

SOUTH AFRICA / JUDGMENT

Competition Commission v Wesgrow Potatoes (Pty) Ltd and Another (CR249Mar17/SA130Nov19) [2020] ZACT 3 (15 January 2020)

[2020] ZACT 3

COURT

Competition Tribunal

BEFORE

Y Carrim, A Ndoni, H Cheadle

CASE / FILE NUMBER

CR249Mar17/SA130Nov19

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Competition tribunal

COMPETITION TRIBUNAL

REPUBLIC OF SOUTH AFRICA

Case No: CR249Mar17/SA130Nov19

In the matter between:

The Competition Commission

Applicant

And

Wesgrow Potatoes (Pty) Ltd; First Respondent

HZPC Holland B.V. Second Respondent

Panel: Y Carrim (Presiding Member)

: A Ndoni (Tribunal Member)

: H Cheadle (Tribunal Member)

Heard on: 15 January 2020

Decided on: 15 January 2020

Settlement Agreement

After hearing the parties, the Tribunal hereby orders as follows-

1. The settlement agreement between the Competition Commission and Wesgrow Potatoes (Pty) Ltd ("Wesgrow") and HZPC Holland B.V. annexed hereto marked "Annexure A" is approved;
2. Wesgrow will place a copy of the settlement agreement on its website for a period of three (3) years from date of approval; and
3. The Commission's principal submissions attached hereto as "Annexure B" are to be read with the settlement agreement.

Presiding Member Ms Yasmin Carrim

15 January 2020

Date

Concurring: Ms Andiswa Ndoni and Mr Halton Cheadle

ANNEXURE A

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT CASE NO: CR249Mar17/SA103NOV19

CC CASE NO: 2015Mar0143

THE COMPETITION COMMISSION OF SOUTH

Applicant

AFRICA

and

WESGROW POTATOES (PTY) LTD

First Respondent

HZPC HOLLAND B.V.

Second Respondent

CONSENT AGREEMENT IN TERMS OF SECTION 49D OF THE COMPETITION CT, NO. 89 OF 1998 (AS AMENDED), BETWEEN THE COMPETITION COMMISSION OF SOUTH AFRICA, WESGROW POTATOES (PTY) LTD AND HZPC HOLLAND B.V.

The Competition Commission, Wesgrow Potatoes (Pty) Ltd and HZPC Holland B.V. hereby agree that an application be made to the Competition

Tribunal for the confirmation of this Consent Agreement as an order of the Competition Tribunal in terms of Section 49D as read with Sections 58(1)(a)(iii) and 58(1)(b) of the Competition Act, No. 89 of 1998, as amended, in respect of an alleged contravention of section 5(1) and section 8(d)(i), alternatively section 8(c), of the Act, 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, 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 Block C, Mulayo Building, DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria;

1.3. "Commissioner" means the Commissioner of the Competition Commission, appointed in terms of section 22 of the Act;

1.4. "Consent Agreement" means this Agreement duly signed and concluded between the Commission and the Respondents;

1.5. "Farm saved seed" means Mondial potato seeds or tubers that have been planted by a farmer as an initial crop, harvested and retained by that farmer for the purpose of planting those potato seeds or tubers in a later season on their own holdings.

1.6. "First Respondent" means Wesgrow;

1.7. "HZPC" means HZPC Holland B.V., a company registered and incorporated in terms of the applicable laws of the Netherlands and with its principal place of business at 5 Edisonweg, 8501 XG Joure, the Netherlands;

1.8. "Parties" mean the Commission and the Respondents;

1.9. "Plantlet" means in vitro propagation material of the Mondial seed potato varietal which is capable of immediate propagation and development and which is no older than 6 generations in tissue culture;

1.10. "Respondents" mean Wesgrow and HZPC;

1.11. "Second Respondent" means HZPC;

1.12. "Professional Seed grower" means all persons or firms, including fanners, wishing to grow the Mondial potato varietal, whether for private or for commercial purposes.

1.13. "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;

1.14. "Wesgrow" means Wesgrow Potatoes Proprietary Limited, a private company duly incorporated under the laws of the Republic of South Africa, with its principal business address at 1 Kooperasie Street, Christiana, North West province, South Africa.

