

SOUTH AFRICA / JUDGMENT

Competition Commission v Suidwes Agriculture (Pty) Ltd (43/CR/Jun11) [2011] ZACT 59; [2011] 2 CPLR 298 (CT) (16 August 2011)

[2011] ZACT 59

COURT

Competition Tribunal

BEFORE

N Manoim, Y Carrim, A Wessels

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 CommissionApplicant

and

Suidwes Agriculture (Pty) LtdRespondent

Panel : N Manoim (Presiding Member), Y Carrim (Tribunal Member), and A Wessels (Tribunal Member)

Heard on D: 16 August 2011

Decided on :16 August 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. CC Case No. 2099Mar4349 In the matter between: THE COMPETITION COMMISSIONApplicant and SUIDWES AGRICULTURE (PTY) LIMITED5th Respondent In re: COMPETITION COMMISSIONApplicant and AFGRI OPERATION LIMITED1st Respondent SENWES LIMITED2nd Respondent NWK LIMITED3rd

Respondent OVK OPERATIONS LIMITED	4th
Respondent SUIDWES AGRICULTURE (PTY) LIMITED	5th
Respondent VRYSTAAT KOOPERASIE BEPERK	6th
Respondent OVERBERG AGRI (PTY) LIMITED	7th
Respondent DIE HUMANSDORPSE KOOPERASIE BEPERK	8th
Respondent SENTRAAL-SUID KOOPERASIE BEPERK	9th
Respondent GWK LIMITED	10th
Respondent KAAP AGRI BEDRYF LIMITED	11th
Respondent MGK BEDRYFSMAATSKAP PY (PTY) LIMITED	12th
Respondent TUINROETE AGRI BEPERK	13th
Respondent MOREESBURGSE KORINGBOERE (EDMS) BEPERK	14th
Respondent TWK LANDBOU BEPERK	15th
Respondent NTK LIMPOPO AGRIC BEPERK	16th
Respondent GRAIN SILO INDUSTRY	17th
Respondent CONSENT AGREEMENT IN TERMS OF SECTION 49D READ WITH SECTION 58(1)Ca) {iii) and 58 (1)(b) OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998), AS AMENDED, BETWEEN THE COMPETITION COMMISSION ("THE COMMISSION") AND SUIDWES AGRICULTURE (PTY) LIMITED ("SUIDWES"), IN RESPECT OF AN ALLEGED CONTRAVENTION OF SECTION 4(1)(b)(i) OF THE COMPETITION ACT, 1998 ("THE ACT"). The Commission and Suidwes hereby agree that application be made to the Tribunal for the confirmation of this Consent Agreement in terms of section 58(1)(a) 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:	

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.

CC Case No. 2099Mar4349

In the matter between:

THE COMPETITION COMMISSION	Applicant
SUIDWES AGRICULTURE (PTY) LIMITED	5th Respondent

In re:

COMPETITION COMMISSION	Applicant
AFGRI OPERATION LIMITED	1st Respondent
SENWES LIMITED	2nd Respondent
NWK LIMITED	3rd Respondent
OVK OPERATIONS LIMITED	4th Respondent
SUIDWES AGRICULTURE (PTY) LIMITED	5th Respondent
VRYSTAAT KOOPERASIE BEPERK	6th Respondent
OVERBERG AGRI (PTY) LIMITED	7th Respondent
DIE HUMANSDORPSE KOOPERASIE BEPERK	8th Respondent
SENTRAAL-SUID KOOPERASIE BEPERK	9th Respondent
GWK LIMITED	10th Respondent
KAAP AGRI BEDRYF LIMITED	11th Respondent
MGK BEDRYFSMAATSKAP PY (PTY) LIMITED	12th Respondent
TUINROETE AGRI BEPERK	13th Respondent
MOREESBURGSE KORINGBOERE (EDMS) BEPERK	14th Respondent
TWK LANDBOU BEPERK	15th Respondent
NTK LIMPOPO AGRIC BEPERK	16th Respondent
GRAIN SILO INDUSTRY	17th Respondent
CONSENT AGREEMENT IN TERMS OF SECTION 49D READ WITH SECTION 58(1)Ca){iii) and 58 (1) (b) OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998), AS AMENDED, BETWEEN THE COMPETITION COMMISSION ("THE COMMISSION") AND SUIDWES AGRICULTURE (PTY) LIMITED ("SUIDWES"), IN RESPECT OF AN ALLEGED CONTRAVENTION OF SECTION 4(1)(b)(i) OF THE COMPETITION ACT, 1998 ("THE ACT").	

