COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 43/CR/Jun11

In the matter between:

The Competition Commission — Applicant

and

Overberg Agri Bedrywe (Pty) Ltd — Respondent

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

Heard on : 07 September 2011

Decided on : 07 September 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

'ANNEXURE A'

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	
OVERBERG AGRI BEDRYWE (PTY) LIMITED	7th Respondent
In re:	
THE COMPETITION COMMISSION	Applicant
and	
AFGRI OPERATIONS LIMITED	1st Respondent
SENWES LIMITED	2nd Respondent
NWK LIMITED	3rd Respondent
OVK OPERATIONS LIMITED	4th Respondent
SUIDWES AGRICULTURE (PTY) LIMITED	5th Respondent
VRYSTAAT KOÖPERASIE BEPERK	6th Respondent
OVERBERG AGRI BEDRYWE (PTY) LIMITED	7th Respondent
DIE HUMANSDORPSE KOÖPERASIE BEPERK	8th Respondent
SENTRAAL-SUID CO-OPERATIVE LIMITED	9th Respondent
GWK LIMITED	10th Respondent
KAAP AGRI BEDRYF LIMITED	11th Respondent
MGK BEDRYFSMAATSKAPPY (PTY) LIMITED	12th Respondent
TUINROETE AGRI BEPERK	13th Respondent
MOOREESBURGSE KORINGBOERE (EDMS) BEPERK	14th Respondent
TWK LANDBOU BEPERK	15th Respondent
NTK LIMPOPO AGRIC BEPERK	16th Respondent
GRAIN SILO INDUSTRY (PTY) LTD	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 OVERBERG AGRI BEDRYWE (PTY) LIMITED ("OVERBERG"), IN RESPECT OF AN ALLEGED CONTRAVENTION OF SECTION 4(1)(b)(i) OF THE COMPETITION ACT, 1998 ("THE ACT").

The *Commission* and *Overberg* 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 Overberg;

1.6. ***"Grain Silo Industry"*** means Grain Silo Industry (Pty) Ltd, 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. ***"Overberg"*** means Overberg Agri Bedrywe (Pty) Limited, a company registered and incorporated in accordance with the laws of the Republic of South-Africa with registration number 1997/021082/07 and with its registered office and main place of business at 11 Donkinstreet, Caledon, 7230.

1.8. ***"Parties"*** means the Commission and Overberg;

1.9. ***"Respondent"*** means for purposes of this agreement Overberg;

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 the storage rate is agreed to and assented to not only by the entities against whom the original complaints initiation was made, but by all members and shareholders of *GSI*. In the circumstances, on 25 May 2010 the *Commissioner* expanded the investigation to refer to all seventeen (17) respondents.

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

2.3.1. the *respondents* and *GSI* have contravened section 4(1)(b)(i) of the Act. The essence of the conduct complained of is that the respondents and *GSI* have contravened section 4(1)(b)(i) of the Act in that they fix the prices of the daily storage tariff for the storage of grain. This is done for application throughout the Republic. The first to sixteenth *respondents* are all former cooperatives who own grain storage silos and provide other agricultural services and are competitors in the market for grain storage.

2.4. The *Commission* found that:

2.4.1. Notwithstanding the fact that they are competitors, the first to sixteenth *respondents* are all shareholders or members of the *GSI*. Although the *GSI* is a private company, it amounts to an industry association for members of the grain storage industry. *SAFEX* placed the onus for the determination of the storage rate on the *GSI* on the basis that it had the necessary knowledge and understanding of the costs involved in providing storage. Until 2008, *SAFEX* requested the standardised tariff from the *GSI* on an annual basis. In 2008, as is set out below, the *GSI* declined to provide the standardised storage tariff to *SAFEX* any longer on account of the *Commission's* contentions that it and its members were contravening section 4(1)(b)(i) of the Act.

2.4.2. It was the *GSI's* technical committee that was responsible for fixing the daily storage tariff on behalf of the *GSI* and its members. In response to requests from *SAFEX*, the *GSI* consulted its shareholders. The shareholders submitted individual proposals as to the appropriate storage rate to *GSI*. These rates were collated and evaluated by the *GSI's* technical committee, the members of which are from competing silo companies. The technical committee then decided on a rate and this was then submitted to *SAFEX* on behalf of GSI and its shareholders.

