

SOUTH AFRICA / JUDGMENT

Competition Commission v Kuehne and Nagel (Pty) Ltd (110/CR/Dec11) [2012] ZACT 13; [2012] 1 CPLR 88 (CT) (22 February 2012)

[2012] ZACT 13

COURT
Competition Tribunal

BEFORE
A Wessels, A Ndoni, M Mokuena

CASE / FILE NUMBER
110/CR/Dec11

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: 110/CR/Dec11

In the matter between:

THE COMPETITION COMMISSIONAPPLICANT

And

KUEHNE + NAG EL (PTY) LTDRESPONDENT

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

Heard on: 18 January 2012

Amended agreement received on: 21 February 2012

Decided on: 22 February 2012

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: A Ndoni and M Mokuena

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: A Ndoni and M Mokuena

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA HELD IN PRETORIA CC Case No.
2007OCT3236 in the matter between: THE COMPETITION COMMISSION

.....Applicant and KUEHNE + NAGEL (PTY) LTD

.....Respondent

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA HELD IN PRETORIA

CC Case No. 2007OCT3236

in the matter between:

THE COMPETITION COMMISSIONApplicant

and

KUEHNE + NAGEL (PTY) LTDRespondent

The Competition Commission and Kuehne + Nagel (Pty) Ltd 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 sections 58(1)(b) and 59(1)(a) 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. "Commissions? 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 2007OCT3236; 1.5. "Consent Agreement" means this agreement duly signed and concluded between the Commission and Kuehne + Nagel (Pty) Limited; 1.6. 'K+N SA" means Kuehne + Nagel (Proprietary) Limited a company registered and incorporated in accordance with the laws of the Republic of South-Africa with registration number 1954/000602/07 and with its registered address, alternatively principal place of business at 9 Nguni Drive Edenvale 1609; 1.7. "K+N" means the Kuehne + Nagel Group of Companies. 1.8. "Parties" means the Commission and K+N SA; 1.9. "Respondents" means the firms subject to the Commission's investigation of the complaint initiated under case number 2007Oct3236, namely Kuehne+Nagel (Pty) Ltd, Kuehne+Nagel Group, Kuehne+Nagel International AG, Schenker South Africa (Pty)Ltd, Schenker AG Group, Deutsche Bahn AG, Expeditors International South Africa (Pty) Ltd, Expeditors International, Panaipina World Transport (Holding) Ltd, UTI South

Africa (Pty) Ltd, UTI Worldwide Inc., DHL International (Pty) Ltd, DHL Global Forwarding, DHL International GmbH, Deutsche Post AG, BAX Global Inc., Dascher, Eagle Air Freight Inc., Emery Air Freight Corporation, Geologistics Corporation, Mahe Freight, Saima and SAAFF. 1.10.

"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 2 October 2007 the Commissioner initiated a complaint against Bax, Dascher, Eagle, Emery, Expeditors, Geologistics,

Kuehne & Nagej, Mine Freight, Panalpina, Sairna, Schenker and UTI in respect of allegations that the respondents, being parties in a horizontal relationship in the provision of freight forwarding services, may have contravened sections 4(1)(a), 4(1)(b)(i) and/or 4(1)(b)(ii) of the Act in that they discussed and agreed to fix the level of various surcharges and accessorial fees. 2.2 The Commission's investigation found, amongst others, that: 2.2.1 United Kingdom Air New Export System Security ("NES"): During the period October 2002 to around 2005 various freight forwarders including Kuhne + Nagel Ltd (UK) in the United Kingdom participated in discussions aimed at achieving the introduction of a so called NES fee for shipments by air originating in the United Kingdom. The NES fee was to be applied in connection with costs arising through the application of a pre-clearance system introduced by the United Kingdom's customs authorities for shipments leaving the United Kingdom. 2.2.2 Air Automated Manifest System ("AMS") fee from Germany and Switzerland: During July 2004 freight forwarders including Kuhne + Nagel (AG & Co.) KG in Germany and Kuhne + Nagel Aktiengesellschaft in Switzerland . participated in discussions aimed at achieving the introduction of a so called AMS fee for prepaid shipments by air to the US originating in Germany and Switzerland. Discussions also related to the approximate level of the AMS fee. The AMS fee was to be applied in connection with costs arising through the application of a pre-clearance system introduced by the US customs authorities for shipments to the US. 2.2.3 Chinese Air Currency Adjustment Factor ("CAF"): During the period July 2005 to March 2006, freight forwarders including Kuhne + Nagel Ltd. (China) in Shanghai, China agreed with competitors on the introduction of a currency adjustment factor or CAF for shipments by air originating in China. The CAF was designed to compensate freight forwarders for the losses incurred following a change in the value ratio of the US dollar to the Chinese renminbi. 2.2.4 Hong Kong air Peak Season Surcharge ("PSS"): During the period August 2005 to May 2007 various freight forwarders including Kuhne + Nagel Ltd. (HongKong) in Hong Kong participated in discussions aimed at exchanging information, such as start and end dates and approximate amounts, regarding the introduction of a peak season surcharge or PSS for shipments by air originating in Hong Kong. The PSS was designed to compensate freight forwarders for the rate increases imposed upon them by the air carriers during busy periods for air cargo shipments. 2.3 In light of its findings, the Commission took a decision to refer its findings of conduct in contravention of section 4(1)(b)(i) to the Tribunal for adjudication. 3. Statement of conduct by K+N SA K+N SA acknowledges that the conduct described above constitutes a contravention of

