

SOUTH AFRICA / JUDGMENT

Competition Commission v Senwes Ltd (110/CR/Dec06) [2013] ZACT 34 (15 May 2013)

[2013] ZACT 34

COURT

Competition Tribunal

BEFORE

N Manoim, Y Carrim, M Holden

CASE / FILE NUMBER

110/CR/Dec06

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COMPETITION TRIBUNAL

REPUBLIC OF SOUTH AFRICA

Case No: 110/CR/Dec06

016484

In the matter between:

The Competition

CommissionApplicant

and

Senwes Limited

Respondent

Panel: N Manoim (Presiding Member), Y Carrim (Tribunal Member) and M Holden (Tribunal Member)

Heard on: 25 April 2013

Final submission received on: 14 May 2013

Decided on: 15 May 2013

Order

The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondent annexed hereto marked "A", supplemented by Annexures 1 to 3 thereto.

Presiding Member

N Manoim

Concurring: Y Carrim and M Holden

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT Case No. 110/CR/DEC06

CC Case No. 2004/DEC1332

THE COMPETITION

COMMISSIONApplicant

SENWES

LIMITEDRespondent

In re:

SETTLEMENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND SENWES LIMITED IN REGARD TO THE CONTRAVENTION OF SECTION 8(C) OF THE COMPETITION ACT, 89 OF 1998, AS AMENDED.

1. BACKGROUND Whereas: 1.1. The Commission referred a complaint against Senwes to the Tribunal in terms of, inter alia, section 8(c) of the Act, in which it was alleged, inter alia that Senwes' practice of charging differential tariff fees for storage was exclusionary and had an anti-competitive effect as it impeded or prevented grain traders who compete with Senwes from expanding within the downstream market for grain trading, was thus in contravention of the Act and that the anti-competitive effect of the differential storage fees charged by Senwes outweighed any technological efficiency or other pro-competitive gain that it might have; 1.2. It was agreed by the parties and decided by the Tribunal that the merits of the complaints referred against Senwes would be dealt with in advance of dealing with remedies; 1.3. After hearings conducted before the Tribunal, the Tribunal found that the Commission had established its complaint against Senwes in respect of margin squeeze and that such conduct amounted to a contravention of section 8(c) of the Act; 1.4. Senwes appealed to the Competition Appeal Court; 1.5. On application by Senwes the Tribunal ordered that the Remedies Hearing be stayed pending the outcome of any appeals by either party but that the parties exchange affidavits pertaining to the issue of remedies pending the outcome of such appeals; 1.6. Pursuant thereto, the remedies and orders sought by the Commission were that: 1.6.1. Senwes be interdicted from charging a tariff (or imposing any other storage condition) for the storage of grain that was different to that charged or imposed to any farmers/producers or from offering to any farmer/producer any benefits or

discount in respect of storage costs that was not available to grain traders; 1.6.2. Directing, that in the event that Senwes offered farmers/producers or any other third party terms and conditions for storage of grain which included a capped tariff in respect of such storage (i.e. an agreement not to charge for storage after a certain period), that the same terms and conditions for storage of grain be offered to all traders who stored grain with Senwes; 1.6.3. Directing that all parties who stored grain with Senwes be charged for such storage on the same terms and conditions; 1.6.4. In conjunction with the three immediately preceding paragraphs, that Senwes be ordered, in terms of section 58(1)(a)(iv) read with section 60(2) of the Act to sell its grain trading division or its storage division to a separate registered company (which may be a subsidiary or associate company of Senwes) (the “New Company”). The New Company was to have a separate and distinct board to that of Senwes and the directors of the New Company would have to include non-executive directors not affiliated to Senwes; 1.6.5. Senwes comply with the order referred to in the immediately preceding paragraph within 90 days of date of the order; 1.6.6. Declaring that the margin squeeze conduct found to be a contravention of section 8(c) of the Act constitutes a prohibited practice in terms of the Act for the purposes of section 65 of the Act and that for clarity it be recorded that such conduct was the conduct of Senwes in supplying storage, in a market in which it was dominant, to downstream rivals, i.e. traders which traded in the physical market for grain at a price that prevented traders which trade in the physical market for grain (i.e. competitors of Senwes) from earning a viable price/cost margin in the area in which Senwes is dominant for the period 1 May 2003 to 20 December 2006; 1.7. After its appeal to the Competition Appeal Court was unsuccessful Senwes appealed, with the leave of the Supreme Court of Appeal, to the Supreme Court of Appeal; 1.8. The Supreme Court of Appeal upheld Senwes' appeal and held that the Tribunal had exceeded its powers under the Act when it ruled that Senwes had contravened section 8(c) by engaging in a margin squeeze; 1.9. The Commission appealed to the Constitutional Court which Court held that a margin squeeze complaint did not form part of the referral but instead that the referral covered a contravention of section 8(c) of the Act, consequently set aside the order issued by the Supreme Court of Appeal and ordered that the ruling of the Tribunal be amended by deleting reference to ‘margin squeeze’; 1.10. The Commission and Senwes have agreed that the issues pertaining to remedies be settled in terms of this Settlement Agreement. 1.11. The Competition Commission and Senwes Limited hereby agree that application be made to the Competition Tribunal for the confirmation of this Settlement Agreement as an order of the Competition Tribunal in terms of section 49D as read with section 58(1)(a) and 58(1)(b) of the Competition Act, 89 of 1998, as amended on the terms set out below,

