

SOUTH AFRICA / JUDGMENT

Competition Commission v Oil and More General Trading CC (CO085Aug20) [2020] ZACT 62 (14 August 2020)

[2020] ZACT 62

COURT

Competition Tribunal

BEFORE

Y Carrim, F Tregenna, A Ndoni

CASE / FILE NUMBER

CO085Aug20

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COMPETITION TRIBUNAL REPUBLIC OF SOUTH AFRICA

Case No: CO085Aug20

In the matter between:

The Competition Commission Applicant

And

Oil and More General Trading CC Respondent

Panel Y Carrim (Presiding Member), F Tregenna (Tribunal Member), A Ndoni (Tribunal Member)

Heard on: 14 August 2020

Decided on: 14 August 2020

CONSENT AGREEMENT

The Tribunal hereby confirms the consent agreement as agreed to and proposed by the
Competition Commission and Oil and More General

Trading CC annexed hereto.

Signed by: Yasmin Tayob Carrim

Signed at: 2020-08-14 14:22:09 +02:00

Reason: I approve this document

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND OIL AND MORE GENERAL TRADING (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 Oil and More General Trading CC 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 O&M;

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 "O&M" means Oil and More General Trading CC, a food distributor and restaurant supplier, that supplies food products and consumables to the hospitality industry, namely, restaurants, cafes' and hotels. O&M's principal place of business is situated at unit 6 & 7, Drill Park, 3 Drill Avenue, Montague Gardens, Cape Town;

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, 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)(i) 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.

3 THE COMMISSION'S INVESTIGATIONS AND FINDINGS

3.1 In April 2020, the Commission received information in terms of section 49B(2)(a) of the Competition Act, against O&M, in relation to the inflated prices of nitrile blue disposable gloves ("nitrile gloves"), that it was charging its customers between March and April 2020.

3.2 Nitrile gloves fall under the category of 'medical and hygiene supplies' in Annexure A as well as item 1.5 of Annexure B of the Consumer Protection Regulations, respectively. 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(3) 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.

3.6 Following receipt of the information, the Commission conducted an investigation into O&M's alleged conduct and found the following:

3.6.1 O&M operates in the market for the supply of food products and consumables to the Hospitality Industry, in the city of Cape Town, in the Western Cape Province.

3.6.2 O&M has market power in the abovementioned market, given the current pandemic and state of national disaster;

3.6.3 During March and April 2020, O&M realised a gross profit margin as depicted in Table 1, below. The table also shows the estimated excess profits realised by O&M during March and April 2020;

Table 1: Excess Profits Earned by O&M During March and April 2020

3.6.4 During the period March to April 2020, the gross profit margin of - for O&M was in excess of the average 20% gross margin, which is generally regarded as the benchmark percentage for this category of products and regarded as fair and reasonable. The gross profit margin during this period was -

At a 20% gross profit margin, the average selling price would have been-(excluding VAT).

3.6.5 Therefore, at a selling price of- (excl. vat) and a gross profit margin of_, the Commission found that O&M has earned excess profits in the amount of-.

3.6.6 The Commission found that the gross profit margin of_ during March and April 2020, in respect of nitrine gloves sold by O&M, amounts to a contravention of section 8(1)(a) of the Act, read together with Regulation 4 of the Consumer Protection Regulations.

3.6.7 O&M admits that the conduct set out above constitutes excessive pricing in terms of section 8(1)(a) of the Act read with Regulation 4 of the Consumer Protection Regulations.

4 AGREEMENT REGARDING FUTURE CONDUCT

O&M agrees to:

4.1 immediately desist from the excessive pricing conduct described above;

4.2 reduce its gross profit margin on nitrile gloves to 20% with immediate effect for the duration of the state of the national disaster;

4.3 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;

4.4 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

4.5 to circulate a statement summarising the content of this Consent Agreement to all management and operational staff employed at O&M 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 Franscois Mynhardt, the Financial Manager of O&M, confirming compliance with this undertaking.

5 CONTRIBUTION TO THE SOLIDARITY FUND

5.1 In addition to its undertaking listed in clause 4 above, O&M will make a monetary contribution in the amount of R18 361,51 (Eighteen Thousand, Three Hundred and Sixty-One Rand and Fifty One Cents) to the Solidarity Fund,

5.2 O&M will pay the amount set out in 5.1 above to the Solidarity Fund within 7 (seven) days from the date of confirmation of this Settlement Agreement as an order by the Tribunal.

5.3 The contribution as set out in 5.1 above will be made in one instalment directly into the Solidarity Fund's bank account, the details of which are as follows:

Name of account holder:

Bank name:

Account number: [...]

Branch code:

SWIFT code:

Payment reference:

5.4 O&M will submit an affidavit under oath, testifying that the abovementioned donations have been made, within 7 calendar days of such donation.

6 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 O&M 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.

Tembinkosi Bonakele

The Commissioner, Competition Commission of South Africa

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