

competitiontribunal
SOUTH AFRICA

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: CR084Dec06/SA102Sep19

In the matter between:

The Competition Commission

Applicant

And

Senwes Limited

First Respondent

Tradevantage Grains (Pty) Ltd

Second Respondent

Panel : E Daniels (Presiding Member)
: Y Carrim (Tribunal Member)
: A Roskam (Tribunal Member)

Heard on : 06 November 2019
Last submission received : 29 November 2019
Decided on : 04 December 2019

Settlement Agreement

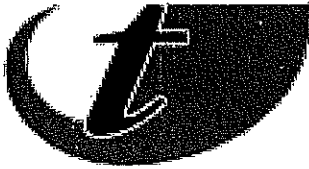
The Tribunal hereby confirms the settlement agreement and its associated addendum as agreed to and proposed by the Competition Commission and Senwes Limited; Tradevantage Grains (Pty) Ltd annexed hereto marked "A".

**Presiding Member
Mr Enver Daniels**

04 December 2019

Date

Concurring: Ms Yasmin Carrim and Mr Anton Roskam



competitiontribunal

south africa

Form CT 6

About this Form

This Form is issued in terms of the Competition Tribunal Rules.

Please indicate in the space provided the nature of your motion, including specific reference to the relevant section of the Act or Tribunal Rules.

If this Notice of Motion concerns a matter being brought in terms of Division F of Part 4 of the Competition Tribunal Rules, it must comply with the requirements of Competition Tribunal Rule 42(3).

Contacting the Tribunal

The Competition Tribunal
Private Bag X24
Sunnyside
0132
Republic of South Africa
tel: 27 12 394 3300
fax: 27 12 394 0169
e-mail: ctsa@comptrib.co.za

Notice of Motion

Date: 17-Sep-2019 **File #** CRO84Dec06/SA102 Sep 19

To: The registrar of the Competition Tribunal

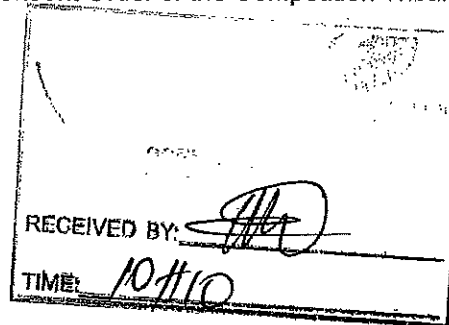
Concerning the matter between:

COMPETITION COMMISSION (Applicant)

and SENWES LIMITED AND ANOTHER (Respondent)

Take notice that the COMPETITION COMMISSION intends to apply to the Tribunal for the following order:

Confirming the attached Agreement to amend the terms of the Consent Order of the Competition Tribunal dated 15 May 2013 entered into between the Applicant and the Respondents as an order of the Tribunal in terms of section 49D of the Competition Act 89 of 1998, as amended, read with clause 6 of the Consent Order of the Competition Tribunal dated 15 May 2013.



Name and Title of person authorised to sign:

Mr Bukhosibakhe Majenge: Chief Legal Counsel

Authorised Signature:

Date:

[Signature]

17/09/2019

For Office
Use Only:

Tribunal file number

Date filed

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

(HELD AT PRETORIA)

CC CASE: 2004Dec1332

CT CASE: CR084Dec06/BRE157Aug17

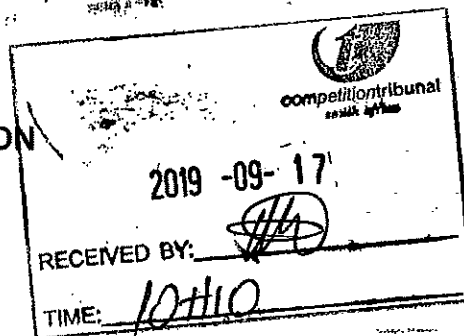
In the matter between:

THE COMPETITION COMMISSION

and

SENWES LIMITED

TRADEVANTAGE GRAINS (PTY) LTD



Applicant

First Respondent

Second Respondent

FILING SHEET

PLEASE TAKE NOTICE THAT the Applicant herewith files the following:

1. CT6 Notice of Motion; and
2. Agreement entered into between the Applicant and the Respondents.

Dated at **PRETORIA** on this the 17 day of September 2019.

