

COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 43/CR/Jun11

In the matter between:

The Competition Commission

Applicant

and

Afgri Operations Limited

Respondent

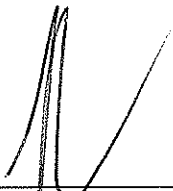
Panel : N Manoim (Presiding Member), Y Carrim (Tribunal Member), and A Wessels (Tribunal Member)

Heard on : 15 June 2011

Decided on : 15 June 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
N Manoim

Concurring: Y Carrim and A Wessels

"A"
43/CR/Sec 11k

1

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
HELD IN PRETORIA

CT Case No.
CC Case No. 2009Mar4349

In the matter between:

THE COMPETITION COMMISSION

Applicant

and

AFGRI OPERATIONS LIMITED

1st 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

MOREESBURGSE KORINGBOERE (EDMS) BEPERK

14th Respondent

TWK LANDBOU BEPERK

15th Respondent

NTK LIMPOPO AGRIC BEPERK

16th Respondent

GRAIN SILO INDUSTRY (PTY) LIMITED

17th Respondent

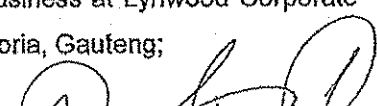
CONSENT AGREEMENT IN TERMS OF SECTION 49D READ WITH SECTION 58(1)(a)(iii) AND 58(1)(b) OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998), AS AMENDED, BETWEEN THE COMPETITION COMMISSION ("THE COMMISSION") AND AFGRI OPERATIONS LIMITED ("AFGRI"), IN RESPECT OF AN ALLEGED CONTRAVENTION OF SECTION 4(1)(b)(i)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

[Handwritten signatures]

The *Commission* and *Afgri* 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. "**Afgri**" means Afgri Operations Limited, a company incorporated and registered in accordance with the laws of the Republic of South Africa with registration number 1995/005872/06 and with its registered office and principal place of business at AFGRI Building, 12 Byls Bridge Boulevard, Highveld Ext 73, Centurion, Pretoria, Gauteng;
 - 1.3. "**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;
 - 1.4. "**Commissioner**" means the Commissioner of the *Commission*, appointed in terms of section 22 of the *Act*;
 - 1.5. "**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*;
 - 1.6. "**Consent Agreement**" means this agreement duly signed and concluded between the *Commission* and *Afgri*;
 - 1.7. "**grain**" means wheat, maize, sunflower seed, soy bean and all other grain and oilseed products which *Afgri* stores in its silos from time to time;
 - 1.8. "**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 Lynwood Corporate Park, Alkantrantstraat, Lynwood Manor, Pretoria, Gauteng;
- 

- 1.9. **"Initial Respondents"** means *Afgri*, Senwes Limited, Noord-Wes Koöperasie Limited, OVK Operations Limited, Suidwes (Pty) Limited, Vrystaat Koöperasie Limited and the GSI;
- 1.10. **"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);
- 1.11. **"Respondents"** means the *Initial* and *Subsequent Respondents*;
- 1.12. **"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;
- 1.13. **"SAFEX tariffs"** means daily *grain* storage rates charged by Silo Respondents to customers in a given season in respect of transactions concluded on SAFEX;
- 1.14. **"Silo Respondents"** means the *Respondents* other than the GSI;
- 1.15. **"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, Moreesburgse Koringboere (Edms) Beperk, TWK Landbou Beperk, NTK Limpopo Agric Beperk and Villiersdorp Koöperasie Limited; and
- 1.16. **"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 impermissibly 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 had the necessary knowledge and understanding of the *grain storage industry* and the costs involved in providing *grain storage services*;
- 

- 2.5.3. *Afgri* understood that the GSI proposed such tariffs to SAFEX because uniform tariffs were necessary for the proper functioning of SAFEX;
- 2.5.4. the GSI's technical committee (the members of which were representatives of the *Silo Respondents*) was responsible for proposing SAFEX tariffs on behalf of the GSI and its members. 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 and evaluated by the GSI's technical committee which decided on and submitted to SAFEX proposed SAFEX tariffs on behalf of the GSI. 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 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 2008, SAFEX requested proposed SAFEX tariffs from the GSI on an annual basis;
- 2.5.8. in about 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 impermissibly 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. The *Commission* took a decision to refer the *Complaint* to the *Tribunal*.

