

COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 44/CR/Jun11

In the matter between:

The Competition Commission

Applicant

and

NWK Limited

Respondent

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

Heard on : 15 June 2011

Decided on : 14 July 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"

44/CE/5un11

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
HELD IN PRETORIA

CT Case No.
CC Case No. 2008Oct4045

In the matter between:

THE COMPETITION COMMISSION

Applicant

and

NWK LIMITED

Respondent

In re:

COMPETITION COMMISSION

Applicant

and

NWK LIMITED

First Respondent

RAND MERCHANT BANK, A DIVISION OF
FIRSTRAND BANK LIMITED

Second Respondent

CONSENT AGREEMENT IN TERMS OF SECTION 49D READ WITH SECTION 58(1)(a)(iii) AS READ WITH SECTION 58(1)(b) OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998), AS AMENDED, BETWEEN THE COMPETITION COMMISSION AND NWK LIMITED, IN REGARD TO AN ALLEGED CONTRAVENTION OF SECTION 4(1)(b)(ii) OF THE COMPETITION ACT, 1998

The *COMMISSION* and *NWK LIMITED* hereby agree that application be made to the Competition Tribunal for the confirmation of a 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 Competition Commission, appointed in terms of section 22 of the Act;
- 1.4 **"Complaint"** means the complaint initiated by the Commissioner of the Competition Commission in terms of section 49B of the Act under case number 2008Oct4045;
- 1.5 **"Consent Agreement"** means this agreement duly signed and concluded between the Commission and NWK Limited ("NWK");
- 1.6 **"FirstRand"** means FirstRand Bank Limited, a company registered and incorporated in accordance with the laws of the Republic of South-Africa with registration number 1929/001225/06 and with its registered office at 1st Floor, 4 Merchant Place, Sandton, 2146, South Africa;
- 1.7 **"NWK"** means NWK Limited, a company registered and incorporated in accordance with the laws of the Republic of South-Africa with registration number 1998/007577/06 and with its registered address, alternatively principal place of business at 81 Scholtz Street, Lichtenburg, 2740, South-Africa;
- 1.8 **"Parties"** means the Commission and NWK;
- 1.9 **"Respondents"** means both RMB and NWK;
- 1.10 **"RMB"** means Rand Merchant Bank, a division of FirstRand Bank Limited and with its registered address, alternatively principal place of business at 1 Merchant Place, c/o Fredman Drive and Rivonia Road, Sandton, 2196, South Africa. RMB is a diversified financial services brand encompassing investment banking, fund management, private wealth management and advisory services. RMB is involved in the agricultural industry in that it engages in paper trading. It also provides brokering (and related) services and financing options to its clients in the agricultural industry;
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- 1.11 "**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 During October 2008 the Commission initiated a complaint against the respondents in respect of allegations that the respondents had contravened section 4(1)(b)(ii) of the Act in that they have divided the market in which they compete by allocating territories and/or customers.
- 2.2 The Commission conducted its investigation and found that RMB and NWK are both engaged in the business of trading grain on the South African Futures Exchange (SAFEX) and in the physical market. As such, they are competitors and are in a horizontal relationship within the meaning of the Act. RMB and NWK entered into an agreement on 29 April 2005 in respect of grain owned by RMB and stored in NWK silos.
- 2.3 The background to the agreement was the following:
- That RMB had stored 450, 000 tons of grain at various NWK-owned silos;
 - This represented close to 47 percent of all grain stored in the NWK silos;
 - The RMB stock was a carry-over from the previous harvest season;
 - NWK realised that it would face capacity constraints, given the expected bumper crop in the 2005 harvest season. That is, unless additional storage space would be created, NWK would not be in a position to accept new grain in some of its silos where RMB grain was stored;
 - Thus, NWK and RMB agreed terms upon which certain RMB grain was to be reallocated to alternative silos, certain RMB grain would be swapped for NWK grain and NWK was given the opportunity to sell certain RMB grain as well as other incidental matters.
 - The agreed terms were recorded in a signed agreement.
- 2.4 More specifically, the contract between RMB and NWK contains the following agreement:

- 172 902 tons of grain would be transferred by NWK to alternative storage locations;
- 127, 864 tons of grain would be sold by RMB to NWK;
- 67, 000 tons of grain would be swapped with grain at the other NWK storage locations;
- 140, 069 tons of grain will be moved by RMB to silos not owned by NWK;
- RMB will deliver and store a further 20, 000 tons of grain at NWK's Kameel Silo; and
- RMB granted NWK a sole mandate to sell the transferred and swapped grain to third parties via a tender process.