COMPETITION COMMISSION

DTI Campus

77 Meintjies Street

Sunnyside, Pretoria

Tel: 012 394 5816

Ref: Nelly Sakata/ Nokuphiwa Kunene

E-mail: [NokuphiwaK@compcom.co.za/](mailto:NokuphiwaK@compcom.co.za)

MayaS@compcom.co.za

To: THE REGISTRAR
Competition Tribunal
3rd Floor, Mulayo Building
The DTI Campus
77 Meintjies Street
Sunnyside, Pretoria
Tel: (012) 394-3300/55
E-mail address: KameelP@comptrib.co.za

And to: Cliffe Dekker Hofmeyr Inc
First and Second Respondents' Attorneys
Cnr Fredman and Protea Place
Sandton
Johannesburg
2196
Tel: 011 562 1092/082 376 9237
Email: andries.legrange@cdhlegal.co.za

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

HELD AT PRETORIA

CC Case No: 2004Dec1332

CT Case No: CR084Dec06/BRE157Aug17

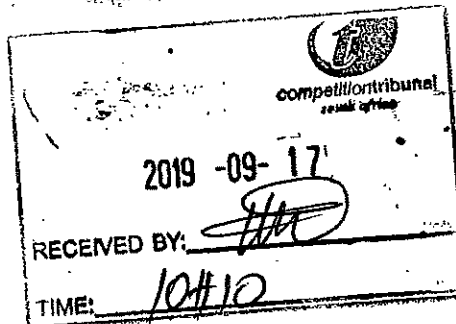
In the matter between:

THE COMPETITION COMMISSION OF SOUTH AFRICA

Applicant

and

SENWES LIMITED



First Respondent

TRADEVANTAGE GRAIN (PTY) LTD

Second Respondent

**AGREEMENT ON THE TERMS OF AN APPROPRIATE ORDER IN TERMS OF
SECTION 49D OF THE COMPETITION ACT, NO. 89 OF 1998, AS AMENDED**

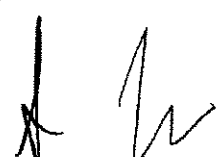
Whereas:

The Commission and Respondents in the above matter hereby agree that application be made to the Competition Tribunal to have this Agreement confirmed as a consent order as provided for in section 58(1)(b) of the Act, read with clause 6 of the Consent Order of 15 May 2013.

1. DEFINITIONS

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

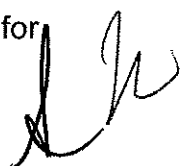
- 1.1 **"Act"** means the Competition Act, Act No. 89 of 1998, as amended;
- 1.2 **"this Agreement"** means the agreement set out herein concluded in terms of clause 6 of the Consent Order of 15 May 2013 and duly signed by the Commissioner and the First and Second Respondents;
- 1.3 **"Commission"** 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 Mulayo Building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;
- 1.4 **"Commissioner"** means the Competition Commissioner of South Africa, the Chief Executive Officer of the Commission appointed by the Minister of Trade and Industry in terms of section 22 of the Act;
- 1.5 **"Competition Tribunal"** means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Act with principal place of business at the DTI Campus, Block C, Mulayo Building, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;
- 1.6 **"Consent Order"** means the Tribunal Order decided on 15 May 2013 under case number: 110/CR/Dec06 in relation to a complaint referral by the Commission against Senwes relating to a contravention of section 8(c) of the Act;



- 1.7 **"Newco"** means TradeVantage Grain (Pty) Ltd;
- 1.8 **"Parties"** means the Commission, Senwes Limited and TradeVantage Grain (Pty) Ltd;
- 1.9 **"Respondents"** means Senwes and TradeVantage;
- 1.10 **"Senwes"** means Senwes Limited ("Senwes"), a public company duly registered in accordance with the company laws of the Republic of South Africa, with principal place of business at 1 Charel De Klerk Street, Klerksdorp, North West Province, South Africa;
- 1.11 **"This Agreement"** means the agreement set out herein, duly signed by the Commissioner and the First and Second Respondents.
- 1.12 **"Tradevantage"** means Tradevantage Grain (Pty) Ltd a private company duly incorporated and registered in accordance with the company laws of the Republic of South Africa, with its principal place of business at 1 Charel De Klerk Street, Klerksdorp, North West Province, South Africa; and
- 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 Mulayo building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

2 BACKGROUND

- 2.1 In December 2004 the Commission referred a complaint against Senwes for alleged conduct in contravention of inter alia section 8(c) of the Act.



2.2 The Commission and Senwes subsequently entered into a consent agreement, which was confirmed as a consent order of the Tribunal on 15 May 2013, which is attached hereto as Annexure A.

2.3 On 12 October 2015 Farmwise (Pty) Ltd ("Farmwise") laid a complaint with the Competition Commission that employees of Tradevantage had access to their competitively sensitive information, which was alleged to constitute a contravention of the Competition Act. This complaint was non-referred by the Commission as far as section 4(1)(a) of the Act is concerned as the Commission found that the information was disclosed on the basis of a commercial transaction and did not amount to a contravention of section 4(1)(a) of the Act. The Commission however, investigated the matter as a possible breach of the Consent Order of the Tribunal dated 15 May 2013.

