

COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 43/CR/Jun11

In the matter between:

The Competition Commission

Applicant

and

Senwes Ltd

Respondent

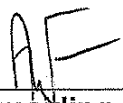
Panel : A Wessels (Presiding Member), M Mokuena (Tribunal Member), and A Ndoni (Tribunal Member)

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.
CC Case No. 2009Mar4349

In the matter between:

THE COMPETITION COMMISSION

and

SENWES LIMITED

In re:

THE COMPETITION COMMISSION

and

AFGRI OPERATIONS LIMITED
SENWES LIMITED
NWK LIMITED
OVK OPERATIONS LIMITED
SUIDWES AGRICULTURE (PTY) LIMITED
VRYSTAAT KOÖPERASIE BEPERK
OVERBERG AGRI (PTY) LIMITED
DIE HUMANSDORPSE KOÖPERASIE BEPERK
SENTRAAL-SUID KOÖPERASIE BEPERK
GWK LIMITED
KAAP AGRI BEDRYF LIMITED
MGK BEDRYFSMAATSKAPPY (PTY) LIMITED
TUINROETE AGRI BEPERK
MOORREESBURGSE KORINGBOERE (EDMS) BEPERK
TWK LANDBOU BEPERK
NTK LIMPOPO AGRIC BEPERK
GRAIN SILO INDUSTRY (PTY) LIMITED

1st Respondent
2nd Respondent
3rd Respondent
4th Respondent
5th Respondent
6th Respondent
7th Respondent
8th Respondent
9th Respondent
10th Respondent
11th Respondent
12th Respondent
13th Respondent
14th Respondent
15th Respondent
16th Respondent
17th Respondent

competition tribunal
Applicant

2011-09-23

RECEIVED BY: *Abigail* 2nd Respondent

TIME: 9:35

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 SENWES LIMITED ("SENWES"), IN RESPECT OF AN ALLEGED CONTRAVENTION OF SECTION 4(1)(b)(i) OF THE COMPETITION ACT, 1998 ("THE ACT").

The Commission and Senwes hereby agree that application be made to the Tribunal for the

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confirmation of this *Consent Agreement* in terms of section 58 (1)(a)(iii) as read with section 58(1)(b) of the Competition Act, 1998 (Act No. 89 of 1998), as amended, 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 in terms of section 49B of the Act, including a complaint concerned with allegations of, *inter alia*, price fixing in terms of section 4(1)(b)(i) of the Act initiated on 17 March 2009, as well as an expanded initiation on 25 May 2010 after the decision was made to include all the members and shareholders of the Grain Silo Industry;
- 1.5. **"Consent Agreement"** means this agreement duly signed and concluded between the Commission and Senwes;
- 1.6. **"Grain Silo Industry"** means Grain Silo Industry (Pty) Ltd, a private company duly incorporated in accordance with the company laws of the Republic of South Africa, having its registered offices at Lynwood Corporate Park, Alkantrantstraat, Lynwood Manor, Pretoria, Gauteng Province. The GSI represents its members in public forums wherein matters related to the storage and trading of grain and oilseeds are discussed and provides specialist research services that members may request on an ad-hoc basis. The GSI represented its constituent members in interactions with the Agricultural Products Division of the Johannesburg Stock Exchange (the "APD" previously "SAFEX"); this conduct has ceased.



- 1.7. **"Senwes"** means Senwes Limited, a company registered and incorporated in accordance with the laws of the Republic of South-Africa with registration number 1997/005336/06 and with its registered office and main place of business at 1 Charel de Klerk Street, Klerksdorp, North West Province, South Africa;
- 1.8. **"Parties"** means the Commission and Senwes;
- 1.9. **"Respondent"** means for purposes of this agreement Senwes;
- 1.10. **"Respondents"** means Respondents one (1) to seventeen (17) described above;
- 1.11. **"Safex"** means the South African Futures Exchange which was established to provide market participants with a price determination mechanism and a price risk management facility through which they can manage their exposure to adverse price movements in the underlying commodity.
- 1.12. **"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 Complaint Investigation

