CONSTITUTIONAL COURT OF SOUTH AFRICA

Competition Commission of South Africa v Senwes Limited

Case No.: CCT 61/11
[2012] ZACC 6

Date of Hearing: 22 November 2011
Date of Judgment: 12 April 2012

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Thursday 12 April 2012, the Constitutional Court delivered judgment in a case involving anti-competitive behaviour. The question for determination was whether Senwes Limited was guilty of anti-competitive conduct.

The complaint arose in the context of trading in grain which takes place in a supply chain involving farmers, traders, processors and retailers. Before grain is used to produce consumable goods, it has to be stored while it passes from hand to hand during trading. The cost for its storage is built into the ultimate price quoted and the longer it is stored, the higher price it fetches between the harvest seasons. Storage is predominantly provided by owners of silos who, for historical reasons dominate the industry in areas where they operate.

Senwes, a company which is hundred years old is a silo owner and provides storage facilities for grain. Before 2003 it charged all its customers the same fee for storage, irrespective of whether they were farmers or traders. During the first 100 days all customers paid the same daily fee and thereafter a capped tariff until the next harvest season. In 2003 Senwes withdrew the capped tariff from traders but continued to offer it to farmers. This arrangement was known as the "deferential tariff". It adversely affected its rivals who became unable to compete with prices offered by Senwes' trading arm. The rivals' businesses became unsustainable.

In 2004 CTH Trading (Pty) Ltd laid a complaint to the Competition Commission against Senwes. The Commission investigated it and on 20 December 2006, it referred some complaints to the Tribunal for deciding whether Senwes was guilty of anti-competitive conduct. One of the complaints was that Senwes contravened section 8(c) of the Competition Act 89 of 1998 by charging differential storage fees which prevented other traders from competing with it and expanding within the grain trading market.

After hearing evidence from the Commission and Senwes, the Tribunal found that Senwes was guilty of one complaint. It held that Senwes was engaged in a margin squeeze when it withdrew the capped tariff from traders and consequently it violated section 8(c) of the Act. An appeal by Senwes to the Competition Appeal Court was unsuccessful. In a further appeal to the Supreme Court of Appeal Senwes was successful. The Supreme Court of Appeal held that the margin squeeze complaint was not part of the complaints referred to the Tribunal and as a result the Tribunal had no authority to determine that complaint.

In the Constitutional Court Jafta J, in a majority judgment, held that the Supreme Court of Appeal erred in concluding that a complaint relating to a contravention of Section 8(c) of the Act was not part of the referral. He pointed out that the error committed by the Tribunal was to call the breach a margin squeeze, a term which is not used in the Act. The order granted by the Supreme Court of Appeal was set aside and the Tribunal's ruling was amended by deleting reference to margin squeeze.

In a dissenting judgment Froneman J held that the matter should be referred back to the Tribunal for re-hearing.