2.4 The Commission filed an application under case number: CR084Dec06/BRE157Aug17. In the application, the Commission sought relief against Senwes and Tradevantage, alleging that they had breached the terms of the Consent Order in that Senwes and Tradevantage had exchanged competitively sensitive information of a third party. In addition, the Commission alleged that Tradevantage's board of directors had not been constituted in accordance with provisions of the Consent Order.

Exchange of information

2.5 The exchange of the information between Senwes and Tradevantage occurred in the context of a commercial arms' length transaction in terms of which Tradevantage had successfully won a tender issued by Farmwise to acquire



sunflower seeds from Farmwise. The Respondents allege that Farmwise's employees struggled to provide the appropriate information regarding the relevant contract number or folio number ("account number") under which sunflower seeds was stored at Senwes to Tradevantage.

2.6 This information was required to make payment for the sunflower seeds which Tradevantage had purchased. In the light of various discussions and correspondence between the respective employees of Farmwise and Tradevantage, an administrative employee of Tradevantage submitted that she believed that she had obtained the necessary consent from Farmwise to assist it to request the relevant information from Senwes by confirming that the sunflower seeds was indeed stored with Senwes and as such actually existed. However, Farmwise's management and employees subsequently contended that such consent had not been provided.

2.7 Senwes and Tradevantage hold the view that this constituted a *bona fide* and technical contravention of the Consent Order. In order to settle this aspect of the matter, Senwes and Tradevantage acknowledge that a once-off contravention of the Consent Order occurred in relation to the exchange of information between Senwes and Tradevantage, which shall be resolved by way of a separate Consent Agreement between the parties.

Directors

2.8 Tradevantage's board of directors included a non-executive director that was not affiliated to Senwes. The Respondents contend that this is in accordance with the wording of clause 4.1.1.6 of the Consent Order. The Commission

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contended that this is not sufficient in the circumstances as the Consent Order contemplated that the boards of Senwes and Tradevantage be separate and distinct. The Commission however conceded that the wording of clause 4.1.1.6 of the Consent Order is unclear and no longer sought any relief against the respondents for the alleged breach of clause 4.1.1.6 in the referral proceedings under case number: CR084Dec06/BRE157Aug17.

3 REMEDIES

- 3.1 In relation to the constitution of Tradevantage's board of directors, the Commission and the Respondents agree that it is appropriate to clarify the wording of the Consent Order to avoid potential future ambiguity, and to bring a joint application to the Tribunal as provided for in clause 6 of the Consent Order to amend the provisions of clause 4.1.1.6 of the Consent Order on the agreed terms set out below.

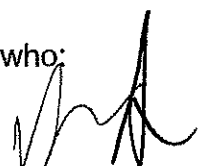
4 AMENDMENTS TO THE CONSENT ORDER

- 4.1 The parties hereby agree to the following amendments to the Consent Order as to resolve any future ambiguity in terms of the composition of the board of Tradevantage.

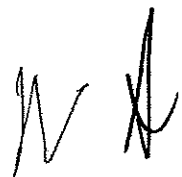
Amendments to clause 1

- 4.2 The following new definition shall be inserted into clause 1 of the Consent Order:

"Independent non-executive director" shall mean an individual who:

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- 4.2.1 Does not own shares in Senwes of more than 3% (three percent) of the market capitalisation of Senwes, directly or indirectly as per Senwes' 'latest audited financial statements and would materially affect such directors' independence of mind;
- 4.2.2 not been employed as a director by Senwes in the preceding 2 (two) financial years and is not currently an employee of Senwes;
- 4.2.3 Is not a member of the immediate family (which in this context shall mean "related" as defined in section 2(1)(a) of the Companies Act, 2008) of an individual who has been employed by the Newco or Senwes in an executive capacity in any of the preceding three financial years;
- 4.2.4 Has not been a professional advisor to Newco or Senwes, including the designated external auditor/key member of the audit team responsible for performing the external audit in the preceding three financial years;
- 4.2.5 In the context of the total business of Senwes, is not a significant supplier, (including the provision of financial capital or funding to Senwes) or is not a significant customer of Senwes or part of the executive management of such supplier or customer;
- 4.2.6 In the context of the total business of Senwes does not have a significant contractual relationship with the Newco or Senwes;
- 4.2.7 Is not entitled to remuneration, excluding directors' fees, contingent on the performance of Newco; and
- 4.2.8 Does not participate in any incentive scheme(s) of Newco."

