contravention by the GSI of the *Act*, namely the fixing of the daily grain storage tariffs for SAFEX, that falls within the ambit of the *Complaint* and/or is disclosed in this *Consent Agreement*.

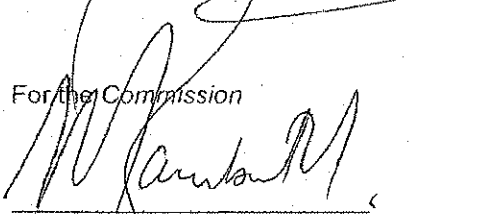
Dated and signed at *Pretoria* on the *2nd* day of *November* 2011.

For the GSI



Chief Executive Officer

For the Commission



Commissioner

Tebogo Mputle

From: Tebogo Mputle
Sent: Wednesday, November 09, 2011 2:55 PM
To: Leanie Mouton; gcprok@gmail.com; freekm@gwk.co.za; Andries Le Grange; marianne.wagener@nortonrose.com; 'Desmond Rudman'; Hanneke Spies; 'rraath@werksmans.com'
Cc: Mervin Dorasamy; Songezo Ralarala; Lerato Motaung
Subject: Competition Commission v Afgri Operations Ltd & Others - CT Case no. 43/CR/Jun11
Attachments: 43CRJun11 Grain Silo.pdf; 43CRJun11 GWK.pdf; 43CRJun11 NTK.pdf; 43CRJun11 OVK.pdf; 43CRJun11 Senwes.pdf; 43CRJun11 NWK.pdf; 43CRJun11 Vrystaat.pdf

Dear Sirs

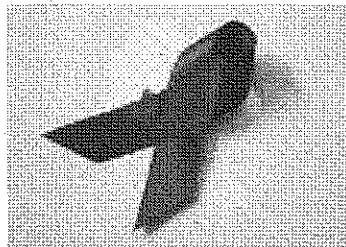
Please see attached consent orders in respect of the consent agreements concluded between the Competition Commission and the following parties:

1. GWK Ltd
2. Senwes Ltd
3. NWK Ltd
4. Vrystaat Kooperasie Beperk
5. NTK Limpopo Agric Beperk
6. OVK Operations Ltd
7. Grain Silo Industry (Pty) Ltd

Kindly confirm receipt.

Regards

Tebogo Mputle
Registry Administrator
competition tribunal south africa
Tel No: +27 (12) 394 3354
Fax No: +27 (12) 394 4354
Mobile: +27 (82) 557 6897
Email: tebogom@comptrib.co.za
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