2. THE COMPLAINT

2.1. On 28 March 2015 the Commissioner initiated a complaint against the Respondents, in terms of section 49B(1) of the Act, in which it is alleged, inter alia, that:

2.1.1 They contravened section 5(1) of the Act through their exclusive agreement from 11 October 2013 to date;

2.1.2 Wesgrow contravened section 8(d)(i) of the Act through its exclusive agreements with its customers, from October 2013 to date; and

2.1.3 In the alternative to 2.1.2 above, Wesgrow contravened section 8(c) of the Act through its exclusive agreements with its customers, from October 2013 to date.

3. COMMISSION'S INVESTIGATION AND FINDINGS

3.1 The Commission's investigation indicated to it, at least prima facie, inter alia, that:

3.1.1 The relevant product market is the market for the production and supply of the Mondial seed potato varietal.

3.1.2 Wesgrow has a 99.1% market share in the market for the production and supply of the Mondial seed potato varietal in South Africa.

3.1.3 A prohibited practice has been established on the part of the Respondents, in contravention of section 5(1) of the Act.

3.1.4 A prohibited practice has been established on the part of Wesgrow, in contravention of section 8(d)(i), alternatively section 8(c), of the Act.

3.2 On 31 March 2017 the Commission filed a complaint referral with the Tribunal against the Respondents, wherein it alleged, inter alia, that:

3.2.1 The agreement between Wesgrow and HZPC, from 11 October 2013 to date, contravened section 5(1) of the Act;

3.2.2 The agreements between Wesgrow and its customers, from 11 October 2013 to date, contravened section 8(d)(i) of the Act;

3.2.3 In the alternative to 3.2.2 above, the conduct of Wesgrow, from 11 October 2013 to date, contravened section 8(c) of the Act.

4. In the Commission's complaint referral, the Commission sought an order declaring that:

4.1 The agreement between the Respondents from 11 October 2013 to date contravenes section 5(1) of the Act;

4.2 The agreements between Wesgrow and its customers constitute a prohibited practice in contravention of section 8(d)(i), alternatively, the agreements between Wesgrow and its customers constitute a prohibited practice in contravention of section 8(c) of the Act;

4.3 Paragraphs 2.1, 8.2 and 9.3 of the current licence agreement between the Respondents, entered into on or about 27 March 2014, and

insofar as the Mondial seed potato varietal is concerned, are void;

4.4 Paragraphs 22, 23 and 24, and paragraphs with similar content, of the sale agreements between Wesgrow and its customers, insofar as the Mondial seed potato varietal is concerned, are void;

4.5 Interdicting the Respondents from entering into similar agreements in future that contain the same or similar terms as paragraphs 2.1, 8.2 and 9.3 of the current licence agreement in respect of the Mondial seed potato varietal;

4.6 Interdicting Wesgrow from entering into similar agreements with customers in future that contain the same or similar terms as paragraphs 22, 23 and 24 of the current sale agreements in respect of the Mandia! seed potato varietal; and

4.7 Wesgrow be required to pay an administrative penalty equal to 10% of its annual turnover in the Republic and its exports

from the Republic during the preceding financial year.

5. The Respondents filed an answering affidavit on 12 June 2017 in which they disputed the Commission's findings, its investigation

and the allegations made by the Commission in its complaint referral; and set out the factual basis for their contentions. In particular,

the Respondents disputed the Commission's market definitions, its allegation that Wesgrow was a dominant firm, its claim that Wesgrow had contravened section 8 of the Act and its claim that the Respondents had contravened section 5 of the Act. The Respondents sought the dismissal of the complaint against them.

6. Following the close of pleadings, the Commission and the Respondents have concluded this agreement in settlement of the complaint referral.

7. RESPONDENTS' UNDERTAKINGS

The Respondents hereby undertake as follows:

7.1. Subject to the provisions of paragraph 7.3 below, Wesgrow will, for a period of three (3) years from date of confirmation of this agreement as an order of the Tribunal, supply Plantlets for the Mondial seed potato varietal to Professional Seed growers, seed

banks, laboratories, and tissue culture facilities (including the Agricultural Research Council).

7.2. Wesgrow will supply Pfantlets in terms of clause 7.1 at cost, including the reasonable import and transportation costs (where applicable) and handling fees associated with the preservation and care of such material. The Plantlets will be supplied from Wesgrow's own gene bank or, where Wesgrow is reasonably unable to supply Plantlets from its own gene bank, the Plantlets will be supplied from

HZPC, through Wesgrow.