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Amendments to clause 4.1.1.6

4.3 Clause 4.1.1.6 currently reads as follows in the Consent Order:

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

4.4 The current clause 4.1.1.6 will be deleted and replaced with the following clause 4.1.1.6:

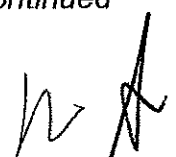
"4.1.1.6 Newco will have a separate and distinct board of directors to that of Senwes, comprising of at least 3 (three) directors appointed as such by the shareholder/s of Newco from time to time, as follows:

4.1.1.6.1 Appointees to Newco's board of directors shall not qualify to serve on Senwes' board of directors and will not be employees of Senwes; similarly, board members of Senwes shall not qualify to serve on Newco's board of directors and will not be employees of Newco.

4.1.1.6.2 Newco's board shall have at least 2 (two) independent non-executive directors as defined in the definitions clause. The Board shall annually elect a Chairman from the ranks of the aforesaid independent non-executive directors.

4.1.1.6.3 Subject to clause 4.1.1.6.2, executive director(s) shall be appointed by the Newco Board, as constituted above; and


4.1.1.6.4 Newco and Senwes shall have their own employee incentive schemes; and an independent non-executive director of Newco may continue to serve in an independent capacity for longer than 9 (nine) years, only if the board annually assesses that directors' independence every year after such nine years. The board shall objectively make a conclusion on continued

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service, failing which such director shall no longer be able to serve and should tender his/her resignation."

For the First Respondent:

Dated and signed at Pretoria on this the 4 day of September 2019.


Signature: 

Name in full: A.M. le Grange

Authority: Only authorised legal representative.

For the Second Respondent:

Dated and signed at Pretoria on this the 4 day of September 2019.


Signature: 

Name in full: A.M. le Grange

Authority: Only authorised legal representative

For the Commission:

Dated and signed at ISHTWANE on this the 10th day of SEPTEMBER 2019.



Tembinkosi Bonakele

The Commissioner: Competition Commission

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: 110/CR/Dec06
016484

In the matter between:

The Competition Commission

Applicant

and

Senwes Limited

Respondent

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

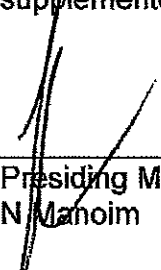
Heard on: 25 April 2013

Final submission received on: 14 May 2013

Decided on: 15 May 2013

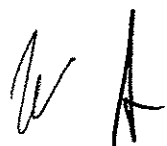
Order

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



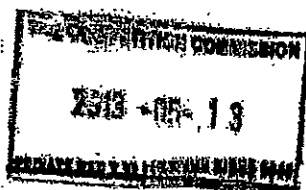
Presiding Member
N Manoim

Concurring: Y Carrim and M Holden



"A"

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA



CT Case No. 110/CR/DEC06

CC Case No. 2004/DEC1332

In the matter between:

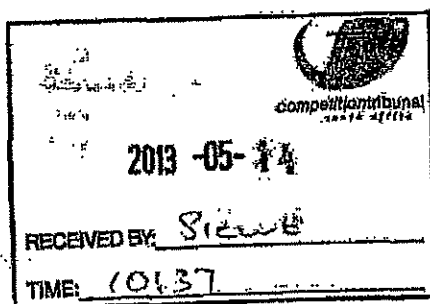
THE COMPETITION COMMISSION

Applicant

and

SENWES LIMITED

Respondent



In re:

THE COMPETITION COMMISSION

Applicant

and

SENWES LIMITED

Respondent

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

1 BACKGROUND

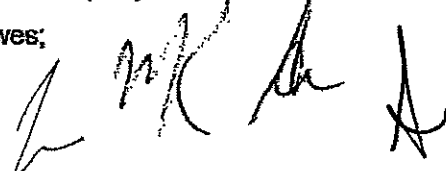
Whereas:

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

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differential storage fees charged by Senwes outweighed any technological efficiency or other pro-competitive gain that it might have;

