

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: 44/CR/Jun11

In the matter between:

The Competition Commission

Applicant

and

Rand Merchant Bank, a division of First Rand Bank Limited

Respondent


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

Heard on : 15 June 2011

Decided on : 14 July 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"

44/ce/Jan 11

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
HELD IN PRETORIA

CT Case No.
CC Case No. 2008Oct4045

In the matter between:

THE COMPETITION COMMISSION Applicant

and

RAND MERCHANT BANK, A DIVISION OF
FIRSTRAND BANK LIMITED Respondent

In re:

COMPETITION COMMISSION Applicant

and

NOORDWES KO-OPERASIE LIMITED First Respondent

RAND MERCHANT BANK, A DIVISION OF
FIRSTRAND BANK LIMITED Second Respondent

CONSENT AGREEMENT IN TERMS OF SECTION 49D READ WITH SECTION 58(1)(a)(iii) AS READ WITH SECTION 58(1)(b) OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998), AS AMENDED, BETWEEN THE COMPETITION COMMISSION AND RAND MERCHANT BANK, A DIVISION OF FIRSTRAND BANK LIMITED IN RESPECT OF AN ALLEGED CONTRAVENTION OF SECTION 4(1)(b)(ii) OF THE COMPETITION ACT, 1998

The *Commission* and *FirstRand* 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. "*Agreement*" means the agreement concluded between NWK and RMB in April 2005;
- 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 1st Floor, Mulayo Building (Block C), the dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;
- 1.4. "*Commissioner*" means the Commissioner of the *Commission*, appointed in terms of section 22 of the Act;
- 1.5. "*Complaint*" means the complaint under case number 2008Oct4045 initiated by the *Commissioner* in terms of section 49B of the *Act*, including a complaint concerned with allegations of market allocation in terms of section 4(1)(b)(ii) of the Act initiated on 4 May 2009;
- 1.6. "*Consent Agreement*" means this agreement duly signed and concluded between the *Commission* and *FirstRand*;
- 1.7. "*FirstRand*" means FirstRand Bank Limited, a company registered and incorporated in accordance with the laws of the Republic of South-Africa with registration number 1929/001225/06 and with its registered office at 1st Floor, 4 Merchant Place, Sandton, 2146, South Africa;
- 1.8. "*NWK*" means Noordwes Ko-operasie Limited, a company registered and incorporated in accordance with the laws of the Republic of South-Africa with registration number 1998/007577/06 and with its registered address, alternatively principal place of business at 81 Scholtz Street, Lichtenburg, 2740, South-Africa;
- 1.9. "*Parties*" means the *Commission* and *FirstRand*;
- 1.10. "*Respondents*" means both *FirstRand* and *NWK*;

- 1.11. "*RMB*" means the grain desk of Rand Merchant Bank, a division of *FirstRand* and with its registered address, alternatively principal place of business at 1 Merchant Place, c/o Fredman Drive and Rivonia Road, Sandton, 2196, South Africa. *RMB* is a diversified financial services brand encompassing investment banking, fund management, private wealth management and advisory services. ;
- 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. During October 2008 the Commission initiated a complaint against the Respondents in respect of allegations that the Respondents had contravened section 4(1)(b)(i) of the Act in that they engaged in price fixing and fixing of trading conditions.
- 2.2. During May 2009, the Commission extended the complaint to include allegations that the Respondents divided the market in which they compete by allocating territories and/or customers in contravention of section 4(1)(b)(ii).
- 2.3. The Commission conducted its investigation and concluded that:
- 2.3.1. although the *agreement* was predominantly an agreement concerned with the relationship between a supplier of storage services and its customer, clause 4.4 of the *agreement* was incidentally capable of horizontal application between *RMB* and *NWK* to the extent that *RMB* and *NWK* are both engaged in the business of trading grain on the South African Futures Exchange (SAFEX) and in the physical market for the trading of grain.
- 2.3.2. Clause 4.4 of the *agreement* included an undertaking on the part of *FirstRand* that *RMB* would not sell 140 000 tons of grain relocated to

non-*NWK* silos within South Africa or Botswana in the period between 29 April 2005 and 1 May 2007.

