

SOUTH AFRICA / JUDGMENT

Competition Commission v West Coast Hardware (Pty) Ltd (CO044Jun20)

[2020] ZACT 57 (6 July 2020)

[2020] ZACT 57

COURT

Competition Tribunal

BEFORE

E Daniels, A Ndoni, F Tregenna

CASE / FILE NUMBER

CO044Jun20

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COMPETITION TRIBUNAL REPUBLIC OF SOUTH AFRICA

Case No: CO044Jun20

In the matter between:

The Competition Commission

Applicant

And

West Coast Hardware (Pty) Ltd

Respondent

Panel: E Daniels (Presiding Member)

A Ndoni (Tribunal Member)

F Tregenna (Tribunal Member)

Heard on: 06 July 2020

Decided on: 06 July 2020

CONSENT AGREEMENT

The Tribunal hereby confirms the consent agreement as agreed to and proposed by the Competition Commission and West Coast Hardware (Pty) Ltd annexed hereto.

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND WEST COAST HARDWARE (PTY) LTD T/A BRIGHTS HARDWARE STORE 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 West Coast Hardware (Pty) Ltd Ua Brights Hardware Store 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 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 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 West Coast Hardware;

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 "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;

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

1.8 "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; and

1.9 "West Coast Hardware" means West Coast Hardware (Pty) Ltd trading as Brights Hardware Store a private company duly registered in accordance with the laws of the Republic of South Africa, with its principal place of business at Shop No 1, Laguna Mall, Langebaan, Western Cape.

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 –

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

or

4.2.2. 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 March 2020, the Commission received information in terms of section 498(2)(a) of the Competition Act, against West Coast Hardware in relation to the allegedly inflated prices of dust masks FFP1 that it was charging its customers in March 2020.

3.2 Dust masks FFP1 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(3) of the Act, market power can also be inferred from the economic behaviour of the firm. The mere ability to raise prices can be 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 West Coast Hardware's alleged conduct and found the following:

3.6.1 West Coast Hardware trades as Brights Hardware Store, which is a group of hardware stores that trades in eight towns in the Western Province;

3.6.2 West Coast Hardware operates in the market for the supply of a variety of hardware product range, including dust masks, tools, plumbing, building electronics to consumers in areas such as, Blackheath, Boston, Langebaan, Mitchells Plain, Montague Park, Platteklouf, Stikland, Uitzicht and Brackenfell which are all located within the Western Cape Province;

3.6.3 West Coast Hardware has market power in the market for the supply of dust masks to consumers in the areas where it operates, given the current pandemic and state of national disaster;

3.6.4 During March 2020, West Coast Hardware realised gross margins and mark-up as depicted in table 1 below. The table also shows the estimated excess profits realised by West Coast Hardware.

3.7 During the above -mentioned period, the gross margins across all of West Coast Hardware's branches were in excess of the average 20% gross margin, which is generally earned on dust mask and regarded as fair and reasonable. The Commission found that the average gross margin of approximately 49.4% during March 2020 in respect of dust masks FFP1 by West Coast Hardware across all of its branches is a contravention of section 8(1)(a) of the Act read together with Regulation 4 of the Consumer Protection Regulations.

3.8 West Coast Hardware does not admit 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.

3.9 After engaging with the Commission, West Coast Hardware nevertheless agrees to resolve the complaint on the terms set out below.

4 AGREEMENT REGARDING FUTURE CONDUCT AND DONATION TO THE SOLIDARITY FUND

West Coast Hardware agrees to:

4.1 immediately desist from the pricing conduct described above;

4.2 reduce its gross margin on dust masks FFP1 to 20% with immediate effect for the duration of the state of the national disaster;

4.3 pay RS 074.63 in the form of donation to the Solidarity Fund within 7 (Seven) calendar days from the date of confirmation of this Consent Agreement as an order by the Tribunal.

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: SBZAJAJ

PAYMENT REF: CompCom 2020AprC0262/West Coast

4.4 submit within a period of 7 (Seven) calendar days, an affidavit under oath by the owner of West Coast Hardware testifying that the abovementioned donation has been made to the Solidarity Fund in line with paragraph 4.3 above;

4.5 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;

4.6 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

4.7 to circulate a statement summarising the content of this Consent Agreement to all management and operational staff employed at West Coast Hardware in all eight stores 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 CEO of West Coast Hardware confirming compliance with this undertaking.

5 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 West Coast Hardware 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. 2020AprC0262.

Orlando Luis

CEO: West Coast Hardware (Pty) Ltd

Tembinkosi Bonakele

The Commissioner, Competition Commission of South Africa

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