2. DEFINITIONS For the purposes of this Agreement the following definitions shall apply: 2.1. "Act" means the Competition Act, 1998 (Act No. 89 of 1998), as amended; 2.2. "Agency Agreement" means the Agency Agreement contemplated in clause 4.1.1.10. below, in terms of which Senwes, shall, from time to time, procure grain on behalf of grain traders, including Newco; 2.3. "Agreement" means this Settlement Agreement duly signed and

concluded between the Commission and Senwes; 2.4. "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, Muiayo Building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng; 2.5. "Commissioned" means the Commissioner of the Commission, appointed in terms of section 22 of the Act; 2.6. "Senwes" means Senwes Limited, a company registered and incorporated in accordance with the laws of the Republic of South Africa with

registration number 1997/005336/06 and with its registered office and main place of business at 1 Charel de Klerk Street, Klerksdorp,

North West Province, South Africa; 2.7. "Service Level Agreement" means the Service Level Agreement to be entered into between Senwes and Newco, as contemplated in clause 4.11.8; 2.8. "Parties" means the Commission and Senwes; 2.9. "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, Muiayo Building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

3. INTRODUCTION 3.1. The parties to this agreement are the Commission and Senwes, 3.2. Senwes and the Commission have agreed upon the terms of an appropriate order to be submitted to the Tribunal for confirmation, without prejudice to their right to enter into a remedies hearing should the Agreement not be confirmed as an order of the Tribunal.
4. THE ORDER SOUGHT 4.1. The Commission and Senwes propose that the following order be confirmed by the Tribunal; 4.1.1. It is noted that Senwes has already transferred part of its grain marketing business in relation to certain types of grain to the Bunge Senwes Joint Venture, as per the merger approval, attached hereto as Annexure 1. The terms of the transaction documents, submitted during that merger, shall continue to apply, and the terms of this Agreement shall, accordingly, govern the remaining grain business of Senwes which does not form part of the Bunge Senwes Joint Venture. 4.1.1.2. The remaining grain marketing business owned by Senwes, comprising Senwes' client base and goodwill in relation to white maize, sunflower and diverse commodities, will be transferred by Senwes to a separate legal entity owned by Senwes (referred to as "Newco") by 31 May 2014 or a date falling 9 months after the confirmation of this Agreement by the Competition Tribunal, whichever is earlier. A period of time is required to configure Senwes' financial and IT systems to accommodate the arrangement with Newco according to an indicative project plan, which has been submitted to the Commission, attached hereto as Annexure 2, and which will need to be updated upon the approval of this agreement by the Tribunal. During the period between the confirmation of the settlement by the Tribunal and the transfer date of the business to Newco, strict controls and processes, as appear in Annexure 3 hereto, will be implemented and that will continue to ensure that Senwes' grain trading business and

its storage business are operated as distinct business units and that the former is not treated differently to any other trader in terms of storage.

SETTLEMENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND SENWES LIMITED IN REGARD TO THE CONTRAVENTION OF SECTION 8(C) OF THE COMPETITION ACT, 89 OF 1998, AS AMENDED.

