

SOUTH AFRICA / JUDGMENT

Competition Commission v Retrospective Trading 199 CC t/a Merlot Pharmacy (CO018May20.2020) [2020] ZACT 53; [2020] 1 CPLR 303 (CT) (14 May 2020) [2020] ZACT 53

COURT

Competition Tribunal

BEFORE

Y Carrim, A Ndoni, A Roskam

CASE / FILE NUMBER

CO018May20.2020

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COMPETITION TRIBUNAL REPUBLIC OF SOUTH AFRICA

Case No: CO018May20

In the matter between:

The Competition Commission

Applicant

And

Retrospective Trading 199 CC t/a

Respondent

Merlot Pharmacy

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 Retrospective Trading 199 CC t/a Merlot Pharmacy annexed hereto marked "A".

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT CASE NO:

CC CASE NO: 2020APRC0393

COMPETITION COMMISSION OF SOUTH AFRICA Applicant

and

RETROSPECTIVE TRADING 199 CC TIA

MERLOT PHARMACY Respondent

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND RETROSPECTIVE TRADING 199 CC TIA MERLOT PHARMACY 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 Retrospective Trading 199 CC t/a Merlot Pharmacy 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

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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 Retrospective Trading 199 CC CC Ua Merlot Pharmacy;

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 "Merlot Pharmacy" means Retrospective Trading 199 CC t/a Merlot Pharmacy with registration number 2002 07 26 7023, situated at Shop 1, Merlot Park, Corner Merlot & Janssens Avenue, Table View, Western Cape, 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, 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.

3 THE COMMISSION'S INVESTIGATIONS AND FINDINGS

3.1 During April 2020, the Commission received information in terms of section 49B(2)(a) of the Competition Act, against Merlot Pharmacy in relation to alleged inflated prices of hand sanitizers and facial masks, to customers in March 2020.

3.2 Hand sanitizers and facial masks fall under the category of 'medical and hygiene supplies' in Annexure A as well as item(s) 1.2 and 1.3 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. 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 Merlot Pharmacy's alleged conduct and found the following:

3.6.1 Merlot Pharmacy is located in the Western Cape and operates in the market for the supply of pharmaceutical products to consumers in the Table View area of the Western Cape;

3.6.2 Merlot Pharmacy has market power in the abovementioned market, given the current pandemic and state of national disaster;

3.6.3 Merlot Pharmacy's average cost mark-up on hand sanitizers in March and April 2020 was 63,04%, which equates to a gross profit margin of 38,67%;

3.6.4 Merlot Pharmacy's average cost mark-up on facial masks in March and April 2020 was 44,95%, which equates to a gross profit margin of 31%;

3.6.5 Merlot Pharmacy did not sell any hand sanitizers and facial masks before March 2020 as they only started selling hand sanitisers and face masks in March 2020, due to the sudden demand and panic-buying brought on by the national state of disaster;

3.6.6. In respect of hand sanitizers, Merlot Pharmacy sold a total of 244 units of hand sanitizers during March and April 2020 and achieved a revenue of R18 300.00 as a result; and

3.6.7. In respect of facial masks, Merlot Pharmacy sold a total of 3 624 units of facial masks during March and April 2020 and achieved a revenue of R181 200.00 as a result.

3.7 The Commission found that the average cost mark-up of 63,04% and gross profit margin of 38,67% in respect of hand sanitizers; and further an average cost mark-up of 44,95% and gross profit margin of 31% in respect of facial masks, in March and April 2020 by Merlot Pharmacy may amount to a contravention of section 8(1)(a) of the Act read together with Regulation 4 of the Consumer Protection Regulations.

4 AGREEMENT REGARDING FUTURE CONDUCT

Merlot Pharmacy, agrees to:

4.1 immediately desist from the pricing conduct described above;

4.2 reduce its gross profit margin on facial masks and hand sanitizers to 20% or less with immediate effect for the duration of the national state of the disaster;

4.3 to donate, within 7 calendar days of the date of confirmation of this Consent Agreement as an order by the Tribunal, an amount of R 16832.00 (sixteen thousand eight hundred and thirty two Rand alone) in the form of a cash donation to the Solidarity Fund using the following bank account details:

Bank: Standard Bank

Branch Name: Sandton City

Account Name: Solidarity Fund

Account Number: [....]

Account Type: Current account

Branch Code: 051001

SWIFT Code: SBZAJJ

4.4 within 7 calendar days of confirmation of this Consent Agreement as an order of the Tribunal, submit an affidavit under oath by a duly authorised representative of Merlot Pharmacy, testifying that the abovementioned donation has been made. Proof of payment must also be sent to collections@compcom.co.za. Please include this case number 2020APRC0393 in the subject line;

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 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 circulate a statement summarising the content of this Consent Agreement to all management and operational staff employed at Merlot Pharmacy 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 a duly authorised representative of Merlot Pharmacy, 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 Merlot Pharmacy 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. 2020APRC0393.

N. Nagien Ranchod

Duly authorised to sign on behalf of Merlot Pharmacy

Signed at Pretoria on this the 30th day of April 2020.

Tembinkosi Bonakele

The Commissioner, Competition Commission of South Africa

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