

SOUTH AFRICA / JUDGMENT

Competition Commission v Supra Healthcare Cape Town (Pty) Ltd (CO204Mar21) [2021] ZACT 91 (12 March 2021)

[2021] ZACT 91

COURT

Competition Tribunal

BEFORE

AW Wessels, Y Carrim, E Daniels

CASE / FILE NUMBER

CO204Mar21

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COMPETITION TRIBUNAL REPUBLIC OF SOUTH AFRICA

Case No: CO204Mar21

In the matter between:

The Competition Commission

Applicant

And

Supra Healthcare Cape Town (Pty) Ltd Respondent

Panel : AW Wessels (Presiding Member)

: Y Carrim (Tribunal Member)

: E Daniels (Tribunal Member)

Heard on : 12 March 2021

Decided on : 12 March 2021

CONSENT AGREEMENT (PUBLIC VERSION)

The Tribunal hereby confirms the consent agreement as agreed to and proposed by the Competition Commission and Supra Healthcare Cape Town (Pty) Ltd annexed hereto marked “A”.

Presiding Member Mr Andreas Wessels

Concurring: Ms Yasmin Carrim and Mr Enver Daniels

Date 12 March 2021

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT CASE NO:

CC CASE NO: 2020AUG0001

COMPETITION COMMISSION OF SOUTH AFRICA Applicant

and

SUPRA HEALTHCARE CAPE TOWN PROPRIETARY LIMITED Respondent

CONSENT AGREEMENT BETWEEN THE COMPEMION COMMISSION AND SUPRA HEALTHCARE CAPE TOWN (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 Supra Healthcare Cape Town Proprietary Limited 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 an alleged 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

1 DEFINRIONS

The following words shall, unless o1herw1se slated or inconsistent with the context in which they appear, bear the following meanings In this Consent Agreement

1.1 The Act means the Competition Ad 89 of 1998, as amended;

1.2 -Commission• means the Competition Commission of South Africa, a statutory body, established In term& of section 19 of the Ad, with Its principal place of business at Building C, Mulayo Building, the dtl Campus, 77 Meintles Street. Sunnyside, , Gauteng;

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

1.4 ·consent Agreement" means this agreement duly signed and concluded between the Commission and Supra Healthcare;

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 -[...] means personal protection equipment referring to face masks, gloves, and sanitizers used during the Covid 19 pandemic as a measure of protection against infection;

1.7 •supra Healthcare• means Supra Healthcare Cape Town Proprietary Limited (registration number 2006/020950/07), a private company duly Incorporated in terms of the applicable company laws of South Africa, a medical equipment supplier with its registered address at 5 and 6 Kastel Park, Longclaw Drive, Marconi Estate, Montague Gardens, Milnerton, Cape Town.

1.8 "The WC Department of Health• means the Western cape Department of Health, with its principal place of business situated

at 20th Floor, 4 Dorp Street, Gape Town.

1.9 "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 Dtl campus, n4Street, Sunnyside, Pretoria, Gauteng;

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

1.11 "Tribunal for COVID-19 [...] means the Regulations on Competition Tribunal Rules for [...]

2 BACKGROUND AND Context

2.1 On 15 March 2020, the Minister of Co-operative Governance and Traditional Affairs rcOGTA1 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 [...] 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 Ad. 1957 (Ad No. 57 of 2002) [...] 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 [...] 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:

4.1. 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) 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 equalling 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 [...] 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 and B 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 June 2020, the Commission received information in terms of section 49B(2)(a) of the Competition Act, against Healthcare, in relation to an alleged inflated price of medical examination gloves ("examination gloves"), that it charged the Western Cape Department of Health ("the WC Department of Health"). The WC Department of Health alleged that the prices were higher than the regulatory pricing guidelines provided by the National Treasury.

3.2 Examination 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. A 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 [...] absent cost increases.

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

3.6.1 Supra Healthcare is a medical equipment supplier situated in Montague Gardens, Cape Town.

3.6.2 During the Covid-19 disaster, the WC Department of Health attempted to procure PPE from various suppliers registered on the Ariba Platform [1] by way of an open invitation to [...] WC Department of Health.

3.6.3 On 15 May 2020, Supra Healthcare responded to the above mentioned invitation. On 1 June 2020, the WC Department of Health accepted Supra Healthcare's quotation and placed an order for 130 000 medium examination gloves and 130 000 [...] examination gloves.

3.6.4 Based on information submitted by Supra Healthcare, the cost price of the examination gloves amounted to R1.94 per unit (incl. [...]) and it sold [...] examination gloves to the WC Department of Health at a price of R1.94 per unit (incl. [...]). The total value of the order amounted to R504 400.00.

3.6.5 Table 1 below illustrates Supra Healthcare's actual cost; sale price; mark-ups and gross profit margins in relation to the examination gloves procured by the WC Department of Health.

3.6.6 The Commission's gross profit margin analysis revealed that Supra Healthcare derived a mark-up of % on the examination gloves; and a gross profit margin of .%. which is an unreasonably high margin as compared to the 30% benchmark applicable to the public procurement of PPE.

3.6.7 Table 2 below shows the estimated excessive profits generated by Supra Healthcare based on the Commission's calculations. [2]

[...]

3.6.8 [...]

3.6.9 [...]

AGREEMENT REGARDING FUTURE CONDUCT

Supra Healthcare confirms that It:

4.1 will immediately desist from the conduct descended above;

4.2 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 [...] include a mechanism for the monitoring and detection of any contravention of the [...].

4.3 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

4.4 [...] to circulate a statement summarising the content of this Consent Agreement to all management and operational staff employed at Supra Healthcare within 7 (seven) 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 CEO: Supra Healthcare, confirming compliance with this undertaking.

5 SETTLEMENT

5.1 In addition to its undertaking listed in clause 4 above, Supra Healthcare has agreed to provide the WC Department of Health with surgical masks to the value of R304 135. 00 (Three Hundred and Four Thousand, One Hundred and Thirty-Five Rand). The value of the masks will be calculated at cost price, and would be delivered to the WC Department of Health without the Department incurring any costs.

5.2 In light of the planning increasing of Covid-19 cases in the Western Cape in December 2020 and the correlating increased need for personal protection equipment (such as face masks), Supra Healthcare and the Commission agreed that Supra Healthcare would effect immediate delivery of 49 400 masks (which valued R304135 at cost price) to the WC Department of Health. The masks were duly delivered on Friday the 18th of December 2020 in compliance with this obligation.

8 FULL AND FINAL SETTLEMENT

This Consent Agreement, upon confirmation as an order by that Tribunal, is entered into in full and final settlement and concludes all proceedings between the Commission and Supra Healthcare, relating to any alleged contravention of section 8(1)(a) of the Ad read together with Regulation 4 of the Consumer and Customer Protection and National Disaster Management Regulations and Directions published in Government Gazette No 43118 on 19 March 2020 that is the subject of the Commission's investigation under Commission Case No. 2020

Tembinkosl Bonakele

The Commissioner, Competition Commission of South Africa

- [1] Arbia is a cloud based that allows suppliers and buyers to connect and do business on a single platform.
- [2] The commission calculated a overcharge on the examination gloves by making use of a 15% margin on the selling price which has been used in two referrals before the tribunal [....].

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