section 4(1)(b)(i) of the Act and admits that it benefited from such conduct. 4. Administrative Penalty In accordance with the provisions of section 58(1)(a)(iii) as read with sections 59(1)(a), 59(2) and 59(3) of the Act, K+N SA is liable for and has agreed to pay an administrative penalty in the amount of R962,657.01 (nine hundred and sixty two thousand six hundred and fifty seven Rand and one Cent), which amounts constitutes 5% of the relevant turnover in 2007.

K+N SA will pay the amount set out in paragraph 4.3 above to the Commission within seven days of the date of confirmation of this Consent Agreement as an order of the Tribunal.

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 4.4

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 K+N SA agrees to cooperate with the Commission in relation to the prosecution of the conduct described in this Consent Agreement. Without limiting the generality of the foregoing, K+N SA specifically agrees to: Provide witnesses to testify in the complaint referral (if any) in respect of alleged contraventions covered by this Consent Agreement; and

To the extent that it is in existence, and has not already been provided 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. K+N SA agrees that it will refrain from any conduct that may contravene section 4(1)(b) of the Act.

K+N SA undertakes to develop and implement a compliance programme, with corporate governance, designed to ensure that all its relevant employees are aware of the provisions of the Competition Act and do not contravene them; and to submit a copy of the aforementioned compliance programme outlined above to the Commission within 90 business days of the date of confirmation of this Consent agreement as an order of the Tribunal. 6. Full and Final Settlement This 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 K+N SA, Kuehne+Nagel Group, Kuehne+Nagel International AG and any other company that forms part of the Kuehne+Nagel group of companies relating to any alleged contravention of the Act that is the subject of the Commission's

investigation under Case No. 2007Oct 3236. Dated and signed at EDENVALE on the 10th day of FEBRUARY 2012. FOR KUEHNE + NAGEL (PTY) LIMITED

The Competition Commission and Kuehne + Nagel (Pty) Ltd 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 sections 58(1)(b) and 59(1)(a) 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. "Commissions?" 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 2007OCT3236;
- 1.5. "Consent Agreement" means this agreement duly signed and concluded between the Commission and Kuehne + Nagel (Pty) Limited;
- 1.6. "K+N SA" means Kuehne + Nagel (Proprietary) Limited a company registered and incorporated in accordance with the laws of the Republic of South-Africa with registration number 1954/000602/07 and with its registered address, alternatively principal place of business at 9 Nguni Drive Edenvale 1609;
- 1.7. "K+N" means the Kuehne + Nagel Group of Companies.
- 1.8. "Parties" means the Commission and K+N SA;
- 1.9. "Respondents" means the firms subject to the Commission's investigation of the complaint initiated under case number 2007Oct3236, namely Kuehne+Nagel (Pty) Ltd, Kuehne+Nagel Group, Kuehne+Nagel International AG, Schenker South Africa (Pty)Ltd, Schenker AG Group, Deutsche Bahn AG, Expeditors International South Africa (Pty) Ltd, Expeditors International, Panaipina World Transport (Holding) Ltd, UTI South Africa (Pty) Ltd, UTI Worldwide Inc., DHL International (Pty) Ltd, DHL Global Forwarding, DHL International GmbH, Deutsche Post AG, BAX Global Inc., Dascher, Eagle Air Freight Inc., Emery Air Freight Corporation, Geologistics Corporation, Mahe Freight, Saima and SAAFF.
- 1.10. "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 2 October 2007 the Commissioner initiated a complaint against L&B, Dascher, Eagle, Emery, Expeditors, Geologistics,

Kuehne & Nagel, Mine

Freight, Panalpina, Sairna, Schenker and UTI in respect of allegations that the respondents, being parties in a horizontal relationship in the provision of freight forwarding services, may have contravened sections 4(1)(a), 4(1)(b)(i) and/or 4(1)(b)(ii) of the Act in that they discussed and agreed to fix the level of various surcharges and accessorial fees.