7.3. Wesgrow is only obliged to provide Plantlets to any firm in terms of clause 7.1 once, whereafter it shall be the responsibility of the firm to which the Plantlets were supplied to produce and maintain its own genetic material for the Mondial seed potato varietal.

7.4. Wesgrow shall not impose any restrictions or conditions on the firm to which the Plantlets are supplied in terms of clause 7.1 insofar as the planting and sale of the Mondial seed potato varietal is concerned.

7.5. Wesgrow will not prohibit or otherwise impede Professional Seed growers, seed banks, laboratories or tissue culture facilities (including the Agricultural Research Council) from reverse- engineering Generation 3 Mondial seed potato tubers.

7.6. Wesgrow must (subject to Rascal Laboratories' capacity), if so requested by a Professional Seed grower, seed bank, laboratory or

tissue culture facility (including the Agricultural Research Council) wishing to produce Mondial seed potatoes, procure the provision of the technical services of its subsidiary, Rascal Laboratories, on reasonable, market-related terms and conditions, to such firm in developing the Mondial plant material to Generation 0.

7.7. Wesgrow will not prohibit its customers from planting Farm saved seed of the Mondial seed potato varietal.

7.8. Wesgrow undertakes, in relation to the Mondial seed potato varietal, that it will not enforce the provisions of clause 22[1] and 23[2] of its standard sales agreement with Professional Seed growers insofar as these clauses:

7.8.1 prevent the "withholding" {storage) or planting of Farm saved seed;

7.8.2 require the Professional Seed grower to pay a royalty to Wesgrow in respect of the potatoes harvested from Farm saved seed;

7.8.3 prohibit the doing of any act inconsistent with, the Plant Breeders' Rights Act, 15 of 1976 (given that Mondial is no longer protected by a Plant Breeders' right); or

7.8.4 include a waiver of any right or privilege granted under the Plant Breeders' Rights Act, 15 of 1976.

7.8.5 prohibit the breeding or cloning of Mondial seed obtained from Wesgrow.

7.9. HZPC undertakes that, in relation to the Mondial seed potato varietal, it will not enforce the provisions of clause 9.3. of its licence agreement with Wesgrow insofar as this clause:

7.9.1 requires Wesgrow to impose conditions on Wesgrow customers that serve to prevent the customers from planting Farmsaved seed; or

7.9.2 require the customer to pay a royalty to Wesgrow (which is then paid to HZPC) in respect of the potatoes harvested from that Farm saved seed.

7.10. Wesgrow undertakes that, insofar as the Mondial varietal is concerned, it will amend its standard sales agreement to ensure compliance with paragraphs 7.1 to 7.7 above.

7.11. The Respondents will not prohibit or otherwise impede Professional Seed growers, seed banks, laboratories or tissue culture facilities (including the Agricultural Research Council) from reverse- engineering any of their cultivars in South Africa after expiry of their South African Plant Breeder's right in respect of such cultivars.

8. MONITORING OBLIGATIONS

8.1 Wesgrow will provide to the Commission a report detailing its compliance with clauses 7.1 to 7.11 above annually, on the anniversary of signature of this agreement for a period of 3 (three years), together with an affidavit by its Chief Executive Officer confirming the contents of the report.

8.2 The Commission may request any additional information from Wesgrow which the Commission, from time to time, deems necessary for the monitoring of compliance with this agreement.

9. GENERAL

9.1 The Parties agree, on the basis of the undertakings made herein, that no administrative penalty shall be paid by the Respondents.

9.2 The Respondents or the Commission may at any time, on good cause shown following a material change in circumstances, apply to the Tribunal for the variation or amendment of this agreement.

10. FULL AND FINAL RESOLUTION

This agreement, upon confirmation as an order by the tribunal, is in full and final settlement of, and concludes, the complaint referral between the Commission and the Respondents relating to the alleged contravention by the Respondents of sections 5(1) and 8(d)(i), alternatively 8(c), of the Act that is the subject of or was investigated under the Commission's case number 2015MAR0143.

For: Wesgrow Potatoes Proprietary Limited

Date and signed at Christiana on the 27 day of September 2019.