1. BACKGROUND

Whereas:

1.1. The Commission referred a complaint against Senwes to the Tribunal in terms of, inter alia, section 8(c) of the Act, in which it was alleged, inter alia that Senwes' practice of charging differential tariff fees for storage was exclusionary and had an anti-competitive effect as it impeded or prevented grain traders who compete with Senwes from expanding within the downstream market for grain trading, was thus in contravention of the Act and that the anti-competitive effect of the differential storage fees charged by Senwes outweighed any technological efficiency or other pro-competitive gain that it might have;

1.2. It was agreed by the parties and decided by the Tribunal that the merits of the complaints referred against Senwes would be dealt with in advance of dealing with remedies;

1.3. After hearings conducted before the Tribunal, the Tribunal found that the Commission had established its complaint against Senwes in respect of margin squeeze and that such conduct amounted to a contravention of section 8(c) of the Act;

1.4. Senwes appealed to the Competition Appeal Court;

1.5. On application by Senwes the Tribunal ordered that the Remedies Hearing be stayed pending the outcome of any appeals by either party but that the parties exchange affidavits pertaining to the issue of remedies pending the outcome of such appeals;

1.6. Pursuant thereto, the remedies and orders sought by the Commission were that:

1.6.1. Senwes be interdicted from charging a tariff (or imposing any other storage condition) for the storage of grain that was different to that charged or imposed to any farmers/producers or from offering to any farmer/producer any benefits or discount in respect of storage costs that was not available to grain traders;

1.6.2. Directing, that in the event that Senwes offered farmers/producers or any other third party terms and conditions for storage of grain which included a capped tariff in respect of such storage (i.e. an agreement not to charge for storage after a certain period), that the same terms and conditions for storage of grain be offered to all traders who stored grain with Senwes;

1.6.3. Directing that all parties who stored grain with Senwes be charged for such storage on the same terms and conditions;

1.6.4. In conjunction with the three immediately preceding paragraphs, that Senwes be ordered, in terms of section 58(1)(a)(iv) read with section 60(2) of the Act to sell its grain trading division or its storage division to a separate registered company (which may be a subsidiary or associate company of Senwes) (the “New Company”). The New Company was to have a separate and distinct board to that of Senwes and the directors of the New Company would have to include non-executive directors not affiliated to Senwes;

1.6.5. Senwes comply with the order referred to in the immediately preceding paragraph within 90 days of date of the order;

1.6.6. Declaring that the margin squeeze conduct found to be a contravention of section 8(c) of the Act constitutes a prohibited practice in terms of the Act for the purposes of section 65 of the Act and that for clarity it be recorded that such conduct was the conduct of Senwes in supplying storage, in a market in which it was dominant, to downstream rivals, i.e. traders which traded in the physical market for grain at a price that prevented traders which trade in the physical market for grain (i.e. competitors of Senwes) from earning a viable price/cost margin in the area in which Senwes is dominant for the period 1 May 2003 to 20 December 2006;

1.7. After its appeal to the Competition Appeal Court was unsuccessful Senwes appealed, with the leave of the Supreme Court of Appeal, to the Supreme Court of Appeal;

1.8. The Supreme Court of Appeal upheld Senwes' appeal and held that the Tribunal had exceeded its powers under the Act when it ruled that Senwes had contravened section 8(c) by engaging in a margin squeeze;

1.9. The Commission appealed to the Constitutional Court which Court held that a margin squeeze complaint did not form part of the referral but instead that the referral covered a contravention of section 8(c) of the Act, consequently set aside the order issued by the Supreme Court of Appeal and ordered that the ruling of the Tribunal be amended by deleting reference to ‘margin squeeze’;

1.10. The Commission and Senwes have agreed that the issues pertaining to remedies be settled in terms of this Settlement Agreement.