- 1.2 It was agreed by the parties and decided by the Tribunal that the merits of the complaints referred against Senwes would be dealt with in advance of dealing with remedies;
- 1.3 After hearings conducted before the Tribunal, the Tribunal found that the Commission had established its complaint against Senwes in respect of margin squeeze and that such conduct amounted to a contravention of section 8(c) of the Act;
- 1.4 Senwes appealed to the Competition Appeal Court;
- 1.5 On application by Senwes the Tribunal ordered that the Remedies Hearing be stayed pending the outcome of any appeals by either party but that the parties exchange affidavits pertaining to the issue of remedies pending the outcome of such appeals;
- 1.6 Pursuant thereto, the remedies and orders sought by the Commission were that:
 - 1.6.1 Senwes be interdicted from charging a tariff (or imposing any other storage condition) for the storage of grain that was different to that charged or imposed to any farmers/producers or from offering to any farmer/producer any benefits or discount in respect of storage costs that was not available to grain traders;
 - 1.6.2 Directing, that in the event that Senwes offered farmers/producers or any other third party terms and conditions for storage of grain which included a capped tariff in respect of such storage (i.e. an agreement not to charge for storage after a certain period), that the same terms and conditions for storage of grain be offered to all traders who stored grain with Senwes;
 - 1.6.3 Directing that all parties who stored grain with Senwes be charged for such storage on the same terms and conditions;
 - 1.6.4 In conjunction with the three immediately preceding paragraphs, that Senwes be ordered, in terms of section 58(1)(a)(iv) read with section 60(2) of the Act to sell its grain trading division or its storage division to a separate registered company (which may be a subsidiary or associate company of Senwes) (the "New Company"). The New Company was to have a separate and distinct board to that of Senwes and the directors of the New Company would have to include non-executive directors not affiliated to Senwes;

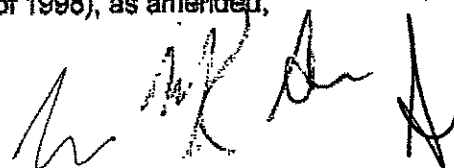


- 1.6.5 Senwes comply with the order referred to in the immediately preceding paragraph within 90 days of date of the order;
- 1.6.6 Declaring that the margin squeeze conduct found to be a contravention of section 8(c) of the Act constitutes a prohibited practice in terms of the Act for the purposes of section 65 of the Act and that for clarity it be recorded that such conduct was the conduct of Senwes in supplying storage, in a market in which it was dominant, to downstream rivals, i.e. traders which traded in the physical market for grain at a price that prevented traders which trade in the physical market for grain (i.e. competitors of Senwes) from earning a viable price/cost margin in the area in which Senwes is dominant for the period 1 May 2003 to 20 December 2006;
- 1.7 After its appeal to the Competition Appeal Court was unsuccessful Senwes appealed, with the leave of the Supreme Court of Appeal, to the Supreme Court of Appeal;
- 1.8 The Supreme Court of Appeal upheld Senwes' appeal and held that the Tribunal had exceeded its powers under the Act when it ruled that Senwes had contravened section 8(c) by engaging in a margin squeeze;
- 1.9 The Commission appealed to the Constitutional Court which Court held that a margin squeeze complaint did not form part of the referral but instead that the referral covered a contravention of section 8(c) of the Act, consequently set aside the order issued by the Supreme Court of Appeal and ordered that the ruling of the Tribunal be amended by deleting reference to 'margin squeeze';
- 1.10 The Commission and Senwes have agreed that the issues pertaining to remedies be settled in terms of this Settlement Agreement.
- 1.11 The Competition Commission and Senwes Limited hereby agree that application be made to the Competition Tribunal for the confirmation of this Settlement Agreement as an order of the Competition Tribunal in terms of section 49D as read with section 58(1)(a) and 58(1)(b) of the Competition Act, 89 of 1998, as amended on the terms set out below.

2 DEFINITIONS

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

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



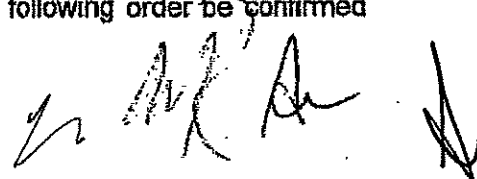
- 2.2 **"Agency Agreement"** means the Agency Agreement contemplated in clause 4.1.1.10 below, in terms of which Senwes, shall, from time to time, procure grain on behalf of grain traders, including Newco;
- 2.3 **"Agreement"** means this Settlement Agreement duly signed and concluded between the Commission and Senwes;
- 2.4 **"Commission"** means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Act, with its principal place of business at 1st Floor, Mulayo Building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;
- 2.5 **"Commissioner"** means the Commissioner of the Commission, appointed in terms of section 22 of the Act;
- 2.6 **"Senwes"** means Senwes Limited, a company registered and incorporated in accordance with the laws of the Republic of South Africa with registration number 1997/005336/06 and with its registered office and main place of business at 1 Charel de Klerk Street, Klerksdorp, North West Province, South Africa;
- 2.7 **"Service Level Agreement"** means the Service Level Agreement to be entered into between Senwes and Newco, as contemplated in clause 4.1.1.8;
- 2.8 **"Parties"** means the Commission and Senwes;
- 2.9 **"Tribunal"** means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Act, with its principal place of business at 3rd Floor, Mulayo Building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

