

SOUTH AFRICA / JUDGMENT

**Competition Commission v Rand
Merchant Bank, a division of First Rand
Bank Ltd (44/CR/Jun11) [2011] ZACT 51;
[2011] 2 CPLR 286 (CT) (14 July 2011)
[2011] ZACT 51**

COURT

Competition Tribunal

BEFORE

N Manoim, Y Carrim, A Wessels

CASE / FILE NUMBER

44/CR/Jun11

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COMPETITION TRIBUNAL

REPUBLIC OF SOUTH AFRICA

Case No: 44/CR/Jun11

In the matter between:

The Competition CommissionApplicant

and

Rand Merchant Bank, a division of First Rand Bank LimitedRespondent

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

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA HELD IN PRETORIA

CT Case No. 44/CR/Jun11

CC Case No. 2008Oct404S

In the matter between:

THE COMPETITION COMMISSIONApplicant

RAND MERCHANT BANK, A DIVISION OF

FIRSTHAND BANK LIMITEDRespondent

In re:

COMPETITION COMMISSIONApplicant

NOORDWES KO-OPERASIE LIMITEDFirst Respondent

FIRSTRAND BANK LIMITEDSecond Respondent

CONSENT AGREEMENT IN TERMS OF SECTION 49D READ WITH SECTION 58(l)(a)(iii) AS READ WITH SECTION 58(1)(!>) OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998), AS AMENDED, BETWEEN THE COMPETITION COMMISSION AND RAND MERCHANT BANK, A DIVISION OF FIRSTRAND BANK LIMITED IN RESPECT OF AN ALLEGED CONTRAVENTION OF SECTION 4(l)(b) (H) OF THE COMPETITION ACT, 1998

The Commission and FirstRand hereby agree that application be made to the Tribunal for the confirmation of this Consent Agreement in terms of section 58 (l)(a)(iii) as read with section 58(l) (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. "Agreement" means the agreement concluded between NWK. and RMB in April 2005;

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 2008Oct4045 initiated by the Commissioner in terms of section 49B of the Act including a complaint concerned with allegations of market allocation in terms of section 4(l)(b)(ii) of the Act initiated on 4 May 2009;

1.6. "Consent Agreement" means this agreement duly signed and concluded between the Commission and FirstRand;

1.7. "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;

1.8. "NWK" means Noordwes Ko-operasie 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, Ltchtenbm-g, 2740, South-Africa;

1.9. "Parties" means the Commission and FirstRand;

1.10. "Respondents" means both FirstRand and NWK;

1.11. "RMB" means the grain desk of Rand Merchant Bank, a division of FirstRand and with its registered address, alternatively principal place of business at 1 Merchant Place, c/o Fredman Drive and Rivoma Road,

Sandton, 2196, South Africa. RMB is a diversified financial services brand encompassing investment banking, fund management, private wealth management and advisory services.;

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, Mulayo building (Block C), the dti Campus, 77 Meintjies Street, Surmynside, 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(l)(b)(i) of the Act in that they engaged in price fixing and fixing of trading conditions. 2.2. During May 2009, the Commission extended the complaint to include allegations that the Respondents divided the market in which they compete by allocating territories and/or customers in contravention of section 4(i)(b)(ii). 2.3. The Commission conducted its investigation and concluded that: 2.3.1. although the agreement was predominantly an agreement concerned with the relationship between a supplier of storage services and its customer, clause 4.4 of the agreement was incidentally capable of horizontal application between RMB and NWK to the extent 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 for the trading of grain. 2.3.2. Clause 4.4 of the agreement included an undertaking on the part of FirstRand that RMB would not sell 140 000 tons of grain relocated to non-NWK silos within South Africa or Botswana in the period between 29 April 2005 and 1 May 2007. 2.3.4. Clause 4.4 of the agreement constituted a contravention of

