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OPINION

Prepared by
Janine Nainkin Inc.
Ref: J NAINKIN
Tel: 083 798 6054
Email: janine@janinenainkin.com

Dear Members of the Board of SAPPA

1. We have been requested to advise the South African Pecan Nut Producers Association NPC on the following:
 - 1.1 Whether there are any circumstances under which the South African Pecan Nut Producers Association NPC (or its members) could obtain an exemption from certain provisions of the Competition Act;
 - 1.2 Whether pecan nut producers and exporters may collaborate on marketing initiatives to present a more coordinated market offering, given that approximately twenty companies currently market pecan nuts independently to various buyers in China;
 - 1.3 Whether the industry could collectively develop and promote a unified South African pecan nut brand;
 - 1.4 Whether there are any legally permissible mechanisms that could help improve industry coordination and market stability while ensuring compliance with Competition Law;
 - 1.5 More specifically, whether there are any lawful measures available that could reduce the risk of exporters undermining one another through aggressive price competition in international markets.
2. We will deal with each of the questions posed under a separate heading here below:
3. **Whether the South African Pecan Nut Producers Association NPC or the pecan nut industry could obtain a temporarily exemption or exclusion from the Competition Act:**

Requirements in terms of Section 10 of the Competition Act, 89 of 1998 ("the Act"):

- 3.1 Section 10 of the Act states that a firm may apply to the Competition Commission for exemption from the application of the Act to an agreement or practice if that agreement or practice meets the requirements of subsection 10(3) of the Act or an exemption in respect of a category of agreements or practices if that category or agreement of practices meets the requirements of subsection 10(3) of the Act.
- 3.2 Practicality speaking an industry body would need to apply for the exemption under the Competition Act. Under the Competition Act this could be an industry body like the South African Pecan Nut Producers Association NPC. Pecan nut producers could also consider incorporating a ringfenced company specifically for the purposes of applying for an exemption under the Act.
- 3.3 The request for an exemption to the Competition Commission must be in the form of an application to exempt a specific practice or category of practices which would otherwise have constituted a contravention of the Act. To illustrate this, for example, the fixing of the selling price of pecan nuts by South African producers to buyers in China would constitute price fixing and therefore that is a practice that would need to be exempted under the Act for the parties thereto to escape liability in South Africa.
- 3.4 The agreement or practice or category of agreements or practices concerned that the Competition Commission is requested to exempt by way of application **MUST** meet one of the following objectives under Section 10(3)(b) of the Act:
- (i) Maintenance or promotion of exports;
 - (ii) Promotion of the effective entry into, participation in or expansion within a market by small and medium business, or firms controlled by historically disadvantaged persons;
 - (iii) Change in productive capacity necessary to stop the decline in an industry;

- (iv) The economic development, growth, transformation or stability of any industry designated by the Minister, after consulting the Minister responsible for that industry; or
- (v) Competitiveness and efficiency gains that promote employment or industrial expansion.

Requirements in terms of Section 10 of the Act:

3.5 An application for exemption to the Competition Commission includes a full written submission which would likely need to include a report from an economist in support of the application being made. The filing fee payable to the Competition Commission in respect of an exemption application is R100 000.00 (excluding VAT) plus an amount of R1 000.00 for each year in respect of which the exemption is being applied for. The recommendation is to apply for at least a five-year term given the amount of time it takes for the Commission to consider an application . Once the Competition Commission has considered the application for exemption, the Commission will publish the exemption application in the Government Gazette for members of the public to comment on.

Substantive grounds:

3.6 We now consider each of the substantive grounds in terms of which an exemption application must be made in terms of section 10(3)(b) of the Act.

10(3)(b)(i) Maintenance or promotion of exports

3.7 The most likely category for application by SAPPA or its members to utilise for an exemption application would be Section 10(3)(b)(i) of the Act namely the maintenance or promotion of exports. The application would, however, need to convince the Commission as to why the pecan nut industry in particular should be favoured with an exemption application for price fixing which is viewed as a hard-core contravention of the Act. We would advise that unless it can be shown that the industry is in severe financial distress an application in terms of this subsection won't be viable. It should also be noted that the Department of Trade

Industry and Competition has already issued the Block Exemption for the Promotion of Exports and it will need very strong economic evidence to consider an exemption over and above that contained in the block exemption that favours a particular industry especially one that will be seen to be to the detriment of a favoured trade partner like China.