Petrus Gerhahrus Johannes Posthumus

Name in full:

Designation: MD of Wesgrow Potatoes

For: HZPC Holland B.V

Date and signed at Jaure on the 23 of Sept 2019.

Gerard Back

Designation: CEO of H2PC

For the Commission

Dated and signed at Tshwane on the 4 day of November 2019.

TEMBINKOSI BONAKELE

COMPETITION COMMISSIONER

Annexure B

HELD AT PRETORIA

CT CASE No: CR249Mar17/SA130NOV19

CC Case No: 2016Mar0143

THE COMPETITION COMMISSION

Applicant

WESGROW POTATOES (PTY) LTD

First Respondent

HZPC HOLLAND B.V.

Second Respondent

COMPETITION COMMISSION'S PRINCIPAL SUBMISSIONS

Introduction:

1. The parties have concluded a settlement agreement in resolution of their dispute. They now apply to this Tribunal for an order incorporating the terms of that settlement agreement.
2. Significant consultation with interested parties has been undertaken by the Commission, during settlement negotiations and subsequent thereto. No objections have been received to the terms of the proposed settlement agreement.

3. As is addressed in further detail below, the Commission's complaint has for all intents and purposes been resolved through external factors that have resulted in the exclusive agreements - that were the primary cause of the Commission's concern in this matter
- no longer have the effect of denying anyone access to the previously exclusive plant material.

Background:

4. Before addressing the legal proceedings leading up to this hearing, it is necessary to touch briefly on the relevant industry, role players, the value chain and the relationship between the First and Second Respondents (Wesgrow and HZPC).
5. This background is almost entirely common cause between the parties and is reflected in the affidavits filed in support of and in

opposition to the complaint referral and the various factual witness statements filed by the parties in anticipation of an opposed hearing of the matter.

The relationship between the First and Second Respondents:

6. Wesgrow is a South African company and a potato seed grower, whose business it is to grow and supply certain varieties of seed potatoes to commercial potato farmers in South Africa.
7. HZPC is a company registered and principally based in the Netherlands. HZPC is a potato seed breeder and its business is the cultivation and marketing of certain seed potato varieties across the world.
8. The relationship between Wesgrow and HZPC is a contractual one. HZPC does not have a branch in South Africa and has entered into

a license agreement with Wesgrow, in terms of which HZPC provides Wesgrow with the initial genetic material of certain seed potato

varieties, which Wesgrow then markets and supplies to the South African market. The relevant seed potato variety that is the subject

of this matter is the Mondial seed potato varietal.

The seed potato value chain

9. The seed potato industry value chain consists of 4 levels:

9.1 Seed potato breeders;

9.2 In-vitro multipliers;

9.3 Seed potato growers; and

9.4 Commercial farmers.

10. Seed potato breeders (like HZPC) develop clones of seed potato varieties. They produce and supply clones (called plantlets) to in-vitro multipliers.

10.1. The seed potato variety, upon establishment, may be protected as an intellectual property right. This is recognized by the Plant

Breeder's Rights Act No 15 of 1976, which affords protection for a period of 20 years. During this period the variety is characterized

as "closed". After expiry of the 20 year period the variety is considered "open".

11. In-vitro multipliers (like Wesgrow's wholly owned subsidiary Rascal Seed Research Laboratories (Pty) Ltd) receive plantlets, which

they multiply in a greenhouse environment, developing them into mini-tubers, which are then supplied to seed potato growers.

12. Seed potato growers plant the mini-tubers and produce and supply seed potatoes. This takes place over 8 generations of growth cycle. This process contemplates the production of certified or uncertified seed potatoes, the former being preferred by commercial farmers due to the established quality thereof.

13. Seed potato growers are able to produce seed potatoes from other seed potatoes, as long as they have access to low generation seed potatoes. In other words, access to plantlets is not essential.

14. Commercial farmers buy seed potatoes from seed potato growers in order to produce table potatoes (or seed potatoes). Table potatoes

are the final tuber that is intended for the consumer market. Most end consumers are unaware of the variety type that they purchase.

The Mondial variety

15. Wesgrow's primary business is to sell seed potatoes to commercial farmers. The Commission contends that Wesgrow is dominant in the market for the production and supply of the Mondial potato variety. The Respondents contend that the relevant product market is

the market for the production and supply of seed potatoes (and not only the Mondial seed potato variety) and that Wesgrow is not

dominant in that market.

