

SOUTH AFRICA / JUDGMENT

Competition Commission v OVK Operations Ltd (43/CR/Jun11) [2011] ZACT 92; [2012] 1 CPLR 104 (CT) (9 November 2011)

[2011] ZACT 92

COURT

Competition Tribunal

BEFORE

A Wessels, M Mokuena, A Ndoni

CASE / FILE NUMBER

43/CR/Jun11

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REPUBLIC OF SOUTH AFRICA

Case No: 43/CR/Jun11

In the matter between:

The Competition Commission Applicant

and

OVK Operations Ltd Respondent

Pane! 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. 43/CR/Jun11 CC Case No. 2009Mar4349 In the matter between: THE COMPETITION COMMISSION Applicant and OVK OPERATIONS LIMITED 4th Respondent In re: THE COMPETITION COMMISSION Applicant and AFGRI OPERATIONS LIMITED 1st Respondent SENWES LIMITED 2nd Respondent NWK LIMITED 3rd

Respondent OVK OPERATIONS LIMITED 4th Respondent SUIDWES (PTY) LIMITED 5th
Respondent VRYSTAAT KOOPERASIE BEPERK 6th

Respondent OVERBERG AGRI (PTY) LIMITED 7th Respondent DIE HUMANS DGRPSE
KOOPERASIE BEPERK 8th Respondent SENTRAAL-SUID KOOPERASIE BEPERK 9th Respondent
GWK LIMITED 10th Respondent KAAP AGRI BEDRYF LIMITED 11* Respondent MGK
BEDRYFSMAATSKAPPY (PTY) LIMITED 12th Respondent TUINROETE AGRI BEPERK 13th
Respondent MOREESBURGSE KORINGBOERE (EDMS) BEPERK 14th Respondent TWK LANDBOU
BEPERK 15th Respondent NTK LIMPOPO AGRIC BEPERK 16m Respondent THE GRAIN SILO
INDUSTRY (PTY) LIMITED 17th Respondent CONSENT AGREEMENT TERMS OF SECTION 49D
READ WITH SECTION 58(1)(a)(iii) AND 58 (1) (b) OF THE COMPETITION ACT, 1988 (ACT NO.89
OF 1998), AS AMENDE, BETWEEN THE COMPETITION COMMISSION ("THE COMMISSION")
AND VRYSTAAT KOOPERASIE BEPERK ("OVK"), IN RESPECT OF AN ALLEDGED
CONTRAVENTION OF SECTION* (1)(b)(i) OF THE COMPETITION ACT, 1998 ("THE ACT").

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 COMMISSION Applicant

OVK OPERATIONS LIMITED 4th Respondent

In re:

THE COMPETITION COMMISSION Applicant

AFGRI OPERATIONS LIMITED 1st Respondent

SENWES LIMITED 2nd Respondent

NWK LIMITED 3rd

Respondent

OVK OPERATIONS LIMITED 4th Respondent

SUIDWES (PTY) LIMITED 5th Respondent

VRYSTAAT KOOPERASIE BEPERK 6th

Respondent

OVERBERG AGRI (PTY) LIMITED 7th Respondent

DIE HUMANS DGRPSE KOOPERASIE BEPERK 8th Respondent

SENTRAAL-SUID KOOPERASIE BEPERK 9th Respondent

GWK LIMITED 10th Respondent

KAAP AGRI BEDRYF LIMITED 11* Respondent

MGK BEDRYFSMAATSKAPPY (PTY) LIMITED 12th Respondent

TUINROETE AGRI BEPERK 13th Respondent

MOREESBURGSE KORINGBOERE (EDMS) BEPERK 14th Respondent

TWK LANDBOU BEPERK 15th Respondent

NTK LIMPOPO AGRIC BEPERK 16m Respondent

THE GRAIN SILO INDUSTRY (PTY) LIMITED 17th Respondent

CONSENT AGREEMENTTERMS OF SECTION 49D READ WITH SECTION 58(1)(a)(iii) AND 58 (1) (b) OF THE COMPETITION ACT, 1988 (ACT NO.89 OF 1998), AS AMENDE, BETWEEN THE COMPETITION COMMISSION ("THE COMMISSION") AND VRYSTAAT KOOPERASIE BEPERK ("OVK"), IN RESPECT OF AN ALLEDGED CONTRAVENTION OF SECTION* (1)(b)(i) OF THE COMPETITION ACT, 1998 ("THE ACT").

The Commission and OVK hereby agree that application be made to the Tribunal for the 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 be low;

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 1988), 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 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 OVK; 1.6. "Grain S//o Industry (Pty) Ltd" is 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, amongst others, 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 represents its constituent members in interactions with the Agricultural Products Division of the Johannesburg Stock Exchange (the "APD" previously "SAFEX").

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

1.6. "Grain S/o Industry (Pty) Ltd" is 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, amongst others, 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 represents its constituent members in interactions with the Agricultural Products Division of the Johannesburg Stock Exchange (the "APD" previously "SAFEX").