- 2.1. On 17 March 2009 the *Commissioner* initiated a complaint against Afgri Operations Limited ("Afgri"), Senwes Limited ("Senwes"), Noord-Wes Koöperasie Limited ("NWK"), OVK Operations Limited ("OVK"), Suidwes (Pty) Limited ("Suidwes"), Vrystaatse Koöperasie Limited ("VKB") and the Grain Silo Industry ("GSI") for alleged contravention of section 4(1)(b)(i) of the Act.
- 2.2. The investigation revealed that the storage rate is agreed to and assented to not only by the entities against whom the original complaint initiation was made, but by all members and shareholders of GSI. In the circumstances, on 25 May 2010 the *Commissioner* expanded the investigation to refer to all seventeen (17) respondents.



2.3. The *Commission* conducted its investigation and concluded that the *respondents* and GSI have contravened section 4(1)(b)(i) of the Act. The essence of the conduct complained of is that the *respondents* and GSI have contravened section 4(1)(b)(i) of the Act in that they fix the prices of the daily storage tariff for the storage of grain. This is done for application throughout the Republic. The first to sixteenth *respondents* are all former cooperatives who own grain storage silos and provide other agricultural services and are competitors in the market for grain storage.

2.4. The *Commission* found that:

2.4.1. Notwithstanding the fact that they are competitors, the first to sixteenth *respondents* are all shareholders or members of the GSI. Although the GSI is a private company, it amounts to an industry association for members of the grain storage industry. SAFEX placed the onus for the determination of the storage rate on the GSI on the basis that it had the necessary knowledge and understanding of the costs involved in providing storage. Until 2008, SAFEX requested the standardised tariff from the GSI on an annual basis. In 2008, as is set out below, the GSI declined to provide the standardised storage tariff to SAFEX any longer on account of the *Commission's* contentions that it and its members were contravening section 4(1)(b)(i) of the Act.

2.4.2. It was the GSI's technical committee that was responsible for fixing the daily storage tariff on behalf of the GSI and its members. In response to requests from SAFEX, the GSI consulted its shareholders. The shareholders submitted individual proposals as to the appropriate storage rate to GSI. These rates were collated and evaluated by the GSI's technical committee, the members of which are from competing silo companies. The technical committee then decided on a rate and this was then submitted to SAFEX on behalf of GSI and its shareholders.

2.4.3. The essence of the conduct complained of is that the daily storage tariff proposed by GSI is agreed to and assented to by all of the *respondents*. Given that the first to sixteenth *respondents* are all

competitors in the provision of storage services, the joint determination of the daily storage rate amounts to prohibited price fixing in that it quite simply amounts to an agreement between firms in a horizontal relationship for the direct fixing of storage prices.

- 2.4.4. The manner in which the *SAFEX* storage tariff is determined is, in the Commission's view, restrictive of competition. In addition to agreeing to the *SAFEX* rate, the respondents exchanged detailed cost information. In addition, the storage tariff determined for *SAFEX* purposes has been used to determine storage fees in respect of sales transactions in the physical market.

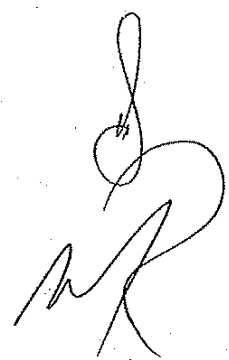
- 2.5. The *Commission* took a decision to refer to the *Tribunal* its complaint that is described above.

3. **Statement of conduct by Senwes**

Senwes admits that it participated, as a member of the GSI, in the fixing of the daily grain storage tariff in contravention of section 4(1)(b)(i) of the Act as described above, to the extent that it competes with the other Respondents.