10(3)(b)(ii) Promotion of the effective entry into, participation in or expansion within a market by small and medium business, or firms controlled by historically disadvantaged persons

- 3.8 It is our understanding most of the SAPPA members are already active in the export market and that the exemption application is not required to promote their entry into the export market. Furthermore, small businesses are defined as businesses with a turnover of less than R5 000 000.00 (five million rand) whereas medium enterprises are defined as enterprises with a turnover of less than R50 000 000.00 (fifty million rand) depending on the nature of the goods. Given, however, that SAPPA members are already exporting pecan nuts it is unlikely that any application under subsection 10(3)(b)(ii) will be successful or perhaps even applicable.

10(3)(b)(iii) Change in productive capacity necessary to stop the decline in an industry

- 3.9 To be successful with an application under Section 10(3)(b)(iii) one would need to show that the pecan nut industry is in decline or that its members are loss giving or likely to suffer foreclosure without state intervention. We would require SAPPA and its members instruction on the factual position, but it is unlikely that the members would meet this requirement unless we can show the industry to be in severe financial distress. With over 20 South African Processors currently exporting to China it is unlikely that SAPPA or its members will be able to make use of this subsection in respect of an exemption application.

10(3)(b)(iv) The economic development, growth, transformation or stability of any industry designated by the Minister, after consulting the Minister responsible for that industry

- 3.10 Subsection 10(3)(b)(iv) requires the Minister to designate a particular industry. If the industry, in this case the pecan nut industry has not already been designated, it is highly unlikely that the Minister can be petitioned to designate such. As far as writer is aware there has been no successful applications brought under this section of the Act to date. If one considers the financial distress various manufacturing and mining sectors are in, in South Africa it is unlikely the authorities will favour any one industry with a designation application.

10(3)(b)(v) Competitiveness and efficiency gains that promote employment or industrial expansion.

- 3.11 An application for exemption in terms of Section 10(3)(b)(v) relates to the competitiveness and efficiency gains that promote employment or industrial expansion. We understand from SAPPA that increases in production seen in the next 5 years will be due to increased production expansion that took place some years ago through increased plantings and capital investment. Future industrial and production expansion could occur due to an exemption being granted and that may benefit supply to alternative export markets.
- 3.12 Writer has acted for numerous parties over the course of two decades in the healthcare, liquid petroleum gas, aviation and shipping industries in terms of which these parties have requested block exemptions from the Competition Commission in various forms. Other large law firms and colleagues there have similarly applied for exemptions under Section 10 of the Act. These applications for exemption to the Competition have all largely been unsuccessful or partially successful and have shown the following characteristics:

- 3.12.1 An extremely long period of investigation of at least three to five years;
- 3.12.2 Political motivations strongly influence the outcome of the Competition Commission's decision making. In this regard I am concerned that any exemption application by SAPPA or its members in respect of the co-ordination of export prices of pecan nuts to China will particularly be negatively received. China is seen as a very large trading partner to South Africa and a very close political ally. It is likely that China will view any exemption application allowing for the co-ordination of export prices of pecan nuts to that country as negative from their perspective;
- 3.12.3 The Competition Commission is hesitant to grant any exemptions under Section 10 unless there are truly exceptional economic circumstances present or the application is made by historically disadvantaged individuals. An example would be the Covid-19 pandemic during which the Competition Commission declared a temporary Healthcare Block Exemption and the exemption granted to the National Health Network which consists of smaller hospital groups owned by historically disadvantaged individuals.
- 3.13 To be successful with an application in terms of Section 10(3)(b)(i) of the Act, SAPPA and its members would need to prove that the industry would not be able to export pecan nuts to China but for the exemption application. Writer would need to be guided by SAPPA and its members whether an economic analysis would support this contention.