The Commission and Suidwes hereby agree that application be made to the Tribunal for the confirmation of this Consent Agreement in terms of section 58(1)(aX»0 as read with section 58(1Xb) of the Competition Act, 1998 (Act No. 89 of 1998), as amended, on the terms set out below:

- Definitions For the purposes of this Consent Agreement the following definitions shall apply: 1.1. "Act" means the Competition 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.

"Commissioned 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 Suidwes; 1.6. "Grain Silo industry" means Grain Silo Industry (Pty) Ltd ("GSI"), 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, Atterantstraat, Lynwood Manor, Pretoria, Gauteng Province. The GSI 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' interactions with the Agricultural Products Division of the Johannesburg Stock Exchange (the "APD" previously "SAFEX"). 1.7. "Suidwes" means Suidwes Agriculture (Pty) Limited, a private company registered and incorporated in accordance with the laws of the Republic of South-Africa with registration number 1990/006879/07 and with its registered office and main place of business at 5 Voortrekker

Street, Leeudoringstad, North West, 2640. 1.8. "Parties" means the Commission and Suidwes; 1.9. "Respondent" means for purposes of this agreement Suidwes; 1.10. "Respondents" means Respondents one (1) to seventeen (17) described above; 1.11. "SAFBX" means the South African Futures 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, Mulayo building (Block C), the dtl Campus, 77 Melntjies 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"), Noord-Wes Koöperasie Limited ("NWK"), OVK Operations Limited (COW), Suidwes, Vrystaatse Koöperasie Limited (CVKB) and the GSI for alleged contravention of section 4(1)(b)(i) of the Act, 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)(fa)(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 GSI's 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 to agreeing to the SAFEX rate, the respondents exchanged detailed cost information. 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.

3. Statement of conduct of Suidwes 3.1. Suidwes admits that, as a member of the GSI, it participated to a very limited extent in agreeing on the standardised daily grain storage tariffs which were recommended to SAFEX. 3.2. It agrees that its conduct as described above may have been in contravention of section 4(1)(b)(i) of the Act.
4. Administrative Penalty 4.1. Having regard to the provisions of sections 58(1)(a)(iii) as read with sections 59(1)(a), 59(2) and 59(3) of the Act, Suidwes 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. 4.2. In order to settle the matter, the parties have agreed that Suidwes will pay an administrative penalty in the amount of R 4 644 617.65. 4.3. This amount does not exceed 10% (ten percent) of the total grain silo storage turnover of Suidwes for the 2009 financial year. 4.4. Suidwes will pay the amount set out in paragraph 4.2 above to the

Commission in three consecutive payments as follows: 4.4.1. R1 000 000 within 30 days of confirmation of this Consent Agreement by the Tribunal; 4.4.2. R1 000 000 on or before 31 December 2011; and 4.4.3. R 2 644 617.65 on or before 30 June 2012. 4.5. This payment shall be made into the Commission's bank account, details of which are as follows:

1. Definitions

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

1.1. "Act" means the Competition 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. "Commissioned 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 Suidwes;

1.6. "Grain Silo industry" means Grain Silo Industry (Pty) Ltd ("GSI"), 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, Atteridgeville, Lynwood Manor, Pretoria, Gauteng Province. The GSI 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' interactions with the Agricultural Products Division of the Johannesburg Stock Exchange (the "APD" previously "SAFEX").

