

COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 43/CR/Jun11

In the matter between:

The Competition Commission

Applicant

and

Kaap Afgri Bedryf Limited

Respondent

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

Heard on : 15 June 2011

Decided on : 15 June 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

"A"

43/cr/ Jun 11

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IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
HELD IN PRETORIA

CT Case No.
CC Case No. 2009Mar4349

In the matter between:

THE COMPETITION COMMISSION

Applicant

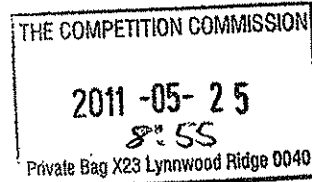
and

KAAP AGRI BEDRYF LIMITED

11th Respondent

In re:

COMPETITION COMMISSION



Applicant

and

AFGRI OPERATIONS LIMITED
SENWES LIMITED
NWK LIMITED
OVK OPERATIONS LIMITED
SUIDWES (PTY) LIMITED
VRYSTAAT KOÖPERASIE BEPERK
OVERBERG AGRI (PTY) LIMITED
DIE HUMANSDORPSE KOÖPERASIE BEPERK
SENTRAAL-SUID KOÖPERASIE BEPERK
GWK LIMITED
KAAP AGRI BEDRYF LIMITED
MGK BEDRYFSMAATSKAPPY (PTY) LIMITED
TUINROETE AGRI BEPERK
MOREESBURGSE KORINGBOERE (EDMS) BEPERK
TWK LANDBOU BEPERK
NTK LIMPOPO AGRIC BEPERK
GRAIN SILO INDUSTRY

1st Respondent
2nd Respondent
3rd Respondent
4th Respondent
5th Respondent
6th Respondent
7th Respondent
8th Respondent
9th Respondent
10th Respondent
11th Respondent
12th Respondent
13th Respondent
14th Respondent
15th Respondent
16th Respondent
17th Respondent

CONSENT AGREEMENT IN TERMS OF SECTION 49D READ WITH SECTION 58(1)(a)(iii) and 58(1)(b) OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998), AS AMENDED, BETWEEN THE COMPETITION COMMISSION ("THE COMMISSION") AND KAAP AGRI BEDRYF LIMITED ("KAAP AGRI"), IN RESPECT OF AN ALLEGED CONTRAVENTION OF SECTION 4(1)(b)(i) OF THE COMPETITION ACT, 1998 ("THE ACT").

Two handwritten signatures are visible at the bottom right of the page, written in dark ink.

The *Commission* and *Kaap Agri* 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 *Kaap Agri*;
- 1.6. **"Grain Silo Industry"** means Grains Silo Industry (Pty) Limited, 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 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 in interactions with the Agricultural Products Division of the Johannesburg Stock Exchange (the "APD" previously "SAFEX").

- 1.7. **"KaaP Agri"** means KaaP Agri Bedryf Limited, a company registered and incorporated in accordance with the laws of the Republic of South-Africa with registration number 1995/000336/06 and with its registered office and main place of business, at 65 Voortrekker Road, Malmesbury, 7300;
- 1.8. **"Parties"** means the *Commission* and *KaaP Agri*;
- 1.9. **"Respondent"** means for purposes of this agreement *KaaP Agri*;
- 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 Koöperasie Limited ("NWK"), OVK Operations Limited ("OVK"), Suidwes (Pty) Limited ("Suidwes"), Vrystaatse Koöperasie Limited ("VKB") and the Grain Silo Industry ("GSI") for alleged contravention of section 4(1)(b)(i) of the Act.
- 2.2. The investigation revealed that, at the request of SAFEX, various standardised daily storage rates for grain were agreed to and assented to not only by the entities against whom the original complaints initiation was made, but by some or all members and shareholders of GSI and recommended to SAFEX from time to time. In the circumstances, on 25 May 2010 the *Commissioner* expanded the investigation to refer to all seventeen (17) respondents.