Double jeopardy:

- 3.14 Should the Competition Commission be inclined to grant an exemption application to SAPPA and/or its members to enable the discussion and

the fixing of prices of pecan nut exports to China, a charge of price fixing may still be brought in the People's Republic of China in respect of the effect that such action(s) has in that country in terms of local anti-trust legislation. This would mean that even if SAPPA and its members obtained an exemption in South Africa in respect of the discussion and fixing of prices in respect of export pecan nuts to China, the action would not be exempt in China and SAPPA and its members could still be pursued in the People's Republic of China for price fixing. Writer's understanding from colleagues practicing in China is that civil actions brought in China for contraventions of their anti-trust legislation by private parties affected by such action are commonplace.

- 3.15 A good illustration of this is the matter of *American Natural Soda Ash Corporation & Another vs The Competition Commission of South Africa*¹ in terms of which ANSAC which was an American association of soda ash producers was charged with price fixing under the South African Competition Act. In terms of legislation in the United States, competitors were allowed to discuss and fix prices in the United States solely for the purposes of export as the American congress had granted an exemption to price fixing for the purposes of export under anti-trust legislation. Notwithstanding the exemption of this conduct in the United States ANSAC was still found guilty of price fixing in South Africa under the Act.
- 3.16 A very similar legislative position currently exists in South Africa in respect of the Block Exemption for the Promotion of Exports under the Competition Act. We enclose a copy of the final block exemption as granted by the Competition Commission hereto as **Exhibit "1"**. The Block Exemption for the Promotion of Exports states that specific categories of agreements or practices are exempt from the application of the Act in terms of Section 4(1)(b)(i) and (ii). The provisions are, however, not clear as to whether or not price fixing itself is exempted in terms of the regulations. The regulations state that parties who wish to enter into an

¹ 554/2003 (2005) ZASCA 42.

agreement or engage in a practice covered by the exemption contained in the regulations must first seek confirmation from the Commission in writing as to whether the agreement or practice falls within the scope of the regulations before implementation thereof.

- 3.17 Even if the Competition Commission states that the discussion and fixing of a price for the export of pecan nuts to China is covered by the exemption, it will still not be “exempted” from prosecution by the Government of the People's Republic of China or third parties affected by such conduct in China as is clearly illustrated by the facts of the ANSAC case.
- 3.18 SAPPa and its members are furthermore cautioned that writing to the Competition Commission to request an exemption of pricing discussions for the purposes of the exports of pecan nuts could attract unwanted and unwarranted attention from the Competition Commission in that they could decline the request and could pursue SAPPa and/or its members for price fixing in terms of the Competition Act. The Competition is known for using information supplied to it for one purpose to prosecute the very same party for a completely different purpose. Parties must therefore weigh up any risk before bringing themselves under the scrutiny of the South African Competition Commission.

To conclude:

- 3.19 In order for SAPPa and/or its members to pursue an exemption from the Competition Act in terms of Section 10(3)(b)(i) it would need to show that there is clear economic grounds for such an application.
- 3.20 Alternatively, SAPPa or its members could approach the Competition Commission to formally enquire whether it believes that the discussion and fixing of an export price of pecan nuts to China would fall under the Block Exemption for the Promotion of Exports.

3.21 Even if the Competition Commission states that such conduct is exempted in terms of the Block Exemption for the Promotion of Exports, the act of fixing the sale price of pecan nuts in China will still be prosecutable in the People's Republic of China by the authorities or any party affected by such conduct under local anti-trust legislation.

4. **Whether producers and exporters may collaborate on marketing initiatives to present a more coordinated market offering, given that approximately twenty companies currently market pecan nuts independently to various buyers in China:**

Whether the industry could collectively develop and promote a unified South African pecan brand:

4.1 In terms of the Block Exemption for the Promotion of Exports, it quite specifically exempts coordination on the collective marketing of South African goods as a brand in export markets. The question is, however, to SAPPa and its members as to whether it is practically feasible for the members if they are not able to coordinate the selling price of pecan nuts to market the product under a single brand?

4.2 It would therefore seem as if the conduct is allowable in terms of the block exemption but the question would be to SAPPa and its members as to whether they would wish to embark on such a unified brand in the absence of an exemption to coordinate on the pricing of pecan nut exports to China or any other export market?