16. Mondial is recognized as having superior characteristics when compared to other potato varieties and is highly sought after by commercial farmers.

17. HZPC was granted a plant breeder's right over the Mondial seed potato variety on 11 October 1993. This expired on 11 October 2013.

18. Although the Mondial varietal then became "open", the Commission was concerned that the exclusive agreements that are the subject of the complaint referral, effectively rendered the Mondial varietal to remain "closed" rather than "open".
19. Wesgrow and HZPC entered into an exclusive agreement which grants Wesgrow the sole and exclusive rights over the Mondial seed potato varietal in South Africa. This was unchanged after the varietal became "open".
20. Wesgrow entered into agreements with its customers which prohibited them from re-selling seed potatoes as propagating material to third parties. This effectively denied third parties access to the Mondial seed potato varietal.

The complaint

21. On 28 March 2015 the Commissioner initiated a complaint against the Respondents, in terms of section 49B(1) of the Competition Act, No 89 of 1998. After concluding its investigation, the Commission filed a complaint referral against the Respondents, alleging that:

21.1 The Respondents contravened section 5(1) of the Act through their exclusive license agreements from 11 October 2013 to date of referral;

21.2 The agreements between Wesgrow and its customers, from 11 October 2013 to date of referral, contravened section 8(d)(i) of the Act;

21.3 Alternatively, that Wesgrow's conduct from 11 October 2013 to date of referral, contravened section 8(c).

22. The Commission sought the following relief:

22.1 An order declaring the agreement between Wesgrow and HZPC, from 11 October 2013 to date, in contravention of section 5(1);

22.2 An order declaring paragraphs 2.1, 8.2 and 9.3 of the current license agreement between Wesgrow and HZPC (27 March 2014) void;

22.3 An order interdicting Wesgrow and HZPC from entering into similar agreements in future containing the same or similar terms as paragraphs 2.1, 8.2 and 9.3 of the current license agreement, in relation to the Mondial seed potato varietal;

22.4 An order declaring the agreements between Wesgrow and its customers, from 11 October 2013 to date, in contravention of section 8(d)(i), alternatively that Wesgrow's conduct was in contravention of section 8(c);

22.5 An order declaring paragraphs 22, 23, 24 or any other paragraphs with the same meaning or extent, of the sale agreements between Wesgrow and its customers in relation to the Mondial seed potato varietal, void;

22.6 An order interdicting Wesgrow from entering into similar agreements with customers in future containing the same or similar terms as paragraphs 22, 23, 24 of the current sale agreements in respect of the Mondial seed potato varietal;

22.7 That Wesgrow be ordered to pay an administrative penalty.

23. The Respondents opposed this relief, contending that Wesgrow's actual and potential competitors are able to access Mondial seed potato variety from sources other than HZPC. And further, that they are able to compete through the production and sale of their own (open and closed) varieties. The Respondents denied that any foreclosure arises as a result of the agreement between Wesgrow and HZPC.

24. Wesgrow further contended that, should it permit its customers (commercial farmers) to produce and sell seed potatoes, using its

high quality Generation 3 seed potatoes as a starting point, it would be put out of business by its customers, allowing them "free-riding"

on the shoulders of Wesgrow's significant investment in the varietal.

25. The matter was set down for hearing and factual witness statements were filed in anticipation thereof by all parties. At the end of 2018 the parties entered into settlement negotiations that finally culminated in the conclusion of the settlement agreement in

November 2019.

The exclusionary provisions of the agreements:

26. In its referral the Commission specifically identified paragraphs 2.1, 8.2 and 9.3 of the license agreement between Wesgrow and HZPC (27 March 2014) as being the offending exclusionary clauses that should be declared void and excluded from any future agreements.

27. Paragraph 2.1 reads as follows:

Article 2 -Agreement of agent

2.1. HZPC hereby appoints WVAMK and WVAMK agrees to act as sole and exclusive agent in South Africa for the technical and commercial representation of HZPC-varieties, which will be selected and nominated in mutual collaboration between HZPC and WVAMK.

28. Paragraph 8.2 reads as follows:

8.2 WVAMK undertakes that no seed potatoes of HZPC varieties will be grown, certified and/or commercialized in South Africa without the licence to be issued by WVAMK under this agreement, to the extent that rights of HZPC-varieties are protected in South Africa and under this agreement with the exception of those varieties that are excluded according article 2.3.

