

SOUTH AFRICA / JUDGMENT

Competition Commission v Domoney Brothers Bloemfontein (Pty) (Ltd) (CO022May20) [2020] ZACT 99 (14 May 2020) [2020] ZACT 99

COURT

Competition Tribunal

BEFORE

Y Carrim, A Ndoni, A Roskam

CASE / FILE NUMBER

CO022May20

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COMPETITION TRIBUNAL REPUBLIC OF SOUTH AFRICA

Case No: CO022May20

In the matter between:

The Competition Commission

Applicant

And

Domoney Brothers Bloemfontein (Pty) (Ltd)

Respondent

Panel : Y Carrim (Presiding Member),

A Ndoni (Tribunal Member),

A Roskam (Tribunal Member)

Heard on : 14 May 2020

Decided on : 14 May 2020

CONSENT AGREEMENT

The Tribunal hereby confirms the consent agreement as agreed to and proposed by the Competition Commission and Domoney Brothers

Bloemfontein (Pty) Ltd annexed hereto.

Presiding Member Ms Yasmin Carrim

Concurring: Ms Andiswa Ndoni and Mr Anton Roskam

Date: 14 May 2020

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT CASE NO:

CC CASE NO: 2020MarC0146

COMPETITION COMMISSION OF SOUTH AFRICA Applicant

DOMONEY BROTHERS BLOEMFONTEIN (PTY) LTD Respondent

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND DOMONEY BROTHERS BLOEMFONTEIN (PTY) LTD IN RESPECT OF AN ALLEGED CONTRAVENTION OF SECTION 8(1)(a) OF THE COMPETITION ACT 89 OF 1998, AS AMENDED, READ WITH REGULATION 4 OF THE CONSUMER AND CUSTOMER PROTECTION AND NATIONAL DISASTER MANAGEMENT REGULATIONS AND DIRECTIONS PUBLISHED IN GOVERNMENT GAZETTE NO 43116 ON 19 MARCH 2020

The Competition Commission and Domoney Brothers Bloemfontein (Pty) Ltd hereby agree that application be made to the Competition Tribunal for the confirmation of this Consent Agreement as an order of the Tribunal in terms of section 49D of the Competition Act 89 of 1998, as amended ("the Act"), in respect of a contravention of section 8(1)(a) of the Act read together with Regulation 4 of the Consumer And Customer Protection And National Disaster Management Regulations And Directions published in Government Gazette No 43116 on 19 March 2020, as well as the Regulations on Competition Tribunal Rules for COVID-19 Excessive Pricing Complaint Referrals published in Government Gazette No 43205 on 3 April 2020 and the Tribunal Directive for Covid-19 Excessive Pricing Complaint Referrals on the terms set out below:

1 DEFINITIONS

The following words shall, unless otherwise stated or inconsistent with the context in which they appear, bear the following meanings in this Consent Agreement:

1.1 "Act" means the Competition Act 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 Building C, Mulayo Building, the dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;

1.3 "Commissioner" means the Commissioner of the Competition Commission, appointed in terms of section 22 of the Act;

1.4 "Consent Agreement" means this agreement duly signed and concluded between the Commission and Demoney;

1.5 "Consumer Protection Regulations" means the Consumer and Customer Protection and National Disaster Management Regulations and Directions published in Government Gazette No 43116 on 19 March 2020;

1.6 "Domoney" means Domoney Brothers Bloemfontein (Pty) Ltd, a company duly incorporated in accordance with the laws of the Republic of South Africa with its principal place of business at 23 Fritz Stockenström Street, New East End, Bloemfontein, South Africa;

1.7 "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 Building C, Mulayo Building, the dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;

1.8 "Tribunal Directive for Covid-19 Excessive Pricing Complaint Referrals" means the directive issued by the Tribunal on 6 April 2020; and

1.9 "Tribunal Rules for COVID-19 Excessive Pricing Complaint Referrals" means the Regulations on Competition Tribunal Rules for COVID-19 Excessive Pricing Complaint Referrals published in Government Gazette No 43205 on 3 April 2020.

