

SOUTH AFRICA / JUDGMENT

Competition Commission v Cargill RSA (Pty) Ltd (016923) [2013] ZACT 61 (17 July 2013) [2013] ZACT 61

COURT

Competition Tribunal

BEFORE

A Wessels, M Mokuena, A Ndoni

CASE / FILE NUMBER

016923

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COMPETITION TRIBUNAL

REPUBLIC OF SOUTH AFRICA

Case No: 016923

In the matter between:

The Competition Commission and

Cargill RSA (Pty) Ltd

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

Heard on: 16 July 2013

Decided on: 17 July 2013

Order The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondent attached hereto marked Annexure “A”, to be read with the addendum to the settlement agreement, attached hereto as Annexure “B”. Presiding Member A Wessels Concurring: M Mokuena and A Ndoni

Order

The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondent attached hereto marked Annexure “A”, to be read with the addendum to the settlement agreement, attached hereto as Annexure “B”.

Presiding Member A Wessels

Concurring: M Mokuena and A Ndoni

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

HELD IN PRETORIA

CC Case No: 2012Sep0553

THE COMPETITION COMMISSION Applicant

and

CARGILL RSA (PTY) LTD 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 CARGILL RSA (PTY) LTD IN REGARD TO A CONTRAVENTION OF SECTION 13A (3) OF THE COMPETITION ACT, 1998

The Competition Commission ("the Commission") and Cargill RSA (Pty) Ltd ("Cargill RSA") hereby agree that application be made to the Competition Tribunal ("the Tribunal") for the confirmation of this Consent Agreement as an order of the Tribunal in terms of section 49D as read with sections 58 (1) (a) (iii), section 58 (1) (b) and section 59 (1) (d)

(i) of the Competition Act, 1998, 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. "Cargill RSA" means Cargill RSA (Pty) Ltd, a company registered and incorporated under the laws of the Republic of South Africa, with its primary place of business at Building No. 2, Montagu Office Park, Cnr Cedar Road & Cedar Lakes Boulevard, Broadacres, 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 the dti Campus, Building C, Mulayo, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;.

1.4. "Consent Agreement" means this agreement duly signed and concluded between the Commission and Cargill RSA (Pty) Ltd;

1.5. "KoroFrance SAS" means KoroFrance SAS, the holding company of the Provimi Group, with its principal place of business at, Parc D'activites de Ferchaud 35320, Crevin, France;

1.6. "NuTec" means NuTec Southern Africa (Pty) Ltd, a private company incorporated in accordance with the laws of the Republic of South Africa, with its principal place of business at, 234 Royston Road, Willoughton, Pietermaritzburg, Kwa-Zulu Natal;

1.7. "Parties" means the Commission and Cargill RSA;

1.8. “Respondent” means Cargill RSA;

1.9. “Sugar Direct” means Sugar Direct (Pty) Ltd, a private company incorporated in accordance with the laws of the Republic of South Africa, with its principal place of business at 33 Williams Way, Racing Park, Killarney, Cape Town, 7441;

1.10. “The Transaction” means the transaction wherein Cargill RSA intended to acquire 100% of the entire issued share capital of Sugar Direct

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, the dti Campus, Building C, Mulayo, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng

2.

BACKGROUND

2.1. On 4 July 2012 Cargill RSA filed an intermediate merger with the Commission wherein Cargill RSA intended to acquire 100% of the entire issued share capital of NuTec (“the NuTec transaction”).

2.2. During its investigation of the NuTec transaction, the Commission found that Cargill RSA acquired Sugar Direct on 1 September 2011. This transaction, being a transaction that requires notification in terms of section 13A of the Competition Act, had not been notified to the Commission.

2.3. On 17 September 2012 the transaction was subsequently notified to the Commission as an intermediate merger under case number 2012Sep0553. The transaction was unconditionally approved by the Commission on December 2012

3. INVESTIGATION AND FINDINGS OF THE COMMISSION

3.1. The Commission investigated the alleged contravention and found the following;

3.1.1. The transaction resulted in Cargill RSA acquiring 100% of the entire issued share capital of Sugar Direct which constituted a merger in terms of section 12 (1) of the Act;

3.1.2. The threshold for an intermediate merger as defined in section 11 (5) (b), read with section 11 (1) of the Act and Notice 216 of 2009 was met in respect of the transaction;

3.1.3. The parties implemented the merger prior to notification and approval by the Commission, in contravention of section 13A (3) of the Act;

3.2. Cargill cooperated with the Commission’s investigation and engaged the Commission with a view to settling the contravention. This agreement is the product of those engagements.

4. ADMISSION

4.1. The Respondent admits that the Sugar Direct transaction constituted a notifiable intermediate merger as defined in section 11 (5) (b) of the Act.

4.2. The Respondent further admits that the merger was implemented prior to notification and approval by the Commission in contravention of section 13A (3) of the Act.

4.3. The Respondent further admits that it and Sugar Direct were responsible for notifying the merger to the Commission in terms of the Act.

5. COMPLIANCE WITH THE ACT

5.1. The Respondent agrees and undertakes to:

5.1.1. Refrain from engaging in the implementation of notifiable mergers without the prior approval of the Commission, in contravention of section 13A

(3) of the Act; and

5.1.2. Develop, implement and monitor a competition law compliance programme incorporating corporate governance, designed to ensure that all its relevant employees, management and directors are aware of the provisions of the Competition Act and do not contravene them; and

5.1.3. Submit a copy of the aforementioned compliance programme to the Commission within 60 days of the date of confirmation of this Consent Agreement as an order by the Tribunal.

6. ADMINISTRATIVE PENALTY

6.1. Having regard to the provisions of sections 58 (1) (a) (iii) as read with sections 59 (1) (d), 59 (2) and 59 (3) of the Act, Cargill RSA is liable for and will pay an administrative penalty in the amount of R100, 000.00 (One hundred thousand rand), which amount constitutes less than 1% of the relevant turnover in 2011

7 TERMS OF PAYMENT

7.1. Cargill RSA shall pay the amount set out above to the Commission within 7 (seven) days from the date of confirmation of this Consent Agreement as an order of the Tribunal;

7.2. The payment shall be made into the Commission's bank account, details of which are as follows:

Bank: ABSA Bank

Branch Name: Pretoria

Account Holder: Competition Commission

Account number: 4050778576

Account type: Current Account

Branch code: 323345

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

8. FULL AND FINAL SETTLEMENT

8.1. This Consent Agreement is entered into in full and final settlement and, upon confirmation as an order by the Tribunal, concludes all proceedings between the Commission and Cargill RSA in relation to a contravention of section 13A(3) of the Act, and that is the subject of the investigation of the Commission under Case No, 2012Sep0553.

Signed at JOHANNESBURG on the 20th day of JUNE 2013

Signed at PRETORIA on the 21st

day of JUNE 2013

Mr Shan Ramburuth, The Commissioner

Competition Commission

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