29. And paragraph 9.3 reads as follows:

9.3. WVAMK acknowledge and accept the trading conditions of HZPC. When negotiating with customers, the WVAMK shall make best endeavors to offer seed potatoes of HZPC varieties in accordance with the terms and general sales conditions that HZPC has communicated to him. One of these conditions will be that the WVAMK can only sell seed potatoes of HZPC varieties under the conditions will be that the WVAMK can only sell seed potatoes of HZPC varieties under the condition that the buyer is not allowed to produce and sell seed potatoes of HZPC varieties and use as planting material for the next crop a licence agreement between the buyer and the WVAMK as representative of HZPC have to be concluded which is in accordance with the instructions given by HZPC have to be concluded which is in accordance with the instructions given by HZPC. Buyers with no licence agreement are only allowed to use the seed potatoes of HZPC varieties to produce table potatoes which cannot be used by the buyer as planting material for the next crop.

30. A similar order was sought in relation to paragraphs 22, 23, 24 of Wesgrow's standard sales agreement, which reads:
22. The Client specifically and expressly undertakes not to, without the written consent of WESGROW, withhold seeds, tubers, and/or products provided by WESGROW for personal use, to not register any tubers that were intended for the production of table potatoes with the certification scheme, to not sell the certified seed derived from WESGROW to third parties, to not sell self-produced uncertified seed to third parties, and in general allow or do anything that is inconsistent with the Plant Breeders' Rights Act, Act 15 of 1976, or that violate any of WESGROW's rights. WESGROW and the Client confirms by signing this agreement that seed potatoes produced by WESGROW to the Client under this agreement may only be used for the production of table potatoes.
23. No breeding, cloning and multiplying of seed obtained from WESGROW is allowed. The Client waives all rights and privileges in respect of seed potatoes, including all rights under Article 23 (6)(f) of the Plant Breeders' Rights Act, Act 15 of 1976, except for the right to exclusively use the seed potatoes to produce harvested material (commercial/ware potatoes). The Client shall never use seed potatoes directly or indirectly as propagating material, thus using seed potatoes to reproduce seeds, license, otherwise making available, subscribe to the National Certification Scheme or -subscribe to the National Tuber Multiplying Scheme. The client will thus only have the right to plant seed potatoes and grow varieties during one growth cycle from the first planting thereof, for the sole purpose of harvesting and sale of commercial potatoes and only while this Agreement is in full force and effect.)
24. If the Client breaches this prohibition in any way, and if such breach is established by WESGROW or any other producer and/or breeder, the Client will be liable to WESGROW, within 30 (thirty) days after a letter of demand by WESGROW has been issued to the Client, an amount of 10 (ten) times the total planting season's invoice value for seed orders placed by the Client with WESGROW.

31. The Commission assessed these provisions, in the circumstances where no Mondial plantlet was available to seed growers, and no access was available to lower generation tubers, allowing for reverse engineering of tubers to plantlets.

31.1 The Commission was particularly concerned that Wesgrow's appointment as sole and exclusive agent and route to the Mondial varietal prohibited other seed growers from gaining access to the varietal, despite the termination of the plant breeder's right.

31.2 The Commission considered that the terms of the license agreement served to effectively extend exclusivity by denying any other seed growers access to the Mondial varietal, prohibiting reverse engineering and even denying customers the election to utilise farm saved seed.

31.3 In addition, the Commission considered that the exclusive provisions contained in the standard sales agreements between Wesgrow and customers was deliberately drafted in order to prevent any seed growers from obtaining access to the Mondial varietal. That being the case, seed growers were effectively denied any opportunity to gain access to the Mondial varietal, not only by being denied access to the plantlet, but also should they wish to reverse engineer the tubers. Although the Respondents contended that competition was possible, the Commission was concerned that this was in fact impossible due to a practical inability to gain access to a Mondial plantlet or low generation tuber for the purposes of reverse engineering.

32. The conclusion of the settlement agreement and the Respondents' undertakings contained therein, have addressed the Commission's

concerns regarding the exclusionary effect of the various agreements. The settlement agreement opens up two avenues of access, being reverse engineering (derived access) and original material (direct access).

