

SOUTH AFRICA / JUDGMENT

Competition Commission v Vrystaat Kooperasie Bpk (43/CR/Jun11) [2011] ZACT 91; [2012] 1 CPLR 121 (CT) (9 November 2011) [2011] ZACT 91

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 CommissionApplicant
and

Vrystaat Kooperasie BeperkRespondent

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

Heard on: 09 November 2011

Decided on : 09 November 2011

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

*“ANNEXURE A” CT Case No. CC Case No. 2009Mar4349 IN THE COMPETITION TRIBUNAL OF
SOUTH AFRICA HELD IN PRETORIA In the matter between: THE COMPETITION COMMISSION
.....Applicant and VRYSTAAT KOOPERASIE
BEPERK*

.....6th Respondent In re: THE COMPETITION
COMMISSIONApplicant 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 HUMANSDORPSE KOOPERASIE BEPERK 8th Respondent SENTRAAL-SUID
KOOPERASIE BEPERK 9th Respondent GWK LIMITED 10th Respondent KAAP AGRI BEDRYF
LIMITED 11th 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 16th
Respondent 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
("VBK"), IN RESPECT OF AN ALLEDGED CONTRAVENTION OF SECTION* (1)(b)(i) OF THE
COMPETITION ACT, 1998 ("THE ACT").

"ANNEXURE A"

CT Case No.

CC Case No. 2009Mar4349

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

HELD IN PRETORIA

In the matter between:

THE COMPETITION COMMISSIONApplicant
VRYSTAAT KOOPERASIE BEPERK

.....6th Respondent

In re:

THE COMPETITION COMMISSIONApplicant
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 HUMANSDORPSE KOOPERASIE BEPERK 8th Respondent

SENTRAAL-SUID KOOPERASIE BEPERK 9th Respondent

GWK LIMITED 10th Respondent

KAAP AGRI BEDRYF LIMITED 11th 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 16th Respondent

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 AMENDED, BETWEEN THE COMPETITION COMMISSION ("THE COMMISSION") AND VRYSTAAT KOOPERASIE BEPERK ("VBK"), IN RESPECT OF AN ALLEGED CONTRAVENTION OF SECTION* (1)(b)(i) OF THE COMPETITION ACT, 1998 ("THE ACT").

The Commission and VKB 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 VKB; 1.6. "Grain Silo 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 GSf 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. "VKB" means Vrystaat Kooperasie Beperk, a company registered and incorporated in accordance with the laws of the Republic of South Africa with registration number 2011/007000/06 and with its registered office, in the alternative its main pface of business, at 31 President CR Swaj£^3treet, Reitz,. 9810; 1.8. "Parties" means the Commission and VKB; 1.9. "Respondent" means, for. purposes of this agreement, VKB; 1.10. "Respondents" means Respondents one (1) to seventeen (17) described above; 1.11. "SAFEX" 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 dti Campus, 77 Meintjies Street, Sunnyslde, 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 Kooperasie Limited ("NWK"), OVK Operations Limited ("OVK"), Suidwes (Pty) Limited ("Suidwes"), Vrystaat Kooperasie Limited ("VKB") and the Grain Silo industry ("GSI") regarding, inter alia, alleged price-fixing in respect of the determination of grain storage tariffs in contravention of section 4(1)(b)(i) of the Act 2.2. The investigation revealed that the relevant storage rate is agreed to and assented to not oniy by the entities against whom the original complaint initiation was made, but by ail members and shareholders of the 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 fixed the prices of the daily storage tariff for grain. This was done for application throughout the Republic. The first to sixteenth respondents are ail 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 a standardised tariff from the GSI on an annua! 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 for purposes of recommending a daily storage rate to SAFEX for use in respect of SAFEX traded contracts. 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 was 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 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 was determined was, 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 by VKB VKB admits that it participated, as a member of the GSI, in the fixing of the daily grain storage tariff recommended to SAFEX 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, VKB 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. The parties have agreed that VKB will pay an administrative penalty in the amount of R 1,286,969.22. 4.3. This amount constitutes 4% (four per cent) of the total grain silo storage turnover of VKB for the 2009 financial year; 4.4. VKB will pay the amount set out in paragraph 4.2 above to the Commission within 10 (ten) days 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. VKB agrees to fully cooperate with the Commission in relation to the prosecution of the complaint referral. Without limiting the generality of the foregoing, VKB 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. VKB 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. VKB shall continue with developing, implementing and monitoring its 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, VKB shall: 5.3.1. continue to 'implement a competition policy and compliance programme; 5.3.2. continue to provide training on competition law compliance on issues particularly relevant to VKB and its employees and officials; 5.3.3. update the competition policy and training annually after confirmation of this Consent Order and continue to do so on an annual basis to ensure VKB's continued compliance with the Act. 5.4. VKB shall submit a copy of its 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 VKB relating to any alleged contravention by the Respondents of the Act that is the subject of the Commission's investigation under case no 2009MAR4349. Dated and signed at Reitz on the 24th day of June 2011. For VBK Chief Executive Officer For the Commission Competition Commissioner

The Commission and VKB 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 VKB;

1.6. "Grain Silo 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 GSf 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. "VKB" means Vrystaat Kooperasie Beperk, a company registered and incorporated in accordance with the laws of the Republic of South Africa with registration number 2011/007000/06 and with its registered office, in the alternative its main place of business, at 31 President CR Swaj£^3street, Reitz, . 9810;

1.8. "Parties" means the Commission and VKB;

1.9. "Respondent" means, for. purposes of this agreement, VKB;

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

1.11. "SAFEX" 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 dti Campus, 77 Meintjies 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 Kooperasie Limited ("NWK"), OVK Operations Limited ("OVK"), Suidwes (Pty) Limited ("Suidwes"), Vrystaat Kooperasie Limited ("VKB") and the Grain Silo industry ("GSI") regarding, inter alia, alleged price-fixing in respect of the determination of grain storage tariffs in contravention of section 4(1)(b)(i) of the Act

2.2. The investigation revealed that the relevant storage rate is agreed to and assented to not only by the entities against whom the original complaint initiation was made, but by all members and shareholders of the 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 fixed the prices of the daily storage tariff for grain. This was 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 a 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 for purposes of recommending a daily storage rate to SAFEX for use in respect of SAFEX traded contracts. 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 was 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 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 was determined was, 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 by VKB

VKB admits that it participated, as a member of the GSI, in the fixing of the daily grain storage tariff recommended to SAFEX 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, VKB 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. The parties have agreed that VKB will pay an administrative penalty in the amount of R 1,286,969.22.

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

4.4. VKB will pay the amount set out in paragraph 4.2 above to the Commission within 10 (ten) days 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. VKB agrees to fully cooperate with the Commission in relation to the prosecution of the complaint referral. Without limiting the generality of the foregoing, VKB 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. VKB 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. VKB shall continue with developing, implementing and monitoring its 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, VKB shall:

5.3.1. continue to 'implement a competition policy and compliance programme;

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

5.3.3. update the competition policy and training annually after confirmation of this Consent Order and continue to do so on an annual basis to ensure VKB's continued compliance with the Act.

5.4. VKB shall submit a copy of its 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 VKB relating to any alleged contravention by the Respondents of the Act that is the subject of the Commission's investigation under case no 2009MAR4349.

Dated and signed at Reitz on the 24th day of June 2011.

For VBK

Chief Executive Officer

For the Commission

Competition Commissioner

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