1.11. The Competition Commission and Senwes Limited hereby agree that application be made to the Competition Tribunal for the confirmation of this Settlement Agreement as an order of the Competition Tribunal in terms of section 49D as read with section 58(1)(a) and 58(1)(b) of the Competition Act, 89 of 1998, as amended on the terms set out below,

2. DEFINITIONS

For the purposes of this Agreement the following definitions shall apply:

2.1. "Act" means the Competition Act, 1998 (Act No. 89 of 1998), as amended;

2.2. "Agency Agreement" means the Agency Agreement contemplated in clause 4.1.1.10. below, in terms of which Senwes, shall, from time to time, procure grain on behalf of grain traders, including Newco;

2.3. "Agreement" means this Settlement Agreement duly signed and concluded between the Commission and Senwes;

2.4. "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, Muiayo Building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;

2.5. "Commissioned" means the Commissioner of the Commission, appointed in terms of section 22 of the Act;

2.6. "Senwes" means Senwes Limited, a company registered and incorporated in accordance with the laws of the Republic of South Africa with

registration number 1997/005336/06 and with its registered office and main place of business at 1 Charel de Klerk Street, Klerksdorp,

North West Province, South Africa;

2.7. "Service Level Agreement" means the Service Level Agreement to be entered into between Senwes and Newco, as contemplated in clause 4.11.8;

2.8. "Parties" I means the Commission and Senwes;

2.9. "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, Muiayo Building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

3. INTRODUCTION

3.1. The parties to this agreement are the Commission and Senwes,

3.2. Senwes and the Commission have agreed upon the terms of an appropriate order to be submitted to the Tribunal for confirmation, without prejudice to their right to enter into a remedies hearing should the Agreement not be confirmed as an order of the Tribunal.

4. THE ORDER SOUGHT

4.1. The Commission and Senwes propose that the following order be confirmed by the Tribunal;

4.1.1. It is noted that Senwes has already transferred part of its grain marketing business in relation to certain types of grain to the Bunge Senwes Joint Venture, as per the merger approval, attached hereto as Annexure 1. The terms of the transaction documents, submitted during that merger, shall continue to apply, and the terms of this Agreement shall, accordingly, govern the remaining grain business of Senwes which does not form part of the Bunge Senwes Joint Venture.

4.1.1.2. The remaining grain marketing business owned by Senwes, comprising Senwes' client base and goodwill in relation to white maize, sunflower and diverse commodities, will be transferred by Senwes to a separate legal entity owned by Senwes (referred to as "Newco") by 31 May 2014 or a date falling 9 months after the confirmation of this Agreement by the Competition Tribunal, whichever is earlier. A period of time is required to configure Senwes' financial and IT systems to accommodate the arrangement with Newco according to an indicative project plan, which has been submitted to the Commission, attached hereto as Annexure 2, and which will need to be updated upon the approval of this agreement by the Tribunal. During the period between the confirmation of the settlement by the Tribunal and the transfer date of the business to Newco, strict controls and processes, as appear in Annexure 3 hereto, will be implemented and that will continue to ensure that Senwes' grain trading business and

its storage business are operated as distinct business units and that the former is not treated differently to any other trader in terms of storage.

4.1.1.3 Senwes shall be the sole shareholder of Newco but it may introduce another company ("Holdco") between itself and Newco, provided that Holdco is a 100% subsidiary of Senwes and Holdco holds 100% of the shares in Newco. Although Senwes may introduce other shareholders at a later stage or restructure Newco or Holdco, any such steps will be subject to the prescribed merger notification procedure in terms of the Act. 4.1.1.4. Senwes may retain a separate grain procurement arm (as part of "Senwes Grainlink Operations", its sifo business), which shall be entitled to contract with any grain trader, including Newco, on a non-discriminatory and arm's length basis, in terms of an Agency Agreement, as contemplated in clause 4.1.1.10, and which may procure grain subject to the restrictions set out in clause 4.1.1.11 below. Senwes' Grainlink Operations shall pay the normal storage and handling costs that will be applicable from time to time in respect of the grain procured by its procurement arm. Senwes shall ensure that its Grainlink Operations are accounted for separately, to enable adequate monitoring of its compliance with these conditions as contemplated in clause 4.1.1.12. 4.1.1.5. Senwes shall offer all parties who store grain with It, including Newco, other grain traders and its Grainlink Operations (contemplated in clause 4.1.1.14 above), equal access to its various storage options on identical terms save for such differentiation that may legitimately be made under the Competition Act, taking into consideration that different storage options may be offered by Senwes, based, on the volume of grain stored, the duration or time of storage, the location of the relevant silo, the type and quality of the commodity, the capacity utilisation of the silo or such other basis of distinction as may be permitted by the Tribunal pursuant to an application brought in terms of clause 6 below. The various options shall be equally available to all Senwes' clients and its Grainlink Operations. 4.1.1.6. Newco will have a separate and distinct board of directors to