The settlement agreement:

33. The resolution of the dispute and the terms on which this is concluded, is reflected in paragraph 7 of the settlement agreement.

In terms thereof:

33.1 Sub-paragraph 7.1: Wesgrow will, for a period of 3 years, supply Mandia! seed potato varietal plantlets to seed growers. In addition this will also be supplied to seed banks, laboratories and tissue culture facilities. This facilitates access by seed growers to

plantlets and ongoing (alternative to the Respondents) supply down the line. The plantlet is the best genetic material available to seed growers.

33.2 Sub-paragraph 7.2: Wesgrow will supply the plantlets at cost from its own gene bank or from HZPC. This provision seeks to ensure

that that no exclusion takes place due to a lack of availability of plantlets or any prohibitive costs.

33.3 Sub-paragraph 7.3: Wesgrow will only provide plantlets once. Consultation with seed growers has confirmed that a once off supply

is sufficient. Innumerable clones may be created from 1 plantlet. Plantlets are specifically defined in the agreement as being capable of immediate propagation and being no older than 6 generations in tissue culture (which seed growers have confirmed to be within required standards).

33.4 Sub-paragraph 7.4: Wesgrow will not, when supplying plantlets in terms of the agreement, impose any restrictions or conditions regarding the planting and sale of the Mondial seed potato varietal. This provision addresses the concerns previously held by seed growers, that even when they have a plantlet available, their use thereof could or would be restricted by Wesgrow.

33.5 Sub-paragraph 7.5: Wesgrow will not prohibit or impede the reverse engineering generation 3 Mondial seed potato tubers. This provision too addresses concerns previously raised by seed growers, that even if a Generation 3 Mondial seed potato tuber is made available, their use thereof could or would be restricted by Wesgrow.

33.6 Sub-paragraph 7.6: Wesgrow will, on request, make available the technical services of its subsidiary, Rascal Laboratories, on reasonable, market-related terms and conditions, to develop the Mondial plant material to Generation 0. This provision empowers parties who intend reverse engineering Mondial potato tubers to plantlet form, to be able to do this. Before the plantlet itself was made available, this was the only alternative means to obtain a Mondial clone and was the means utilized to establish the only other Mondial clone previously available. This also ensures the availability of a laboratory capable of assisting seed growers.

33.7 Sub-paragraph 7.7: Wesgrow will not prohibit its customers from planting farm saved Mondial seed. This was previously prohibited

in Wesgrow's agreements with customers, limiting their opportunity to plant farm saved seed.

33.8 Sub-paragraph 7.8: Wesgrow will not enforce the provisions of clause 22 and 23 of its standard sales agreement, inter alia where they prevent the storage or planting of farm saved seed, or require a royalty to be paid to Wesgrow for farm saved seed, or prohibit the breeding or cloning of Mondial seed obtained from Wesgrow. This provision is specifically included in order to ensure that Wesgrow's standard sales agreement does not contradict the undertakings contained in paragraph 7.

33.9 Sub-paragraph 7.9: HZPC will not impose the provisions of clause 9.3 of its license agreement with Wesgrow, where this requires Wesgrow to impose conditions that prevent customers from planting farm saved seed, or require the payment of a royalty in relation to farm saved seed.

33.10 Sub-paragraph 7.10: Wesgrow will amend its standard sales agreement to ensure it accords with its undertakings in the settlement agreement.

33.11 Sub-paragraph 7.11: The Respondents will not prohibit or impede the reverse engineering of any of their "open" cultivars. According to the industry Mondial is the first open varietal where plant breeder's rights had expired, but seed growers were unable to enter into competition with Wesgrow, due to an inability to access the necessary genetic material. This general and forward-looking provision provides clarity that was lacking in the market in the present matter, particularly regarding the opportunity to reverse engineer varieties, without interference from the Respondents.

Interested parties:

34. The relevant parties impacted by the non-availability of the Mondial varietal are the seed potato growers. There are approximately 119 registered seed potato growers in South Africa (growing any number of open or closed varieties). In the course of its investigation and preparation for hearing the Commission identified 5 potato seed growers that were able to testify regarding the Mondial and the impact of the relevant exclusivity agreements. The Respondents identified one seed potato grower as a factual witness.