2.4.3. The essence of the conduct complained of is that the daily storage tariff proposed by *GSI* is agreed to and assented to by all of the

respondents. Given that the first to sixteenth respondents are all competitors in the provision of storage services, the joint determination of the daily storage rate amounts to prohibited price fixing in that it quite simply amounts to an agreement between firms in a horizontal relationship for the direct fixing of storage prices.

2.4.4. The manner in which the *SAFEX* storage tariff is determined is, in the Commission's view, restrictive of competition. In addition to agreeing to the *SAFEX* rate, the respondents exchanged detailed cost information In addition, the storage tariff determined for *SAFEX* purposes has been used to determine storage fees in respect of sales transactions in the physical market. This amount 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 Overberg**

3.1 *Overberg* admits that, as a member of the GSI, it was asked on three occasions for input regarding the standardised daily wheat storage tariff which were to be recommended to SAFEX, namely:

3.1.1 via e-mail during February 2003;

3.1.2 when, as a member of GSI, it attended a GSI Technical Committee meeting on 10 May 2007 at which the standardised daily wheat storage tariff which were to be recommended to SAFEX was discussed;

3.1.3 via e-mail in June 2007 when it was requested to indicate if its systems could accommodate ½ cent tariffs.

3.2 Overberg therefore participated, to the aforesaid limited extent, in agreeing on the standardised daily wheat storage tariffs which were recommended to SAFEX. As it had (and still has) no other option in the market circumstances, it also used the SAFEX daily wheat storage tariffs in respect of transactions in the physical market.

3.3 Although Overberg acted *bona fides*, it accepts that its aforesaid conduct may be perceived as constituting a contravention of section 4(1)(b)(i) of the Act.

4. **Administrative Penalty**

4.1. Having regard to the provisions of sections 58(1)(a)(iii) as read with sections 59(1)(a), 59(2) and 59(3) of the Act, *Overberg* 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. *Overberg* will therefore pay an administrative penalty in the amount of R241 186.20.

4.3. This amount constitutes 4% (four per cent) of the total wheat daily storage tariff silo turnover for the 2009 financial year;

4.4. *Overberg* will pay the amount set out in paragraph 4.2 above to the *Commission* upon the date of confirmation of this *Consent Agreement* by the *Tribunal.*

4.5. This payment shall be made into the *Commission's* bank account, details of which are as follows:

Bank name:	Absa Bank
Branch name:	Pretoria
Account holder:	Competition Commission Fees Account
Account number:	4050778576
Account type:	Current Account
Branch Code:	323 345

4.6. The payment will be paid over by the *Commission* to the National Revenue Fund in accordance with section 59(4) of the Act.

5. **Agreement Concerning Future Conduct**

5.1. *Overberg* agrees to fully cooperate with the *Commission* in relation to the prosecution of the complaint referral. Without limiting the generality of the foregoing, *Overberg* 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. *Overberg* agrees that it will in future refrain from the provision of contractual undertakings that have the potential to constitute contraventions of section 4(1)(b) of the Act.

5.3. *Overberg* shall develop, implement and monitor a competition law compliance programme incorporating corporate governance designed to ensure that its employees, management, directors and agents do not engage in future contraventions of the Competition Act. In particular, *Overberg*:

5.3.1. shall draft and implement a competition policy and compliance programme;

5.3.2. has already provided training on competition law compliance on issues particularly relevant to *Overberg* and its employees and officials;

5.3.3. shall provide training on competition law compliance to all persons and/or officials employed by *Overberg* in managerial and marketing capacities after the confirmation of this *Consent Agreement* by the Tribunal;

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

5.4. *Overberg* shall submit a copy of such compliance programme to the Commission within 60 days of the date of confirmation of the *Consent Agreement* by the *Tribunal*.

6. **Full and Final Settlement**

This agreement, upon confirmation as an order by the *Tribunal*, is entered into in full and final settlement and concludes all proceedings between the *Commission* and *Overberg* 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 Caledon **on the** 22 **day of** June **2011.**

For *Overberg*

Chief Executive Officer

Dated and signed at Pretoria **on the** 23 **day of** June **2011.**

For the *Commission*

Competition Commissioner