3 INTRODUCTION

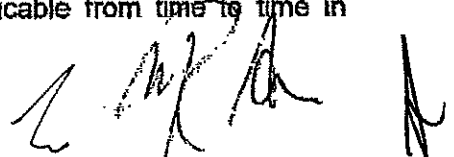
- 3.1 The parties to this agreement are the Commission and Senwes.
- 3.2 Senwes and the Commission have agreed upon the terms of an appropriate order to be submitted to the Tribunal for confirmation, without prejudice to their right to enter into a remedies hearing should the Agreement not be confirmed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

4 THE ORDER SOUGHT

- 4.1.1 The Commission and Senwes propose that the following order be confirmed by the Tribunal:

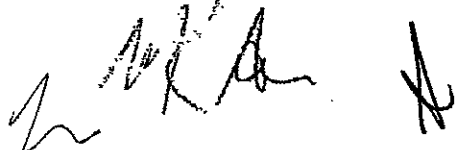
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- 4.1.1.1 It is noted that Senwes has already transferred part of its grain marketing business in relation to certain types of grain to the Bunge Senwes Joint Venture, as per the merger approval, attached hereto as Annexure 1. The terms of the transaction documents, submitted during that merger, shall continue to apply, and the terms of this Agreement shall, accordingly, govern the remaining grain business of Senwes which does not form part of the Bunge Senwes Joint Venture.
- 4.1.1.2 The remaining grain marketing business owned by Senwes, comprising Senwes' client base and goodwill in relation to white maize, sunflower and diverse commodities, will be transferred by Senwes to a separate legal entity owned by Senwes (referred to as "Newco") by 31 May 2014 or a date falling 9 months after the confirmation of this Agreement by the Competition Tribunal, whichever is earlier. A period of time is required to configure Senwes' financial and IT systems to accommodate the arrangement with Newco according to an indicative project plan, which has been submitted to the Commission, attached hereto as Annexure 2, and which will need to be updated upon the approval of this agreement by the Tribunal. During the period between the confirmation of the settlement by the Tribunal and the transfer date of the business to Newco, strict controls and processes, as appear in Annexure 3 hereto, will be implemented and that will continue to ensure that Senwes' grain trading business and its storage business are operated as distinct business units and that the former is not treated differently to any other trader in terms of storage.
- 4.1.1.3 Senwes shall be the sole shareholder of Newco but it may introduce another company ("Holdco") between itself and Newco, provided that Holdco is a 100% subsidiary of Senwes and Holdco holds 100% of the shares in Newco. Although Senwes may introduce other shareholders at a later stage or restructure Newco or Holdco, any such steps will be subject to the prescribed merger notification procedure in terms of the Act.
- 4.1.1.4 Senwes may retain a separate grain procurement arm (as part of "Senwes Grainlink Operations", its silo business), which shall be entitled to contract with any grain trader, including Newco, on a non-discriminatory and arm's length basis, in terms of an Agency Agreement, as contemplated in clause 4.1.1.10, and which may procure grain subject to the restrictions set out in clause 4.1.1.11 below. Senwes' Grainlink Operations shall pay the normal storage and handling costs that will be applicable from time to time in



respect of the grain procured by its procurement arm. Senwes shall ensure that its Grainlink Operations are accounted for separately, to enable adequate monitoring of its compliance with these conditions as contemplated in clause 4.1.1.12.

- 4.1.1.5 Senwes shall offer all parties who store grain with it, including Newco, other grain traders and its Grainlink Operations (contemplated in clause 4.1.1.4 above), equal access to its various storage options on identical terms save for such differentiation that may legitimately be made under the Competition Act, taking into consideration that different storage options may be offered by Senwes, based, on the volume of grain stored, the duration or time of storage, the location of the relevant silo, the type and quality of the commodity, the capacity utilisation of the silo or such other basis of distinction as may be permitted by the Tribunal pursuant to an application brought in terms of clause 6 below. The various options shall be equally available to all Senwes' clients and its Grainlink Operations.
- 4.1.1.6 Newco will have a separate and distinct board of directors to that of Senwes, which will include (a) non-executive director/s not affiliated to Senwes. Newco and Senwes shall have their own employee incentive schemes.
- 4.1.1.7 Newco will provide statutory reports to Holdco in terms of the Companies Act (which Holdco may provide to Senwes), but no further information shall pass between Senwes and Newco, except as is generally available in the market, as is contemplated in or required for the purposes of the fulfilment of the Service Level Agreement or the Agency Agreement or as is made available pursuant to the latter agreement.
- 4.1.1.8 In terms of the Service Level Agreement to be entered into between Senwes and Newco, a copy of which has been provided to the Competition Commission, Senwes will provide support services to Newco, such as financial management, information technology and compliance services at market related rates.
- 4.1.1.9 Newco will procure grain on its own behalf in the market.
- 4.1.1.10 In terms of an Agency Agreement, a copy of which has been provided to the Competition Commission, grain traders, including Newco, may approach Senwes to procure grain on their behalf, based on mandates