4. **Administrative Penalty**

- 4.1. Having regard to the provisions of sections 58(1)(a)(iii) as read with sections 59(1)(a), 59(2) and 59(3) of the Act, *Senwes* accepts that a contravention of section 4(1)(b)(i) may lead to the imposition of an administrative penalty where the *Tribunal* deems it appropriate.
- 4.2. The parties have agreed that *Senwes* will pay an administrative penalty in the amount of R 7 628 670.36
- 4.3. This amount constitutes 4% (four per cent) of *Senwes*' total grain silo turnover for the 2009 financial year;
- 4.4. *Senwes* will pay the amount set out in paragraph 4.2 above to the Commission in four consecutive payments as follows:

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4.3.1 R 2 000 000 within 10 days of confirmation of this *Consent Agreement* by the *Tribunal*;

4.3.2 R 2 000 000 on or before 31 December 2011;

4.3.3 R 2 000 000 on or before 30 June 2012;

4.3.3 R 1 628 670.36 on or before 31 December 2012.

4.5. This payment shall be made 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

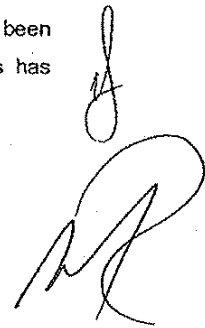
4.6. The payment will be paid over by the *Commission* to the National Revenue Fund in accordance with section 59(4) of the Act.

5. **Agreement Concerning Future Conduct**

5.1. *Senwes* agrees to fully cooperate with the *Commission* in relation to the prosecution of the complaint referral. Without limiting the generality of the foregoing, *Senwes* specifically agrees to:

5.1.1. Testify in the complaint referral (if any) in respect of alleged contraventions covered by this *Consent Agreement*, to the extent that its employees are able to provide assistance in this regard (in the light of the fact that various persons involved in this matter are no longer employed by *Senwes*); and

5.1.2. To the extent that it is in existence and has not already been provided to the *Commission* (it being recorded that *Senwes* has

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already made full disclosure to the Commission), provide evidence, written or otherwise, which is in its possession or under its control, concerning the alleged contraventions contained in this *Consent Agreement*.

- 5.2. *Senwes* agrees that it will in future not engage in prohibited practices that constitute contraventions of section 4(1)(b) of the Act.
- 5.3. *Senwes* has implemented a competition law compliance programme incorporating corporate governance (which has been developed by it and its advisors) designed to ensure that its employees, management, directors and agents do not engage in future contraventions of the Competition Act. In particular, *Senwes* shall:
- 5.3.1. Continue to implement and monitor such competition policy and compliance programme;
- 5.3.2. Continue to provide training on competition law compliance on issues particularly relevant to *Senwes* and its employees and officials;
- 5.3.3. Continue to provide training on competition law compliance to all persons and/or officials employed by *Senwes* after the confirmation of this *Consent Agreement* by the Tribunal;
- 5.3.4. update the competition policy and training annually to ensure *Senwes'* continued compliance with the Act (for a period of three years after the confirmation of this consent agreement by the Tribunal);
- 5.4. *Senwes* shall submit a copy of such compliance programme to the Commission within 60 days of the date of confirmation of the *Consent Agreement* by the Tribunal.
6. **Full and Final Settlement**

This agreement, upon confirmation as an order by the *Tribunal*, is entered into in full and final settlement and concludes all proceedings between the *Commission* and *Senwes* relating to any alleged contravention by the *Respondents* of the Act that is the subject of the Complaint and *Commission's* investigation under case



no 2009MAR4349.

Dated and signed at *Teleksdorp* on the *21* day of *June* 2011.

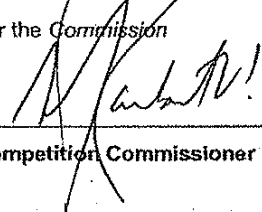
For Senwes



Chief Executive Officer

Dated and signed at *Pretoria* on the *23* day of *June* 2011.

For the Commission



Competition Commissioner