35. Jakkie Mellet is a potato seed grower and the Managing Director of Potato Seed Production (Pty) Ltd based in Lydenburg, Mpumalanga

Province, South Africa. He contended in his factual witness statement, filed by the Commission, that his business was negatively

affected by the conduct of the Respondents in refusing to make Mondial accessible to seed growers. He, in particular, actively

sought access to the Mondial varietal, which access was denied.

36. Christopher Owen of Super Spud Seed potatoes, another seed potato grower, and the only party other than Wesgrow to have access to certified Mondial plantlets, was also identified as a factual witness by the Commission. His statement recorded his concern that he did not have permission from the Respondents to register the Mondial seed that he had reverse engineered, for the purposes of selling it to another seed grower.

37. Throughout the course of the settlement discussions between the parties, the Commission has remained in contact with its factual

witnesses, particularly Mr Owen and Mr Mellet, and has tested their appetite for the various versions of the settlement agreement

preceding final settlement. No objections were at any time received to the objectives of the settlement or the proposed wording thereof.

38. The Commission also consulted the Potato Certification Service (a party independent to the dispute and which deals directly with seed growers seeking certification of varieties) on the settlement terms, which provided expert insight into the industry and confirmed the settlement terms as being appropriate and unobjectionable to seed growers.

39. During the course of such discussions with interested/affected parties, it was drawn to the Commission's attention that the Mondial plantlet was already available from another in-vitro source. It was established that a number of laboratories not linked to Wesgrow (including Ruva Laboratories and Super Spud) are currently selling Mondial clones to seed growers.
40. In order to provide assurance to the Tribunal regarding the attitude of the potato seed growers to the settlement agreement, the Commission has again approached potato seed growers, in order to confirm that there is no objection to the terms of the settlement

agreement being confirmed by the Tribunal as an order. This has been undertaken telephonically and in writing.

41. Annexed hereto, marked "A", is a copy of the correspondence directed to Neels Marais, Managing Director of Aartappelnetwerk South Africa (ANSA), the seed marketing agent company based in Mpumalanga. Marketing agents act for seed growers and take orders from the commercial potato farmer. Mr Marais has advised the Commission as follows with regard to his attitude to the settlement agreement: "I herewith confirm that I have no objections for an order in the terms set out in clause 7.1 - 7.11. I will however have an objection if Wesgrow are not found guilty in harming the industry and roll players since October 2013.

Financial losses are just too big. Thanks for all the work being done on this case". A copy of his response is also reflected in "A". No other written response has been received from seed growers.

42. In the light of the consultations undertaken with all interested/affected parties, the Commission can confirm that it is not aware of any objection to the settlement terms being made an order of the Tribunal. It is clear that, given the significant change

in the market conditions, particularly as a result of the availability of the Mondial varietal elsewhere than through HZPC and

Wesgrow, there is unlikely to be any cause for concern in relation to the settlement terms agreed between the parties.

Relief sought:

25. It is respectfully submitted that the present matter is one where it would be appropriate for the Tribunal to grant an order confirming the terms of the settlement agreement.

Candice Slump

Competition Commission

14 January 2020

- [1] The Client specifically and expressly undertakes not to without the written consent of WESGROW, withhold seeds, tubers, and/or products provided by WESGROW for personal use, to not register any tubers that were intended for the production of table potatoes with

the certification scheme, to not sell the certified seed derived from WESGROW to third parties, to not sell self-produced uncertified seed to third parties, and in general allow or do anything that is inconsistent with the Plant Breeders' Rights Act, Act 15 of 1976, or that violate any of WESGROW's rights. WESGROW and the Client confirms by signing this agreement that seed potatoes produced by WESGROW to the Client under this agreement may only be used for the production of table potatoes.

- [2] No breeding, cloning and multiplying of seed obtained from WESGROW is allowed. The Client waives all rights and privileges in respect of seed potatoes, including all rights under Article 23(6)(1) of the Plant Breeders' Rights Act, Act 15 of 1976, except for the right to exclusively use the seed potatoes to produce harvested material (commercial/Ware potatoes). The Client shall never use seed potatoes directly or indirectly as propagating material, thus using seed potatoes to reproduce seeds, license, otherwise making available, subscribe to the National Certification Scheme or subscribe to the National Tuber Multiplying growth cycle from the first planting thereof, for the sole purpose of harvesting and sale of commercial potatoes and only while this Agreement is in full force and effect.

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