given to Senwes. The Agency Agreement will provide that information flows will take place between grain traders (being Newco or other grain traders), as principals, on the one hand, and Senwes, on the other hand, as is customary in any arms-length principle-agent relationship. The Agency Agreement shall contain a provision in terms of which Senwes shall provide agency services on a non-discriminatory basis to all grain traders (including Newco) and, in particular, on a non-discriminatory basis, as between Newco, on the one hand, and other grain traders, on the other hand.

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

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

5 FULL AND FINAL SETTLEMENT

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

A handwritten signature in black ink, appearing to be 'R. A. J.', is located at the bottom right of the page.

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

(HELD AT PRETORIA)

CC CASE: 2004Dec1332

CT CASE: CR084Dec06/SA102Sep19

In the matter between:

THE COMPETITION COMMISSION

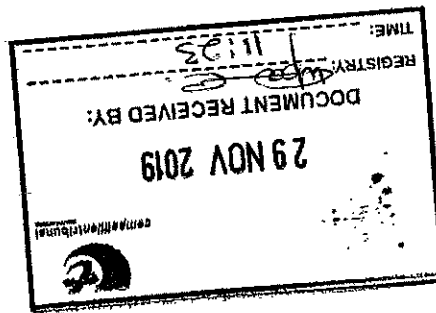
and

SENWES LIMITED

First Respondent

TRADEVANTAGE GRAINS (PTY) LTD

Second Respondent



Applicant

FILING SHEET

PLEASE TAKE NOTICE THAT the Applicant herewith files the Addendum to the Agreement to vary the Consent Order dated 15 May 2013.

Dated at **PRETORIA** on this the 29 day of November 2019.

COMPETITION COMMISSION

DTI Campus

77 Meintjies Street

Sunnyside, Pretoria

Tel: 012 394 5816

Ref: Nelly Sakata/ Nokuphiwa Kunene

E-mail: [NokuphiwaK@compcom.co.za/](mailto:NokuphiwaK@compcom.co.za)

MayaS@compcom.co.za

To: THE REGISTRAR

Competition Tribunal

3rd Floor, Mulayo Building

The DTI Campus

77 Meintjies Street

Sunnyside, Pretoria

Tel: (012) 394-3300/55

E-mail address: KameelP@comptrib.co.za

And to: Cliffe Dekker Hofmeyr Inc

First and Second Respondents' Attorneys

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Johannesburg

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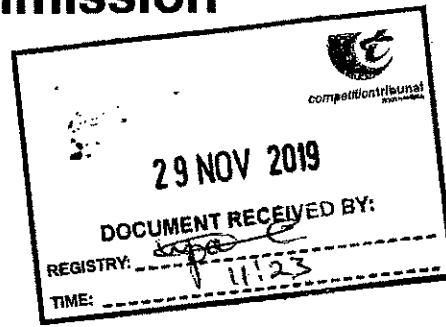
Tel: 011 562 1092/082 376 9237

Email: andries.legrange@cdhlegal.co.za



competition commission
south africa

memorandum



TO:	THE COMMISSIONER		
FROM:	BUKHOSIBAKHE MAJENGE		
PREPARED BY:	NOKUPHIWA KUNENE AND MAYA SWART		
DATE:	12 NOVEMBER 2019		
SUBJECT:	ADDENDUM FOR SIGNATURE: CC V SENWES LIMITED AND ANOTHER CASE NO:		
FILE REFERENCE:	CC CASE NO: 2004Dec1332 CT CASE NO: CR084Dec06/SA102Sep19		
	FOR INFORMATION	X	FOR DECISION/APPROVAL
			FOR COMMENT

PURPOSE

1. The purpose of this memorandum is to request the Competition Commissioner ("the Commissioner") to counter-sign the attached Addendum, Annexure "A" to the Amendment Agreement, concluded between the Commission and Senwes Limited ("Senwes") and Tradevantage Grain (Pty) Ltd ("Tradevantage").

