

SOUTH AFRICA / JUDGMENT

Competition Commission v Afgri Operations Ltd; In re: Competition Commission v Afgri Operations Ltd and Others (43/CR/Jun11) [2011] ZACT 36; [2011] 1 CPLR 93 (CT) (15 June 2011)
[2011] ZACT 36

COURT

Competition Tribunal

BEFORE

N Manoim, Y Carrim, A Wessels

CASE / FILE NUMBER

43/CR/Jun11

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COMPETITION TRIBUNAL

REPUBLIC OF SOUTH AFRICA

Case No: 43/CR/Jun11

In the matter between:

The Competition CommissionApplicant

and

Afgri Operations LimitedRespondent

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

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 COMMISSIONApplicant

AFGRI OPERATIONS LIMITED1st Respondent

In re:

SENWES LIMITED2nd Respondent

NWK LIMITED3rd Respondent

OWK OPERATIONS LIMITED4th Respondent

SUIDWES (PTY) LIMITED5th Respondent

VRYSTAAT KOOPERASIE BEPERK6th Respondent

OVERBERG AGRI (PTY) LIMITED7th Respondent

DIE HUMANSDORPSE KOOPERASIE BEPERK8th Respondent

SENTRAAL-SUID KOOPERASIE BEPERK9th Respondent

GWK LIMITED10th Respondent

KAAP AGRI BEDRYF LIMITED11th Respondent

MGK BEDRYFSMAATSKAPPY (PTY) LIMITED12th Respondent

TUINROETE AGRI BEPERK13th Respondent

MOREESBURGSE KORINGBOERE (EDMS) BEPERK14th Respondent

TWK LANDBOU BEPERK15th Respondent

NTK LIMPOPO AGRIC BEPERK16th Respondent

GRAIN SILO INDUSTRY (PTY) LIMITED17th 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").

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 the Act, on the terms set out below:

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 Byis 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)(t) 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. "GSt 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-vVes KoSperasie Limited, OVK Operations Limited, Suldwes (Pty) Limited, Vrystaat Kofiperasie 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 Kofiperasie Beperk, Senfraal-Suid KoSperasle 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 KoOperasle 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 has 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:

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 Ssb Respondents, through their participation in the GSf, had fixed SAFEX tariffs. The Sito Respondents were and are all former cooperatives who own grain storage sifos and are competitors in the market for grain storage;

2.4.2. in certain instances SAFEX tariffs were used by the Sib 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 GSl on an annual basis. The GSl 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 GSl. Although the GSl 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 GSl 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 GSl proposed such tariffs to SAFEX because uniform tariffs were necessary for the proper functioning of SAFEX,

2.5.4. the GSl's technical committee (the members of which were representatives of the Silo Respondents) was responsible for proposing SAFEX tariffs on behalf of the GSl and its members, in response to requests from SAFEX for proposed SAFEX tariffs, the GSl consulted its shareholders. They were requested to and did submit to the GSl individual proposals. These proposals were collated and evaluated by the GSl's technical committee which decided on and submitted to SAFEX proposed SAFEX tariffs on behalf of the GSl. 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 alt of the Silo Respondents in their capacity as members of the GSK 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)(l) 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 GS! 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 Compliant, 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 (s admitted that non-SAFFX 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;

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 CEO For the Commission Commissioner Pretoria 3 June 2011

Bank name: Absa Bank

Branch name: Pretoria

Account holder: Competition Commission Fees Account

Account number: 4050778576

Account type: Current Account

Branch Code: 323 345

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Dated and signed at Centurion on the 2 day of June 2011,

For Afgri

CEO

For the Commission

Commissioner

Pretoria 3 June 2011

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