2 BACKGROUND AND CONTEXT

2.1 On 15 March 2020, given the magnitude and severity of the COVID-19 outbreak which had been declared a global pandemic by the World Health Organisation (WHO) and classified as a national disaster by the Head of the National Disaster Management Centre, the Minister of Co-operative Governance and Traditional Affairs ("COGTA") declared a State of National Disaster in the Republic of South Africa which declaration was published in Government Notice No. 313 of Government Gazette No. 430096.

2.2 On 18 March 2020, the Minister of COGTA issued regulations ("Disaster Management Regulations") published in Government Notice No. 318 of Government Gazette no. 43107, regarding the steps necessary to prevent an escalation of the disaster or to alleviate, contain and minimize the effects of the disaster. These regulations were made in terms of section 27(2) of the Disaster Management Act, 1957 (Act No. 57 of 2002) ("Disaster Management Act"). Paragraph 10(6) of the Disaster Management Regulations ("Disaster Management Regulations") authorised the Minister of Trade and Industry to, inter alia, issue directions to protect consumers from excessive, unfair, unreasonable or unjust pricing of goods and services during the national state of disaster.

2.3 On 19 March 2020, the Minister of Trade and Industry published the Consumer Protection Regulations. The purpose of the Consumer Protection Regulations is to promote concerted conduct to prevent an escalation of the national disaster and to alleviate, contain and minimise the effects of the national disaster and to protect consumers and customers from unconscionable, unfair, unreasonable, unjust or improper commercial practices during the national disaster.

2.4 In relation to excessive pricing, the Consumer Protection Regulations states the following:

"4. Excessive Pricing.

4.1. In terms of section 8(1) of the Competition Act a dominant firm may not charge an excessive price to the detriment of consumers or customers.

4.2. In terms of section 8(3)(f) of the Competition Act during any period of the national disaster, a material price increase of a good or service contemplated in Annexure A which -

4.1.1. does not correspond to or is not equivalent to the increase in the cost of providing that good or service; or

4.1.2. increases in net margin or mark-up on that good or service above the average margin or mark-up for that good or service in the three-month period prior to 1 March 2020. is a relevant and critical factor for determining whether the price is excessive or unfair and indicates prima facie that the price is excessive or unfair."

2.5 Annexure A lists the goods and services that fall to be regulated by the Consumer Protection Regulations.

2.6 On 23 March 2020, the President of the Republic of South Africa announced the enforcement of a nationwide lockdown for 21 days with effect from midnight on Thursday, 26 March 2020.

2.7 On 3 April 2020, the Tribunal Rules for COVID-19 Excessive Pricing Complaint Referrals were published and thereafter, on 6 April, the Tribunal Directive for Covid-19 Excessive Pricing Complaint Referrals was issued.

2.8 On 9 April 2020, the President of the Republic of South Africa announced an extension of the enforced nationwide lockdown by a further two weeks, until the end of April 2020.

3 THE COMMISSION'S INVESTIGATIONS AND FINDINGS

Investigation

3.1 On 28 March 2020, the Commission received a complaint against Budget Shop, a retailer based in Bloemfontein who was alleged to be selling face masks at an excessively high price. Budget Shop attributed the increase in price to cost increases by its supplier, Domoney, the Respondent.

3.2 Facial masks fall under the category of 'medical and hygiene supplies' in Annexure A as well as item 1.3 of Annexure B of the Consumer Protection Regulations. Regulation 4 of the Consumer Protection Regulations is therefore applicable to the conduct described in this Consent Agreement.

3.3 In terms of Section 7(c) of the Act, market power can also be inferred from the economic behaviour of the firm. In this case, the mere ability to raise prices is indicative of market power as it demonstrates a lack of constraints such that there is an ability to control prices and/or behave independently of competitors and customers.

3.4 States of disaster often provide the conditions for temporary market power to be held by market participants that may not otherwise have market power outside of the disaster period. The removal of constraints may occur for several reasons, many of which are conceptually related to a narrowing of the geographic market for products as a result of disruptions to the normal functioning of markets. Due to the national lockdown, the scope of the geographic market is narrow as citizens' movements are heavily restricted.

3.5 In a state of national disaster, an established test within the assessment of excessive pricing under the Act is determining whether price increases have a corresponding cost justification. This is because an excessive profit margin is detectable if the ordinary prices are increased materially absent cost increases.