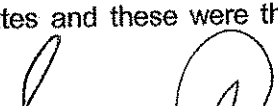
2.3. The *Commission* conducted its investigation and concluded that:

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 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. Until 2008, SAFEX requested on an annual basis that GSI recommend a standardised grain storage tariff. SAFEX placed the onus for recommending the daily storage rates for grain on the GSI on the basis that GSI had the necessary knowledge and understanding of the costs involved in providing grain storage. In 2008, as is set out below, the GSI declined to recommend 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 agreeing on the recommended SAFEX daily storage tariff on behalf of the GSI and its members. In response to annual requests from SAFEX to recommend a suitable storage tariff for the various grain commodities traded on SAFEX, the GSI consulted some or all of its shareholders. The shareholders submitted individual proposals as to the appropriate SAFEX grain storage rates to the 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 appropriate rates and these were then



submitted as recommended grain daily storage tariffs to *SAFEX* on behalf of *GSI* and its shareholders.

2.4.3. The essence of the conduct complained of is that the recommended daily storage tariffs for the various grain commodities proposed by *GSI* to *SAFEX* were agreed to and assented to by some or all of the respondents. Given that the first to sixteenth respondents are competitors in the provision of storage services, the joint determination of the *SAFEX* daily grain storage tariffs 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 grain storage prices.


2.4.4. The manner in which the standardised *SAFEX* daily grain storage tariffs were determined is, in the Commission's view, restrictive of competition. In addition to agreeing to the *SAFEX* daily grain storage tariffs, the respondents exchanged detailed cost information. In addition, the daily grain storage tariffs which were determined for *SAFEX* purposes have been used to determine storage fees in respect of sales transactions in the physical market. This, in the Commission's view, 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 Kaap Agri**

3.1. *Kaap Agri* admits that, as a member of the *GSI*, it participated to a very limited extent in agreeing on the standardised daily wheat storage tariffs which were recommended to *SAFEX* and that the *SAFEX* daily grain storage tariffs were used in respect of transactions in the physical market.

3.2. *Kaap Agri* was *bona fide* in its actions and did not intend to contravene the Act. It agrees that its conduct may, inadvertently, have been in contravention of section 4(1)(b)(i) of the Act.



4. **Administrative Payment**

- 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, *Kaap Agri* 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 *Kaap Agri* will pay an administrative penalty in the amount of R1,199,075.36 (one million one hundred and ninety-nine thousand seventy five rand and thirty six cents)
- 4.3. This amount does not exceed 10% (ten percent) of the total grain silo storage turnover of *Kaap Agri* for the 2009 financial year.
- 4.4. *Kaap Agri* will pay the amount set out in paragraph 4.2 above to the *Commission* upon the first business day following 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.

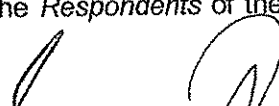
5. **Agreement Concerning Future Conduct**

- 5.1. *Kaap Agri* agrees to fully cooperate with the *Commission* in relation to the prosecution of the complaint referral. Without limiting the generality of the foregoing, *Kaap Agri* 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. *Kaap Agri* agrees that it will in future refrain from the provision of undertakings that have the potential to constitute contraventions of section 4(1)(b) of the Act.
- 5.3. *Kaap Agri* has developed, implemented and is monitoring a competition law compliance programme incorporating corporate governance designed to ensure that its employees, management, directors and agents do not engage in future contraventions of the Competition Act. In particular, *Kaap Agri* :
 - 5.3.1. has drafted and implemented a competition policy and compliance programme;
 - 5.3.2. has provided training on competition law compliance on issues particularly relevant to *Kaap Agri* and its employees and officials;
 - 5.3.3. will, when necessary, provide training on competition law compliance to all persons and/or officials employed by *Kaap Agri* after the confirmation of this *Consent Agreement* by the Tribunal;
 - 5.3.4. will update its competition policy and training annually to ensure *Kaap Agri's* continued compliance with the Act.
- 5.4. *Kaap Agri* will 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 *Kaap Agri* relating to any alleged contravention by the *Respondents* of the



Act that is the subject of the *Commission's* investigation under case no
2009MAR4349.

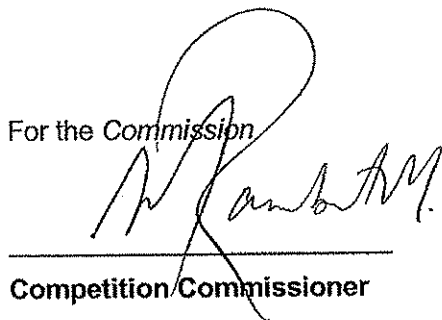
Dated and signed at *Malmesbury* on the *23rd* day of *May* 2011.

For Kaap Agri



Chief Executive Officer

For the Commission



Competition Commissioner