1.7. "OVK" means OVK Operations Limited, a company registered and incorporated in accordance with the laws of the Republic of South-Africa with registration number 1999/004069/06 and with its registered office, in the alternative its main place of business, at 19 Dan Pienaar Street, Ladybrand, Free State, 9745; 1.8. "Parties" means the Commission and OVK;

1.9. "Respondent" means for purpose's of this agreement OVK; 1.10. "Respondents" means Respondents one (1) to seventeen (17) described above; 1.11. "SAFEX" means the the South African Futures Exchange (currently known as the Agricultural Products Division 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 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, 'MuJayo' building (Block C), the dti Campus, 77 Metntjies 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"), Boord-Wes Kooperasie Limited ("NWK"), OVK Operations Limited fOVK"), Suidwes (Pty) Limited ("Suidwes"), Vrystaatse Kooperasie Limited ("VKB") and the Grain Silo Industry ("GSI") for alleged contravention of section 4(1)(b)(i) of the Act, in the form of fixing day storage tariffs for grain stored in silos. 2.2. The investigation revealed that the storage rate is agreed to and assented to not only by the entities against whom the original

complaints initiation was made, but by ail members and shareholders of GSI. In the circumstances, on 25 May 2010 the Commissioner expanded the investigation to refer to ail seventeen (17) respondents. 2.3. The Commission conducted its investigation and concluded that: 2.3.1. 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 GSL 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 GS/"on an annual basis. In 2008, as Is set out below, the GSf declined to provide the standardised storage tariff to SAFEX any longer on account of the Commission's contentions that if 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 GSf'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 GSf 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 ail 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, the storage tariff determined for SAFEX purposes has been used to determine storage fees in respect of sales transactions in the physical market. This amount to collusion. 2.5. The

Commission took a decision to refer to the Tribunal its complaint that is described above.

1.7. "OVK" means OVK Operations Limited, a company registered and incorporated in accordance with the laws of the Republic of South-Africa with registration number 1999/004069/06 and with its registered office, in the alternative its main place of business, at 19 Dan Pienaar Street, Ladybrand, Free State, 9745;

1.8. "Parties" means the Commission and OVK;

1.9. "Respondent" means for purpose's of this agreement OVK;

1.10. "Respondents" means Respondents one (1) to seventeen (17) described above;

1.11. "SAFEX" means the the South African Futures Exchange (currently known as the Agricultural Products Division 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 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,' MuJayo building (Block C), the dti Campus, 77 Metntjies 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"), Boord-Wes Kooperasie Limited ("NWK"), OVK Operations Limited ("OVK"), Suidwes (Pty) Limited ("Suidwes"), Vrystaatse Kooperasie Limited ("VKB") and the Grain Silo Industry ("GSI") for alleged contravention of section 4(1)(b)(i) of the Act, in the form of fixing day storage tariffs for grain stored in silos.

2.2. The investigation revealed that the storage rate is agreed to and assented to not only by the entities against whom the original

complaints 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:

2.3.1. 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, the storage tariff determined for SAFEX purposes has been used to determine storage fees in respect of sales transactions in the physical market. This amounts to collusion.

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

Statement of conduct by OVK OVK 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. Administrative Penalty Having regard to the provisions of sections 58(1)(a)(ii) as read with sections 59(1)(a), 59(2) and 59(3) of the Act, OVK 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. The parties have agreed that OVK will pay an administrative penalty in the amount of R 375 615. This amount constitutes 4% (four per cent) of the total grain silo storage turnover for the 2009 financial year. OVK will pay the amount set out in paragraph 4.2 above to the Commission within two months from the date of confirmation of this Consent Agreement by the Tribunal, 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. OVK agrees to fully cooperate with the Commission in relation to the prosecution of the complaint referral. Without limiting the generality of the foregoing, OVK 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. OVK agrees that it will in future refrain from participating in activities that contravene section 4(1)(b) of the Act 5.3. OVK shall 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, OVK shall: 5.3.1. . draft and implement a competition policy and compliance programme; 5.3.2. provide training on competition law compliance on issues particularly relevant to OVK and its employees and officials; 5.3.3. provide training on competition law compliance to all relevant persons and/or officials employed by OVK after the confirmation of this Consent Agreement by the Tribunal; 5.3.4. update the competition policy and training annually to ensure OVK's continued compliance with the Act 5.4. OVK 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 OVK relating to any alleged contravention by the Respondents of the Act, namely the fixing of the daily grain silo storage tariff, that is the subject of the Commission's investigation under case no 20Q9MAR4349. Dated and signed at Ladybrand on the 26th day of September 2011. For OVK Managing Director For the Commission Competition Commissioner

Statement of conduct by OVK

OVK 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.

Administrative Penalty

Having regard to the provisions of sections 58(1)(a)(ii) as read with sections 59(1)(a), 59(2) and 59(3) of the Act, OVK 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.

The parties have agreed that OVK will pay an administrative penalty in the amount of R 375 615.

This amount constitutes 4% (four per cent) of the total grain silo storage turnover for the 2009 financial year.

OVK will pay the amount set out in paragraph 4.2 above to the Commission within two months from the date of confirmation of this Consent Agreement by the Tribunal,

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. OVK agrees to fully cooperate with the Commission in relation to the prosecution of the complaint referral. Without limiting the generality of the foregoing, OVK 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. OVK agrees that it will in future refrain from participating in activities that contravene section 4(1)(b) of the Act

5.3. OVK shall 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, OVK shall:

5.3.1. . draft and implement a competition policy and compliance programme;

5.3.2. provide training on competition law compliance on issues particularly relevant to OVK and its employees and officials;

5.3.3. provide training on competition law compliance to all relevant persons and/or officials employed by OVK after the confirmation of this Consent Agreement by the Tribunal;

5.3.4. update the competition policy and training annually to ensure OVK's continued compliance with the Act

5.4. OVK 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 OVK relating to any alleged contravention by the Respondents of the Act, namely the fixing of the daily grain silo storage tariff, that is the subject of the Commission's investigation under case no 20Q9MAR4349.

Dated and signed at Ladybrand on the 26th day of September 2011.

For OVK

Managing Director

For the Commission

Competition Commissioner

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Prepared on 12 October 2026 · Esheria