that of Senwes, which will include (a) non-executive director/s not affiliated to Senwes. Newco and Senwes shall have their own employee incentive schemes. 4.1.1.7. Newco will provide statutory reports to Holdco in terms of the Companies Act (which Holdco may provide to Senwes), but no further information shall pass between Senwes and Newco, except as is generally available in the market, as is contemplated in or required for the purposes of the fulfilment of the Service Level Agreement or the Agency Agreement or as is made available pursuant to the latter agreement. 4.1.1.8. In terms of the Service Level Agreement to be entered into between Senwes and Newco, a copy of which has been provided to the Competition Commission, Senwes will provide support services to Newco, such as financial management, information technology and compliance services at market related rates. 4.1.1.9. Newco will procure grain on its own behalf in the market. 4.1.1.10. In terms of an Agency Agreement, a copy of which has been provided to the Competition Commission, grain traders, including Newco, may approach Senwes to procure grain on their behalf, based on mandates given to Senwes. The Agency Agreement will provide that information flows will take place between grain traders (being Newco or other grain traders), as principals, on the one hand, and Senwes, on the other hand, as is customary in any arms-length principle-agent relationship. The Agency Agreement shall contain a provision in terms of which Senwes shall provide agency services on a non-discriminatory basis to all grain traders (including Newco) and, in particular, on a non-discriminatory basis, as between Newco, on the one hand, and other grain traders, on the other hand. 4.1.1.11. Senwes' procurement arm (forming part of its Grainlink Operations), may, from time to time, procure grain in Senwes' own name, but such grain will be sold on a tender or auction basis, to all traders so that Newco and other grain traders are treated equally, information regarding the details of tenders or auctions will be communicated in accordance with the Consumer Protection Act, where applicable, and all traders will be treated equally in terms of access to information regarding the time, place and the subject matter of the auction or the terms of the tender. Alternatively, Senwes shall be entitled to deliver the grain procured in its own name onto the South African Futures Exchange ("Safex"), where all participants will have equal opportunity to purchase it according to the rules of Safex. 4.1.1.12. Senwes shall monitor that it is in compliance with the terms of this Agreement. In the event that the Commission requests Senwes to confirm that it is compliant with the terms of this Agreement, Senwes shall provide written confirmation to the Commission, verified by its external auditors, if so required by the Commission. Provided that for the first five years following the date of this order, Senwes shall provide the written confirmation of its compliance verified by its external auditors to the Commission. The confirmation shall be provided annually to the Commission within three months of the end of Senwes' financial year.

5. FULL AND FINAL SETTLEMENT This Agreement, upon confirmation as an order of the Tribunal, is entered into in full and final settlement and concludes all proceedings between the Commission and Senwes relating to the subject matter of the hearing before the Tribunal under case no. 110/CR/Dec06.

6. VARIATION OF THE AGREEMENT The parties agree that any variation or amendment to this Agreement shall only be binding once it has been reduced to writing, signed on behalf of both Parties and confirmed by the Competition Tribunal, pursuant to an application brought by the Parties to the Tribunal, setting out the proposed amendment and the grounds upon which such amendment is sought. SIGNED at Sandton on 13 May 2013 For and on behalf of SENWES LIMITED SIGNED at Pretoria on 14 May 2013 For and on behalf of THE COMPETITION COMMISSION

4.1.1.3 Senwes shall be the sole shareholder of Newco but it may introduce another company ("Holdco") between itself and Newco, provided that Holdco is a 100% subsidiary of Senwes and Holdco holds 100% of the shares in Newco. Although Senwes may introduce other shareholders at a later stage or restructure Newco or Holdco, any such steps will be subject to the prescribed merger notification procedure in terms of the Act.

4.1.1.4. Senwes may retain a separate grain procurement arm (as part of "Senwes Grainlink Operations", its sifo business), which shall be entitled to contract with any grain trader, including Newco, on a non-discriminatory and arm's length basis, in terms of an Agency Agreement, as contemplated in clause 4.1.1.10, and which may procure grain subject to the restrictions set out in clause 4.1.1.11 below. Senwes' Grainlink Operations shall pay the normal storage and handling costs that will be applicable from time to time in respect of the grain procured by its procurement arm. Senwes shall ensure that its Grainlink Operations are accounted for separately, to enable adequate monitoring of its compliance with these conditions as contemplated in clause 4.1.1.12.