2.5 RMB also undertook not to sell the grain stored in Agriserve silos in South Africa or Botswana because that grain was tied up in a similar agreement with another storer of grain. The relevant clause 4.4 of the agreement reads as follows:

"RMB hereby undertakes that the grain which is relocated from the current locations to silos owned by Agriserve will not be sold to any person or organization in the Republic of South Africa or Botswana before 1 May 2007."

2.6 This clause 4.4 of the agreement implicates or may constitute an agreement by competitors not to compete in a particular market for a particular period.

2.7 In light of its findings, the Commission took a decision to refer the complaint concerning the allegation of market allocation in contravention of section 4(1)(b)(ii) to the Tribunal for adjudication.

3. Statement of conduct by NWK

NWK admits that the terms of clause 4.4 of the aforesaid agreement could be interpreted as a contravention of section 4(1)(b)(ii) of the Act.

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, NWK accepts that it is liable to pay an administrative penalty.

The parties have agreed that NWK will pay an administrative penalty in the

amount of R520 290 (five hundred and twenty thousand, two hundred and ninety rand).

- 4.2 This amount constitutes 3% (three per cent) of the value of grain affected by clause 4.4 of the aforesaid agreement.
- 4.3 NWK will pay the amount set out in paragraph 4.1 above to the Commission upon the date of confirmation of this Consent agreement by the Tribunal.
- 4.4 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

- 4.5 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

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

- 5.1.1 Testify in the complaint referral (if any) in respect of alleged contraventions covered by this Consent Agreement; and

- 5.1.2 To the extent that it is in existence, 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 NWK agrees that it will in future refrain from the provision of contractual undertakings that may contravene section 4(1)(b) of the Act.
- 5.3 Develop, implement and monitor a competition law compliance programme incorporating corporate governance designed to ensure that its employees, management, directors and agents do not engage in future contraventions of the Competition Act. In particular, such compliance programme will include the following:
- 5.3.1 a competition policy to be drafted and implemented by NWK;
 - 5.3.2 provide specific training on competition law aspects particularly relevant to NWK, to its members;
 - 5.3.3 ensure that such training will be made available to all new employees joining NWK. Furthermore, NWK will update such training annually to ensure on an ongoing basis that it will not be used as a platform where its members can engage in any collusive activities;
- 5.4 The submission of a copy of such compliance programme to the Commission within 60 days of the date of confirmation of the *Consent Agreement* as an order by the Competition 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 NWK relating to any alleged contravention by the respondents of the Act that is the subject of the Commission's investigation (Case No. 2008Oct4045).

A handwritten signature in black ink, consisting of a stylized 'J' or 'I' followed by a large, sweeping loop.

Dated and signed at *Lichtenburg*

on the 27 day of *May* 2011.

FOR NWK LIMITED

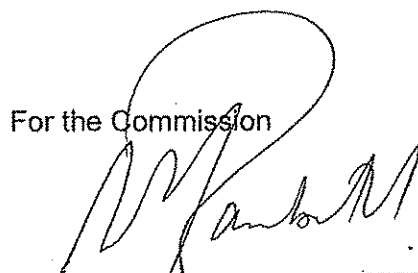
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MR D F MARAIS:
MANAGING DIRECTOR

A handwritten signature in dark ink, appearing to be 'J A Grobbelaar', written over a horizontal line.

MR J A GROBBELAAR:
OPERATIONAL DIRECTOR

For the Commission

A handwritten signature in dark ink, appearing to be 'R. K. M.', written over a horizontal line.

Competition Commissioner

Pretoria, 3 June 2011.