BACKGROUND

2. On 24 August 2017 the Commission referred a matter against Senwes and Tradevantage for a breach of clause 4.1.1.6 and clause 4.1.1.7 of the consent order of the Competition Tribunal ("Tribunal") dated 15 May 2013.¹ The Commission subsequently abandoned the relief sought against the respondents for a breach of

¹ The matter was referred under CT case number: CR084Dec06/BRE157Aug17.

clause 4.1.1.6; the remaining relief sought was for a breach of clause 4.1.1.7 of the consent order.

3. The Commission Meeting of 6 August 2019 approved the conclusion of an amendment agreement to amend clause 4.1.1.6 of the consent order of 2013, and a settlement agreement relating to the alleged breach of clause 4.1.1.7 of the consent order. The Commission and the respondents concluded the two agreements with the respondents, which were filed with the Tribunal on 17 September 2019 for confirmation as orders of the Tribunal.
4. At the hearing of 6 November 2019 to confirm the agreements as orders of the Tribunal, the Tribunal directed that the parties consider certain amendments to the Amendment Agreement. The team and the respondents have concluded an Addendum as Annexure "A" to the Amendment Agreement, in the manner advised by the Tribunal.

Annexure "A" to the Amendment Agreement

5. The purpose of the Addendum, Annexure "A" to the Amendment Agreement, is:
 - 5.1 To amend the reference to the heading of paragraph 4.2, which refers to an amendment to clause 1, to refer to an amendment to clause 2;
 - 5.2 To correct the reference to clause 1 at paragraph 4.2, which ought to refer to clause 2; and
 - 5.3 To substitute the reference to 3% (three percent) at paragraph 4.2.1 and to replace it with 1% (one percent).

RECOMMENDATION

6. The team recommends that the Commissioner counter-sign the attached Addendum Annexure "A" to the Amendment Agreement.

Submitted By

Bukhosibakhe Majenge

Divisional Manager: Legal Services Division


Annexure "A"

ADDENDUM TO AGREEMENT ON THE TERMS OF AN APPROPRIATE ORDER IN TERMS OF SECTION 49D OF THE COMPETITION ACT, NO. 89 OF 1998, AS AMENDED

1. Terms and abbreviations used in this document ("the Addendum") shall have the meaning assigned to them in the parties in the Agreement concluded by the Commission, Senwes and Tradevantage and presented for confirmation by the Competition Tribunal on 6 November 2019, is amended as follows:

PURPOSE

2. The purpose of this addendum is:
 - 2.1 To correct the reference to the heading of paragraph 4.2, which refers to an amendment to clause 1. The heading ought to have referred to an amendment to clause 2;
 - 2.2 To correct the reference to clause 1 at paragraph 4.2, which ought to refer to clause 2; and
 - 2.3 To substitute the reference to 3% (three percent) at paragraph 4.2.1 and to replace it with 1% (one percent).



CORRECTION OF HEADING TO CLAUSE 4.2

3. The heading of clause 4.2 is amended by replacing the reference to "clause 1" with a reference to "clause 2" so that the amended heading reads as follows:

"Amendment to clause 2"

CORRECTION OF PARAGRAPH 4.2

4. Paragraph 4.2 is amended by replacing the reference to "clause 1" with a reference to "clause 2" so that the amended heading reads as follows:

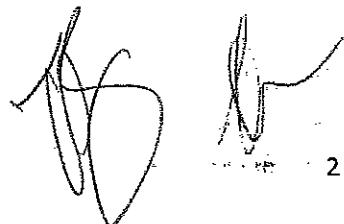
"4.2 The following new definition shall be inserted into clause 2 of the Consent Order:"

AMENDMENT OF PARAGRAPH 4.2.1

5. Paragraph 4.2.1 is amended by replacing the reference to "3% (three percent)" with a reference to "1% (one percent)" so that the amended paragraph reads as follows:

"Independent non-executive director" shall mean an individual who:


4.2.1 Does not own shares in Senwes of more than 1% (one percent) of the market capitalisation of Senwes, directly or indirectly as per Senwes' 'latest audited financial statements and would materially affect such directors' independence of mind;"



2

6. This Addendum forms an amendment to and an integral part of the Agreement, the terms of which remain otherwise unchanged.

Dated and signed in Sandton on this the 8th day of November 2019.



Duly authorised signatory
Senwes Limited



Duly authorised signatory
Tradevantage Grains (Pty) Ltd

Name in full: Andries le Grange

Authority: Attorney, acting on behalf of Senwes and Tradevantage

Dated and signed in Pretoria on this the 15th day of November 2019.



Tembinkosi Bonakele
The Commissioner: Competition Commission