2.2 The Commission's investigation found, amongst others, that:

2.2.1 United Kingdom Air New Export System Security ("NES"):

During the period October 2002 to around 2005 various freight forwarders including Kuehne + Nagel Ltd (UK) in the United Kingdom participated in discussions aimed at achieving the introduction of a so called NES fee for shipments by air originating in the United Kingdom. The NES fee was to be applied in connection with costs arising through the application of a pre-clearance system introduced by the United Kingdom's customs authorities for shipments leaving the United Kingdom.

2.2.2 Air Automated Manifest System ("AMS") fee from Germany and Switzerland:

During July 2004 freight forwarders including Kuehne + Nagel (AG & Co.) KG in Germany and Kuehne + Nagel Aktiengesellschaft in Switzerland . participated in discussions aimed at achieving the introduction of a so called AMS fee for prepaid shipments by air to the US originating in Germany and Switzerland. Discussions also related to the approximate level of the AMS fee. The AMS fee was to be applied in connection with costs arising through the application of a pre-clearance system introduced by the US customs authorities for shipments to the US.

2.2.3 Chinese Air Currency Adjustment Factor ("CAF"):

During the period July 2005 to March 2006, freight forwarders including Kuehne + Nagel Ltd. (China) in Shanghai, China agreed with competitors on the introduction of a currency adjustment factor or CAF for shipments by air originating in China. The CAF was designed to compensate freight forwarders for the losses incurred following a change in the value ratio of the US dollar to the Chinese renminbi.

2.2.4 Hong Kong air Peak Season Surcharge ("PSS"):

During the period August 2005 to May 2007 various freight forwarders including Kuehne + Nagel Ltd. (HongKong) in Hong Kong participated in discussions aimed at exchanging information, such as start and end dates and approximate amounts, regarding the introduction of a peak season surcharge or PSS for shipments by air originating in Hong Kong. The PSS was designed to compensate freight forwarders for the rate increases imposed upon them by the air carriers during busy periods for air cargo shipments.

2.3 In light of its findings, the Commission took a decision to refer its findings of conduct in contravention of section 4(1)(b)(i) to the Tribunal for adjudication.

3. Statement of conduct by K+N SA

K+N SA acknowledges that the conduct described above constitutes a contravention of section 4(1)(b)(i) of the Act and admits that it benefited from such conduct.

4. Administrative Penalty

In accordance with the provisions of section 58(1)(a)(iii) as read with sections 59(1)(a), 59(2) and 59(3) of the Act, K+N SA is liable for and has agreed to pay an administrative penalty in the amount of R962,657.01 (nine hundred and sixty two thousand six hundred and fifty seven Rand and one Cent), which amounts constitutes 5% of the relevant turnover in 2007.

K+N SA will pay the amount set out in paragraph 4.3 above to the Commission within seven days of the date of confirmation of this Consent Agreement as an order of the Tribunal.

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

4.4 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 K+N SA agrees to cooperate with the Commission in relation to the prosecution of the conduct described in this Consent Agreement. Without limiting the generality of the foregoing, K+N SA specifically agrees to:

Provide witnesses to testify in the complaint referral (if any) in respect of alleged contraventions covered by this Consent Agreement; and

To the extent that it is in existence, and has not already been provided 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.

K+N SA agrees that it will refrain from any conduct that may contravene section 4(1)(b) of the Act.

K+N SA undertakes to develop and implement a compliance programme, with corporate governance, designed to ensure that all its relevant employees are aware of the provisions of the Competition Act and do not contravene them; and to submit a copy of the aforementioned compliance programme outlined above to the Commission within 90 business days of the date of confirmation of this Consent agreement as an order of the Tribunal.

6. Full and Final Settlement

This 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 K+N SA, Kuehne+Nagel Group, Kuehne+Nage! International AG and any other company that forms part of the Kuehne+Nagel group of companies relating to any alleged contravention of the Act that is the subject of the Commission's

investigation under Case No. 2007Oct 3236.

Dated and signed at EDENVALE on the 10th day of FEBRUARY 2012.

FOR KUEHNE + NAGEL (PTY) LIMITED

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