section 4(l)(b)(ii) of the Act. 2.4. In coming to its conclusion, the Commission took into account that the pretext and essence of the agreement was that: 2.4.1. RMB had stored 450, 000 tons of grain at various NWK-ov/md siios in and during 2004 and 2005; 2.4.2. the tonnage stored represented close to 47 percent of ail grain stored in the NWK silos; 2.4.3. NWK realised that it would face capacity constraints in circumstances where a bumper crop was expected in the 2005 harvest season and that NWK would not have been in a position to take in grain from farmers during the harvest season in the absence of an arrangement with RMB; 2.4.4. NWK approached RMB to find a mutually acceptable solution to the capacity constraints faced by NWK; and 2.4.5. the result of discussions on this score was the agreement. 2.5. The Commission found that the agreement provided for certain arrangements to give effect to the intention to regulate the vertical relationship between NWK and RMB: 2.5.1. 172 902 tons of grain were to be relocated from over-utilised siios to alternative NWK-owned silos that had surplus capacity; 2.5.2. 127, 864 tons of grain would be sold by RMB to NWK; 2.5.3. 67, 000 tons of grain would be exchanged with NWK grain in alternative NWK storage locations; 2.5.4. 140, 069 tons of grain would be moved by RMB to silos not owned by NWK;

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(l)(b)(i) of the Act in that they engaged in price fixing and fixing of trading conditions.

2.2. During May 2009, the Commission extended the complaint to include allegations that the Respondents divided the market in which they compete by allocating territories and/or customers in contravention of section 4(i)(b)(ii).

2.3. The Commission conducted its investigation and concluded that:

2.3.1. although the agreement was predominantly an agreement concerned with the relationship between a supplier of storage services and its customer, clause 4.4 of the agreement was incidentally capable of horizontal application between RMB and NWK to the extent 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 for the trading of grain.

2.3.2. Clause 4.4 of the agreement included an undertaking on the part of FirstRand that RMB would not sell 140 000 tons of grain relocated to non-NWK silos within South Africa or Botswana in the period between 29 April 2005 and 1 May 2007.

2.3.4. Clause 4.4 of the agreement constituted a contravention of section 4(l)(b)(ii) of the Act.

2.4. In coming to its conclusion, the Commission took into account that the pretext and essence of the agreement was that:

2.4.1. RMB had stored 450, 000 tons of grain at various NWK-ov/md siios in and during 2004 and 2005;

2.4.2. the tonnage stored represented close to 47 percent of ail grain stored in the NWK silos;

2.4.3. NWK realised that it would face capacity constraints in circumstances where a bumper crop was expected in the 2005 harvest season and that NWK would not have been in a position to take in grain from farmers during the harvest season in the absence of an arrangement with RMB;

2.4.4. NWK approached RMB to find a mutually acceptable solution to the capacity constraints faced by NWK; and

2.4.5. the result of discussions on this score was the agreement.

2.5. The Commission found that the agreement provided for certain arrangements to give effect to the intention to regulate the vertical relationship between NWK and RMB:

2.5.1. 172 902 tons of grain were to be relocated from over-utilised siios to alternative NWK-owned silos that had surplus capacity;

2.5.2. 127, 864 tons of grain would be sold by RMB to NWK;

2.5.3. 67, 000 tons of grain would be exchanged with NWK grain in alternative NWK storage locations;

2.5.4. 140, 069 tons of grain would be moved by RMB to silos not owned by NWK;

2.5.5. RMB would deliver and store a further 20, 000 tons of grain at NWJCs Kameel Silo; and

2.5.6. RMB granted NWK the right to purchase RMB grain for the purpose of on-selling such grain to third parties.

2.6. The Commission took a decision to refer to the Tribunal its complaint that the Respondents, through the inclusion of clause 4.4 in the agreement, had engaged in market allocation in contravention of section 4(l)(b)(ii) of the Act, on the basis that the undertaking contained therein had the capacity to find horizontal application between the Respondents, 2.7. The Commission decided not to refer to the Tribunal the remainder of the complaint. 3. Statement of conduct by RMB 3.1. RMB admits that: 3.1.1. although the predominant nature of the agreement was a vertical one (i.e. an agreement entered into between a company and its customer), clause 4.4 thereof may be interpreted to fmd horizontal application (I.e. an agreement entered into between competitors); 3.1.2. if the agreement is so interpreted, then the effect of clause 4.4 of the agreement is that the Respondents entered into an agreement to divide markets by allocating territories; and 3.1.3. if so read, clause 4.4 of the agreement falls within the strict interpretation and also strict liability created by section 4(l)(b)(ii) regardless of whether the transaction had an effect on competition. 4. Administrative Payment 4.1. Having regard to the provisions of sections 58(l)(a)(iii) as read with sections 59(l)(a), 59(2) and 59(3) of the Act, JRMB accepts that a contravention, of section 4(i)(b)(ii) may lead to the imposition of an administrative penalty where the Tribunal deems it appropriate. 4.2. The parties have agreed that RMB will pay an administrative penalty in the amount of R 2.1 million (two million one hundred thousand rand). 4.3. This amount constitutes 3% (three per cent) of the value of grain affected by clause 4.4 of the agreement. 4.4. RMB will pay the amount set o\it in paragraph 4.2 above to the