Findings

3.6 The Commission conducted an investigation into Domoney's alleged conduct and found the following:

3.6.1 Domoney is based at 23 Fritz Stockenström Street, New East End, Bloemfontein, South Africa;

3.6.2 Domoney is a supplier of a diverse range of quality protective and corporate clothing, health and safety equipment and corporate gifts,

3.6.3 Domoney has a varied product range, including FFP1 unvalved dust masks;

3.6.4 Domoney does not manufacture the FFP1 unvalved dust masks, but rather purchases them from a number of suppliers and then on-sells the masks to its customers;

3.6.5 Based on pricing information supplied by Domoney in relation to FFP1 unvalved dust masks -

3.6.5.1 Domoney's mark-up was 56% in February 2020 on the FFP1 unvalved dust masks bought from its supplier Pinnacle Welding and Safety (Pty) Ltd ("Pinnacle"); and

3.6.5.2 Domoney's mark-up was 262% in March 2020 on the FFP1 unvalved dust masks bought from its supplier Rebel Safety Gear (Pty) Ltd ("Rebel").

3.7 The Commission found that the increase in mark-up by Domoney of approximately 56% bought from its supplier Pinnacle in February 2020 and 262% bought from its supplier Rebel in March 2020 in respect of FFP1 unvalved dust masks is a contravention of section 8(1)(a) of the Act read together with Regulation 4 of the Consumer Protection Regulations.

4 ADMISSION

Domoney admits that it significantly increased its mark-up on FFP1 unvalved dust masks during February 2020 and March 2020 in contravention of section 8(1)(a) of the Act read together with Regulation 4 of the Consumer Protection

Regulations.

5 CONTRIBUTION TO THE SOLIDARITY FUND

5.1 Demoney undertakes to pay a contribution in the amount of R30 040,00 to the Solidarity Fund.

5.2 Demoney will pay the amount set out above to the Solidarity Fund within 30 (thirty) days from the date of confirmation of this Consent Agreement as an order by the Tribunal.

5.3 The contribution must be paid into the Solidarity Fund's bank account which is as follows:

NAME: Solidarity Fund BANK: Standard Bank

ACCOUNT NUMBER: [...]

ACCOUNT TYPE: Current account

BRANCH CODE: 051001

SWIFT CODE: [...]

PAYMENT REF: Competition Commission 2020MarC0146/Domoney

6 AGREEMENT REGARDING FUTURE CONDUCT

Domoney agrees to:

6.1 immediately desist from the excessive pricing conduct described above;

6.2 reduce its mark-up on FFP1 unvalved dust masks to a maximum of- with immediate effect for the duration of the state of the national disaster;

6.3 donate face shields amounting to a total of R30 040,00 including VAT within 7 calendar days of confirmation of this Consent Agreement as an order of the Tribunal to the following organisations -

6.3.1 Carel Du Toit School for the Deaf situated at National Hospital, Roth Avenue, Willows, Bloemfontein;

6.3.2 Universitas Hospital situated at 1 Logeman Street, Universitas, Bloemfontein; and

6.3.3 Pelonomi Academic Hospital situated at 121 Dr Belcher Rd, Heidedal, Bloemfontein;

6.4 submit an affidavit under oath by the owner or director of Domoney testifying that the abovementioned undertakings have been adhered to within 7 calendar days of confirmation of the Consent Agreement as an order by the Tribunal;

6.5 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 Act. In particular, such compliance programme will include a mechanism for the monitoring and detection of any contravention of the Act;

6.6 to submit a copy of a compliance programme to the Commission within 60 business days of the date of confirmation of the Consent Agreement as an order by the Tribunal; and

6.7 to circulate a statement summarising the content of this Consent Agreement to all management and operational staff employed at Domoney within 7 calendar days from the date of confirmation of this Consent Agreement by the Tribunal and notifying the Commission by submitting an affidavit under oath by the owner or director of Domoney confirming compliance with this undertaking.

7 FULL AND FINAL SETTLEMENT

This Consent 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 Domoney relating to any alleged contravention of section 8(1)(a) the Act read together with Regulation 4 of the Consumer and Customer Protection and National Disaster Management Regulations and Directions published in Government Gazette No 43116 on 19 March 2020 that is the subject of the Commission's investigation under Commission Case No.

2020MarC0146.

Tembinkosi Bonakele

The Commissioner, Competition Commission of South Africa

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