4.1.1.5. Senwes shall offer all parties who store grain with It, including Newco, other grain traders and its Grainlink Operations (contemplated in clause 4.1.1.14 above), equal access to its various storage options on identical terms save for such differentiation that may legitimately be made under the Competition Act, taking into consideration that different storage options may be offered by Senwes, based, on the volume of grain stored, the duration or time of storage, the location of the relevant silo, the type and quality of the commodity, the capacity utilisation of the silo or such other basis of distinction as may be permitted by the Tribunal pursuant to an application brought in terms of clause 6 below. The various options shall be equally available to all Senwes' clients and its Grainlink Operations.

4.1.1.6. Newco will have a separate and distinct board of directors to that of Senwes, which will include (a) non-executive director/s not affiliated to Senwes. Newco and Senwes shall have their own employee incentive schemes.

4.1.1.7. Newco will provide statutory reports to Holdco in terms of the Companies Act (which Holdco may provide to Senwes), but no further information shall pass between Senwes and Newco, except as is generally available in the market, as is contemplated in or required for the purposes of the fulfilment of the Service Level Agreement or the Agency Agreement or as is made available pursuant to the latter agreement.

4.1.1.8. In terms of the Service Level Agreement to be entered into between Senwes and Newco, a copy of which has been provided to the Competition Commission, Senwes will provide support services to Newco, such as financial management, information technology and compliance services at market related rates.

4.1.1.9. Newco will procure grain on its own behalf in the market.

4.1.1.10. In terms of an Agency Agreement, a copy of which has been provided to the Competition Commission, grain traders, including Newco, may approach Senwes to procure grain on their behalf, based on mandates given to Senwes. The Agency Agreement will provide that information flows will take place between grain traders (being Newco or other grain traders), as principals, on the one hand, and Senwes, on the other hand, as is customary in any arms-length principle-agent relationship. The Agency Agreement shall contain a provision in terms of which Senwes shall provide agency services on a non-discriminatory basis to all grain traders (including Newco) and, in particular, on a non-discriminatory basis, as between Newco, on the one hand, and other grain traders, on the other hand.

4.1.1.11. Senwes' procurement arm (forming part of its Grainlink Operations), may, from time to time, procure grain in Senwes' own name, but such grain will be sold on a tender or auction basis, to all traders so that Newco and other grain traders are treated equally, information regarding the details of tenders or auctions will be communicated in accordance with the Consumer Protection Act, where applicable, and all traders will be treated equally in terms of access to information regarding the time, place and the subject matter of the auction or the terms of the tender. Alternatively, Senwes shall be entitled to deliver the grain procured in its own name onto the South African Futures Exchange ("Safex"), where all participants will have equal opportunity to purchase it according to the rules of Safex.

4.1.1.12. Senwes shall monitor that it is in compliance with the terms of this Agreement. In the event that the Commission requests Senwes to confirm that it is compliant with the terms of this Agreement, Senwes shall provide written confirmation to the Commission, verified by its external auditors, if so required by the Commission. Provided that for the first five years following the date of this order, Senwes shall provide the written confirmation of its compliance verified by its external auditors to the Commission. The confirmation shall be provided annually to the Commission within three months of the end of Senwes' financial year.

5. FULL AND FINAL SETTLEMENT

This Agreement, upon confirmation as an order of the Tribunal, is entered into in full and final settlement and concludes all proceedings between the Commission and Senwes relating to the subject matter of the hearing before the Tribunal under case no. 110/CR/Dec06.

6. VARIATION OF THE AGREEMENT

The parties agree that any variation or amendment to this Agreement shall only be binding once it has been reduced to writing, signed on behalf of both Parties and confirmed by the Competition Tribunal, pursuant to an application brought by the Parties to the Tribunal, setting out the proposed amendment and the grounds upon which such amendment is sought.

SIGNED at Sandton on 13 May 2013

For and on behalf of

SENWES LIMITED

SIGNED at Pretoria on 14 May 2013

THE COMPETITION COMMISSION

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Prepared on 10 October 2026 · Esheria