Commission within 6 (six) 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. RMB agrees to fully cooperate with the Commission in relation to the prosecution of the complaint referral. Without limiting the generality of the foregoing, RMB specifically agrees to: 5.1.1. Testify in the complaint referral (if any) in respect of alleged contraventions covered by this Consent Agreement; and

2.5.5. RMB would deliver and store a further 20, 000 tons of grain at NWJCs Kameel Silo; and

2.5.6. RMB granted NWK the right to purchase RMB grain for the purpose of on-selling such grain to third parties.

2.6. The Commission took a decision to refer to the Tribunal its complaint that the Respondents, through the inclusion of clause 4.4 in the agreement, had engaged in market allocation in contravention of section 4(l)(b)(ii) of the Act, on the basis that the undertaking contained therein had the capacity to find horizontal application between the Respondents,

2.7. The Commission decided not to refer to the Tribunal the remainder of the complaint.

3. Statement of conduct by RMB

3.1. RMB admits that:

3.1.1. although the predominant nature of the agreement was a vertical one (i.e. an agreement entered into between a company and its customer), clause 4.4 thereof may be interpreted to find horizontal application (I.e. an agreement entered into between competitors);

3.1.2. if the agreement is so interpreted, then the effect of clause 4.4 of the agreement is that the Respondents entered into an agreement to divide markets by allocating territories; and

3.1.3. if so read, clause 4.4 of the agreement falls within the strict interpretation and also strict liability created by section 4(l)(b)(ii) regardless of whether the transaction had an effect on competition.

4. Administrative Payment

4.1. Having regard to the provisions of sections 58(l)(a)(iii) as read with sections 59(l)(a), 59(2) and 59(3) of the Act, JRMB accepts that a contravention, of section 4(i)(b)(ii) may lead to the imposition of an administrative penalty where the Tribunal deems it appropriate.

4.2. The parties have agreed that RMB will pay an administrative penalty in the amount of R 2.1 million (two million one hundred thousand rand).

4.3. This amount constitutes 3% (three per cent) of the value of grain affected by clause 4.4 of the agreement.

4.4. RMB will pay the amount set out in paragraph 4.2 above to the Commission within 6 (six) 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. RMB agrees to fully cooperate with the Commission in relation to the prosecution of the complaint referral. Without limiting the generality of the foregoing, RMB 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. RMB agrees that it will in future refrain from the provision of contractual undertakings that have the potential to constitute contraventions of section 4(i)(b) of the Act.

5.3. RMB 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, RMB 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 RMB and its employees and officials;

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

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

5.4. RMB 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 RMB relating to any alleged contravention by the Respondents of the Act that is the subject of the Commission's investigation under case no 2008OCT4045. Dated and signed at Sandton on the 17th day of May 2011 For the Rand Merchant Bank Chief Executive Officer For the Commission Competition Commissioner Pretoria, 3 June 2011

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. RMB agrees that it will in future refrain from the provision of contractual undertakings that have the potential to constitute contraventions of section 4(i)(b) of the Act.

5.3. RMB 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, RMB 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 RMB and its employees and officials;

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

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

5.4. RMB 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 RMB relating to any alleged contravention by the Respondents of the Act that is the subject of the Commission's investigation under case no 2008OCT4045.

Dated and signed at Sandton on the 17th day of May 2011

For the Rand Merchant Bank

Chief Executive Officer

For the Commission

Competition Commissioner

Pretoria, 3 June 2011

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