3. Statement of Conduct by *Afgri*

3.1. Having conducted a detailed factual and legal investigation of the matters which form the subject matter of the *Complaint*, *Afgri* admits that it -

3.1.1. participated, as a member of the *GSI*, in the fixing of *SAFEX tariffs* as described in paragraphs 2.5.1 to 2.5.8 above;

3.1.2. used *SAFEX tariffs* as or in order to determine its *non-SAFEX rates* as described in paragraph 2.5.9 above. In this regard it is admitted that *non-SAFEX rates* determined in this manner were applied by *Afgri* until -

3.1.2.1. about November 2008 in respect of wheat; and

3.1.2.2. about March 2009 in respect of sunflower seed and soy bean; and

3.1.2.3. about May 2009 in respect of maize; and

3.1.3. exchanged detailed cost information with other *Silo Respondents* as described in paragraph 2.5.10 above.

3.2. *Afgri* no longer engages in the conduct referred to in paragraph 3.1 above.

3.3. *Afgri* records that in determining its current *non-SAFEX rates* it has regard *inter alia* to current *SAFEX tariffs* but understands this to be consistent with the *Act* since *SAFEX tariffs* are no longer fixed in contravention of the *Act*.

4. Administrative Penalty to be Paid by *Afgri*

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*, *Afgri* 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. *Afgri* agrees to pay an administrative penalty in the amount of R 15 600 000.00 (the "*penalty*").
- 4.3. The *penalty* constitutes 4% (four per cent) of *Afgri's* total grain silo storage turnover for the 2009 financial year.
- 4.4. *Afgri* 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:

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 *Afgri*

- 5.1. *Afgri* 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, *Afgri* 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*.

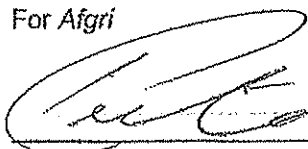
- 5.2. *Afgri* agrees that it will in future refrain from the provision of contractual undertakings that constitute contraventions of section 4(1)(b) of the *Act*.
- 5.3. *Afgri* shall develop, implement and monitor a competition law compliance programme incorporating corporate governance (the "*programme*") designed to ensure that its employees, management and directors do not engage in future contraventions of Chapter 2 of the *Act*. In particular, after confirmation of this *Consent Agreement* by the *Tribunal*, *Afgri* shall:
 - 5.3.1. formulate and implement the *programme*;
 - 5.3.2. as part of the *programme*, provide training on relevant competition law compliance to all relevant persons and/or officials employed by *Afgri*; and
 - 5.3.3. review (and update where necessary) the *programme* annually to ensure *Afgri's* continued compliance with the *Act*.
- 5.4. *Afgri* 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 *Afgri*

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 *Afgri* relating to any alleged contravention by *Afgri* of the *Act* that falls within the ambit of the *Complaint* and/or is disclosed in this *Consent Agreement*.

Dated and signed at *CENTURION* on the 2 day of *JUNE* 2011.

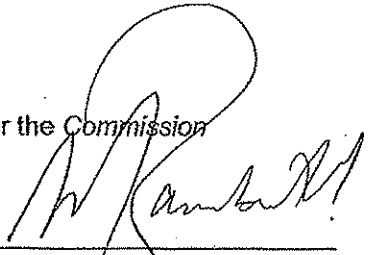
For *Afgri*



Chief Executive Officer



For the Commission



Commissioner

Pretoria, 3 June 2011