1.7. "Suidwes" means Suidwes Agriculture (Pty) Limited, a private company registered and incorporated in accordance with the laws of the Republic of South-Africa with registration number 1990/006879/07 and with its registered office and main place of business at 5 Voortrekker Street, Leeudoringstad, North West, 2640.

1.8. "Parties" means the Commission and Suidwes;

1.9. "Respondent" means for purposes of this agreement Suidwes;

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

1.11. "SAFBX" means the South African Futures 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

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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"), Noord-Wes Kooperasie Limited ("NWK"), OVK Operations Limited COW), Suidwes, Vrystaatse Kooperasie Limited CVKB") and the GSi for alleged contravention of section 4(1)(b)(i) of the Act,

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, -btit 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)(fa)(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 GSf.

These rates were coiiated and evaluated by the GSI's technical committee, the members of which are from competing silo companies.

Tii&i technical committee then decided on a rate and this was then submitted to SAFEX on behalf of GSI and its shareholders.

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

3. Statement of conduct fey Suidwes

3.1. Suidwes admits that, as a member of the GSI, it participated to a very limited extent In agreeing on the standardised daily grain storage tariffs which were recommended to SAFEX.

3.2. It agrees that its conduct as described above may have bean in contravention of section 4(1) (b)(i) of the Ad.

4. Administrative Penalty

4.1. Having regard to the provisions of sections 58(1)(a)(iii) as read with sections 59(1 Xa). 59(2) and 59(3) of the Act, Suidwes 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.

4.2. In order to settle the matter, the parties have agreed that Suidwes will pay an administrative penalty in the amount of R 4 644 617.65.

4.3. This amount does not exceed 10% (ten percent) of the total grain silo storage turnover of Suidwes for the 2009 financial year.

4.4. Suidwes will pay the amount set out in paragraph 4.2 above to the Commission in three consecutive payments as follows:

4.4.1. R1 000 000 within 30 days of confirmation of this Consent Agreement by the Tribunal;

4.4.2. R1 000 000 on or before 31 December 2011; and

4.4.3. R 2 644 617.65 on or before 30 June 2012.

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. Suidwes agrees to fully cooperate with the Commission in relation to the prosecution of the complaint referral. Without limiting the generality of the foregoing, Suidwes 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 its possession or under its control, concerning the alleged contraventions contained in this Consent Agreement 5.2. Suidwes agrees that it will in future refrain from the provision of contractual undertakings that have the potential to constitute contraventions of section 4(1)(b) of the Act. 5.3. Suidwes 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 Act, In particular, Suidwes shall: 5.3.1. draft and implement its competition policy and compliance programme; 5.3.2. provide training on competition law compliance on issues particularly relevant to Suidwes and its employees and officials; 5.3.3. provide training on competition law compliance to all persons and/or officials employed by Suidwes after the confirmation of this Consent Agreement by the Tribunal; 5.3.4. update the competition policy and training annually to ensure Suidwes's continued compliance with the Act. 5.4. Suidwes 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 Suidwes relating to any alleged contravention by the Respondents of the Act that is the subject of the Commission's investigation under case no 2009MAR4349. For Suidwes Dated and signed Leeudoringstad on the 25th day of July 2011 Managing Director For the Commission Dated and signed Pretoria on the 29th day of July 2011 Competition Commissioner

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. Suidwes agrees to fully cooperate with the Commission in relation to the prosecution of the complaint referral. Without limiting the generality of the foregoing, Suidwes 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 if. is &j!'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. Suidwes agrees that it will in future refrain from the provision of contractual undertakings that have the potential to constitute contraventions of section 4(1)(b)ofthe4cf.

5.3. Suidwes shalf 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 Act, In particular, Suidwes shall:

5.3.1. draft and implement's competition policy and compliance programme;

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

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

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

5.4. Suidwes 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 Suidwes relating to any alleged contravention by the Respondents of the Act that is the subject of the Commission's investigation under case no 2009MAR4349.

For Suidwes

Dated and signed Leeudoringstad on the 25th day of July 2011

Managing Director

For the Commission

Dated and signed Pretoria on the 29th day of July 2011

Competition Commissioner

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