2.3.3. Clause 4.4 of the agreement constituted a contravention of section 4(1)(b)(ii) of the Act.

2.4. In coming to its conclusion, the *Commission* took into account that the pretext and essence of the agreement was that:

2.4.1. *RMB* had stored 450, 000 tons of grain at various *NWK*-owned silos in and during 2004 and 2005;

2.4.2. the tonnage stored represented close to 47 percent of all grain stored in the *NWK* silos;

2.4.3. *NWK* realised that it would face capacity constraints in circumstances where a bumper crop was expected in the 2005 harvest season and that *NWK* would not have been in a position to take in grain from farmers during the harvest season in the absence of an arrangement with *RMB*;

2.4.4. *NWK* approached *RMB* to find a mutually acceptable solution to the capacity constraints faced by *NWK*; and

2.4.5. the result of discussions on this score was the agreement.

2.5. The *Commission* found that the *agreement* provided for certain arrangements to give effect to the intention to regulate the vertical relationship between *NWK* and *RMB*:


2.5.1. 172 902 tons of grain were to be relocated from over-utilised silos to alternative *NWK*-owned silos that had surplus capacity;

2.5.2. 127, 864 tons of grain would be sold by *RMB* to *NWK*;

2.5.3. 67, 000 tons of grain would be exchanged with *NWK* grain in alternative *NWK* storage locations;

- 2.5.4. 140, 069 tons of grain would be moved by RMB to silos not owned by NWK;
- 2.5.5. RMB would deliver and store a further 20, 000 tons of grain at NWK's Kameel Silo; and
- 2.5.6. RMB granted NWK the right to purchase RMB grain for the purpose of on-selling such grain to third parties.
- 2.6. The *Commission* took a decision to refer to the *Tribunal* its complaint that the *Respondents*, through the inclusion of clause 4.4 in the *agreement*, had engaged in market allocation in contravention of section 4(1)(b)(ii) of the *Act*, on the basis that the undertaking contained therein had the capacity to find horizontal application between the *Respondents*.
- 2.7. The *Commission* decided not to refer to the *Tribunal* the remainder of the complaint.

3. **Statement of conduct by RMB**

- 3.1. RMB admits that:
- 3.1.1. although the predominant nature of the *agreement* was a vertical one (i.e. an agreement entered into between a company and its customer), clause 4.4 thereof may be interpreted to find horizontal application (i.e. an agreement entered into between competitors);
- 3.1.2. if the agreement is so interpreted, then the effect of clause 4.4 of the *agreement* is that the *Respondents* entered into an agreement to divide markets by allocating territories; and
- 3.1.3. if so read, clause 4.4 of the *agreement* falls within the strict interpretation and also strict liability created by section 4(1)(b)(ii) regardless of whether the transaction had an effect on competition.
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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, RMB accepts that a contravention of section 4(1)(b)(ii) may lead to the imposition of an administrative penalty where the *Tribunal* deems it appropriate.

4.2. The parties have agreed that RMB will pay an administrative penalty in the amount of R 2.1 million (two million one hundred thousand rand).

4.3. This amount constitutes 3% (three per cent) of the value of grain affected by clause 4.4 of the *agreement*.

4.4. *RMB* will pay the amount set out in paragraph 4.2 above to the *Commission* within 6 (six) months from 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. *RMB* agrees to fully cooperate with the *Commission* in relation to the prosecution of the complaint referral. Without limiting the generality of the foregoing, *RMB* 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. *RMB* 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. *RMB* 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, *RMB* shall:

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

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

5.3.3. provide training on competition law compliance to all persons and/or officials employed by *RMB* after the confirmation of this *Consent Agreement* by the Tribunal;

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




5.4. *RMB* 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 *RMB* relating to any alleged contravention by the *Respondents* of the Act that is the subject of the *Commission's* investigation under case no 2008OCT4045.


Dated and signed at SANDTON on the 17th day of MAY 2011.

For Rand Merchant Bank



Chief Executive Officer

For the Commission



Competition Commissioner

Proctor, 3 June 2011.