

SOUTH AFRICA / JUDGMENT

Competition Commission v Sentra Kem Pharmacy CC (CO106Aug20) [2020] ZACT 54 (2 September 2020) [2020] ZACT 54

COURT

Competition Tribunal

BEFORE

E Daniels, AW Wessels, Y Carrim

CASE / FILE NUMBER

CO106Aug20

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COMPETITION TRIBUNAL REPUBLIC OF SOUTH AFRICA

Case No: CO106Aug20

In the matter between:

The Competition Commission

Applicant

And

Sentra Kem Pharmacy CC

Respondent

Panel: E Daniels (Presiding Member)

AW Wessels (Tribunal Member)

Y Carrim (Tribunal Member)

Heard on: 02 September 2020

Decided on: 02 September 2020

CONSENT AGREEMENT

The Tribunal hereby confirms the consent agreement between the Competition Commission and Sentra Kem Pharmacy CC annexed hereto.

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA (HELD AT PRETORIA)

CT CASE NO:

CC CASE NO: 2020APRC0458

THE COMPETITION COMMISSION Applicant

and

SENTRA KEM PHARMACY CC Respondent

FILING NOTICE

TAKE NOTICE THAT the applicant hereby files the following documents:

1. Competition Tribunal Form CT6 (1),
2. A confidential Consent Agreement between the Competition Commission and Sentra Kem Pharmacy CC.

DATED AT PRETORIA ON THIS DAY OF AUGUST 2020.

IN THE COMPETITON TRIBUNAL OF SOUTH AFRICA

COMPETITION COMMISSION OF SOUTH AFRICA Applicant

SENTRA KEM PHARMACY CC Respondent

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND SENTRA KEM PHARMACY CC 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 Sentra Kem Pharmacy 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 490 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 /Page 1 of 12.

Competition Tribunal Rules for COVID-19 Excessive Pricing Complaint Refen-als published in Government Gazette No 43205 on 3 April 2020 and the Tribunal Directive for Covid-19 Excessive Pricing Complaint Refen-als 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 Bulldng, 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 Sentra Kem Pharmacy CC;

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; Page 2 of 12

1.6 "Sentra Kem" means Sentra Kem Pharmacy CC, a close corporation registered in accordance with the laws of South Africa, with Its registered place of business at 154 Main Rd, Hoog-En-Droog, Paarl, 7646.

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 (•01saater Management Regulations•) authorised the Minister of Trade and Industry to, Inter a/ia, 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 prims facie that the price is excessive or unfair."

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

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

2020. The lockdown has subsequently been extended.

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 Covld-19 Excessive Pricing Complaint Referrals was issued.

3 THE COMMISSION'S INVESTIGATIONS AND FINDINGS

Investigation:

3.1 In April 2020, the Commission received information in terms of section 49B(2)(a) of the Competition Act, against Sentra Kem In relation to the inflated prices of facial masks that it was charging its customers between March and April 2020.

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 Page 6 of 12 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 Following receipt of the information, the Commission conducted an investigation into Sentra Kern's alleged conduct and found the following:

3.6.1 Sentra Kem operates in the market for the supply of pharmaceutical products to consumers in the Paarl and surrounding area;

3.6.2 Sentra Kem is a supplier of pharmaceutical products. They previously did not sell facial masks. However, due to the sudden demand and panic buying brought on by the state of national disaster, Sentra Kem started selling facial masks.

3.6.3 Sentra Kern's average gross profit mark-up in respect of facial masks since March 2020 has consistently been above 20%.

Determination

of excessive pricing

3.7. The supplier and sales invoices submitted to the Commission by Sentra Kem revealed the following:

3.7.1.

The weighted average cost and selling price of masks was R19.08 and R27.11 (excluding VAT) respectively for the month of March and April 2020;

3.7.2. Sentra Kem made Gross Profit Margins ("GPM") of 29.61% between March and April 2020 on the sale of face masks as shown in table 1 below;

Tabla 1: Mark-up, gross profit margin and excess profit for sales of face masks over the period March 2020 to April 2020

3.7.3.

Sentra Kern's GPM since March 2020 has been consistently been above 20%. Using 20% as a competitive GPM (i.e. benchmark), the selling price would be R23.85 (excluding VAT). The investigation revealed that the Sentra Kem made excess profits of R15 785.03 during March 2020 and April 2020;

3.7.4. The Commission found that Sentra Kern's conduct of overcharging for facial masks may constitute a contravention of section 8(1)(a) of the Act read together with Regulation 4 of the Consumer Protection Regulations.

3.7.5. Sentra Kem is entering into this Consent Agreement in order to avoid protracted litigation and nothing in this Consent Agreement should be construed as an admission of liability for a contravention of the Consumer Protection Regulations or Section 8(1)(a) of the Act read together with Regulation 4 of Consumer Protection Regulation.

4. CONTRIBUTION TO THE SOLIDARITY FUND

4.1. Sentra Kem undertakes to pay a contribution in the amount of R15 785.03 to the Solidarity Fund;

4.2. Sentra Kem will pay the amount set out above to the Solidarity Fund within 7 (seven) calendar days from the date of confirmation of this consent agreement as an order of the Tribunal;

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

Name

Solldarlty Fund

Bank

Standard Bank

Account Number

[...]

Account Type

Current Account

Branch Coda

051001

Swift Coda

SBZAZAJJ

Payment Ref

2020Apr0458/SentraKem

5. AGREEMENT REGARDING FUTURE CONDUCT

Sentra Kem agrees to:

5.1. immediately desist from the pricing conduct described above;

5.2. reduce the gross profit margin charged in respect of facial masks to 20% or less from the date of confirmation of this agreement as an order by the Tribunal for the duration of the national state of disaster:

5.3. submit proof of payment and an affidavit under oath by the owner of Sentra Kem testifying that the abovementioned contribution has been made to the Solidarity Fund within 7 calendar days of such contribution;

5.4. 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;

5.5. 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

5.6. to circulate a statement summarising the content of this Consent Agreement to all management and operational staff employed at Sentra Kem 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 of Sentra Kem confirming compliance with this undertaking.

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 Sentra Kem 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. 2020APRC0458.

Tembinkosi Bonakele

The Commissioner, Competition Commission of South Africa

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