4.3 The parties should furthermore be aware of the provisions of the South African Trade Marks Act, 193 of 1994 which has the following options available to members:

4.3.1 An association can request that a trade mark be registered which operates as a certification trade mark, in other words where particular goods are certified by that association as indicative of a particular kind, quality, quantity or intended purpose or originating from a specific geographic region. Examples of

certification trade marks for the illustration of SAPPa members are the Woolmark, the Heart Foundation or that of the South African Bureau of Standards

4.3.2 A further option is for members to register a collective trade mark which simply distinguishes the members of that particular collective from persons who are not members of that collective. Geographical indications are often applied for as collective trade marks under the Trade Marks Act. Examples of collective trade marks on the other hand are, for example, Methode Cap Classique or Rooibos which are examples of collective trade marks.

4.4 To conclude, SAPPa and its members could make use of collaborative marketing initiatives and/or promote a unified South African pecan nut brand either under the current Block Exemption for the Promotion of Exports or apply for certification or collective trade marks in terms of the Trade Marks Act. It would, however, be important to ensure that such marketing initiatives do not include any form of direct or indirect pricing discussions or fixing of trading terms and conditions.

Lawful measures that could reduce the risk of exporters undermining one another through aggressive price competition in the international markets:

4.5 Writer has already detailed the requirements in terms of the Act conditions should SAPPa and its members wish to apply for an exemption to enable members to fix the selling prices of pecan nuts for the purposes of exports from South Africa. We have also set out in this opinion that such exemption would not protect SAPPa and/or its members from prosecution or damages claims in the country to which the pecan nuts are exported in terms of antitrust legislation in that country.

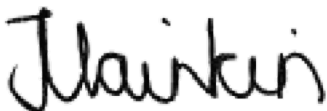
- 4.6 Many clients within the agricultural industry often work together in terms of joint venture companies either, for example for the purposes of establishing cold storage facilities or packing warehouses.
- 4.7 The question then arises whether SAPPA members could lawfully incorporate a joint venture company for the purposes of selling pecan nuts to the Chinese market.
- 4.8 In terms of the Guidelines hereto attached marked **Exhibit "2"**, the Competition Commission has stated that establishment of a joint venture could trigger a merger notification under the Competition Act if the definition of merger as contained in the Act is met. As SAPPA members would notionally be "transferring" their export trade to China, to the joint venture company, the joint venture company would be obtaining control over the business of another entity. This would therefore necessarily trigger a merger notification if the merger thresholds as set out **Exhibit "3"** are met. The advantage of triggering a merger notification is that the parties will have certainty in terms of whether or not the joint venture is seen as contrary to the Act or not. In the absence of that scrutiny, the following factors inter alia will be relevant:
- 4.8.1 Do the competing parent firms compete directly?;
 - 4.8.2 Will the competing parent firms continue to compete directly after the merger?;
 - 4.8.3 Will the merged entity be setting prices with regards to the product being sold by the merged entity?;
 - 4.8.4 Would the activities of the joint venture be seen as an arrangement between competitors that constitutes price fixing in terms of the Act?;
 - 4.8.5 Is there any innovation or benefit to consumers that requires the establishment of the joint venture?;
 - 4.8.6 Are there any pro-competitive outcomes (that benefit end-consumers) that come about as a result of the establishment of the joint venture?;

4.8.7 Will the parent companies continue to compete with the joint venture entity or is a non-compete clause envisaged?

4.9 All the above factors would need to be taken into account to understand whether or not the establishment of the joint venture is simply a conduit for the fixing of prices or whether there is a pro-competitive benefit to consumers or form of innovation that comes about as a result of the establishment of the joint venture. I confirm that we do not hold instructions on these specific outcomes and we therefore do not express an opinion.

4.10 The Competition Commission would view the establishment of a joint venture entity between parent companies where such joint venture entity allows parties to directly and/or indirectly fix prices without any pro-competitive or innovative outcomes that benefit consumers as contrary to the Act and the parties will be liable for direct and indirect price fixing in terms of sections 4(2)(b)(i);(ii) and (iii) of the Act.

JANINE NAINKIN



Date: 04.08.2026

Exhibit “3”

Merger Thresholds	Combined turnover / Asset value	Target turnover / Asset value	Filing Fee
Lower threshold (Intermediate merger)	R1 billion	R200 million	R220 000-00
Higher threshold (Large merger)	R9.5 billion	R280 million	R735 000-00