



competitiontribunal
SOUTH AFRICA

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: CO052Jun20

In the matter between:

The Competition Commission

Applicant

And

Mica Barberton

Respondent

Panel : AW Wessels (Presiding Member)
: Y Carrim (Tribunal Member)
: A Ndoni (Tribunal Member)

Heard on : 08 July 2020

Decided on : 08 July 2020

CONSENT AGREEMENT

The Tribunal hereby confirms the consent agreement as agreed to and proposed by the Competition Commission and Mica Barberton annexed hereto.

**Presiding Member
Mr AW Wessels**

**08 July 2020
Date**

Concurring: Ms Yasmin Carrim and Ms Andiswa Ndoni



Form CT 6

About this Form

This Form is issued in terms of the Competition Tribunal Rules.

Please indicate in the space provided the nature of your motion, including specific reference to the relevant section of the Act or Tribunal Rules.

If this Notice of Motion concerns a matter being brought in terms of Division E of Part 4 of the Competition Tribunal Rules, it must comply with the requirements of Competition Tribunal Rule 42(3).

Contacting the Tribunal

The Competition Tribunal
Private Bag X24
Sunnyside
0132
Republic of South Africa
tel: 27 12 394 3300
e-mail: ctsa@comptrib.co.za

Notice of Motion

Date: _____ File # _____

To: The registrar of the Competition Tribunal

Concerning the matter between:

_____ (Applicant)
and _____ (Respondent)

Take notice that the _____
intends to apply to the Tribunal for the following order:

Name and Title of person authorised to sign:

Authorised Signature:

Date:

For Office Use Only:	Tribunal file number: _____	Date filed: _____
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IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT CASE NO:

CC CASE NO: 2020AprC0040

In the matter between:

COMPETITION COMMISSION OF SOUTH AFRICA

Applicant

and

MICA BARBERTON

Respondent

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND MICA BARBERTON 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 Mica Barberton 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 27(1)(d) read with 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 Settlement Agreement:

- 1.1. “**Act**” means the Competition Act 89 of 1998, as amended;
- 1.2. “**Mica Barberton**” means Mica Barberton a hardware retail store with registration number 2007/038354/23 situated at 113 Crown Street, Barberton, Mpumalanga;
- 1.3. “**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;
- 1.4. “**Commissioner**” means the Commissioner of the Competition Commission, appointed in terms of section 22 of the Act;
- 1.5. “**Consent Agreement**” means this agreement duly signed and concluded between the Commission and Mica Barberton;
- 1.6. “**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;

- 1.7. **“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.
- 2.8. 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.

2.9. 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 of the firm 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.

2.10. 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. THE COMMISSION'S INVESTIGATION AND FINDINGS

3.1. On 02 April 2020, the Commission received information in terms of section 49B(2)(a) of the Act, against Mica Barberton in relation to the inflated prices of FFP2 NR facial masks that it was charging its customers during March 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. Following receipt of the information, the Commission investigated Mica Barberton's alleged conduct and found the following:
- 3.3.1. Mica Barberton is a hardware retail store located in Barberton, Mpumalanga. It sells various products such as automotive components, general building materials and medical and hygiene supplies. Its medical and hygiene supplies include facial masks, hand sanitizers and general personal protective equipment.
- 3.3.2. Mica Barberton had market power in the abovementioned market for the supply of medical and hygiene supplies (specifically facial masks), given the current pandemic and state of national disaster.
- 3.3.3. Mica Barberton sourced FFP2 NR facial masks from PlusTen at a cost of R53.50 per box of 20 masks prior to March 2020. It made no purchases of stock for this product in March 2020.
- 3.3.4. During January 2020, Mica Barberton sold FFP2 NR facial masks to customers at a price of R87.00 per box of 20 masks. In February Mica Barberton increased its price from R87.00 to R96.52 per box of 20 masks. This was a percentage price increase of approximately 11%.
- 3.3.5. In or around 11 March 2020, Mica Barberton increased its price for the same product from R96.52 to R433.91 per box of 20 masks. This was a percentage price increase of approximately 350%.

3.3.6. Mica Barberton therefore added a mark-up of approximately 711% on this product during the period between 11 and 21 March 2020. It sold 16 units of the FFP2 NR facial masks making excess profit of R5 398.24 during period between 11 and 21 March 2020.

3.3.7. The Commission found that Mica Barberton's price increase of FFP2 NR facial masks during period between 11 and 21 March 2020 contravention of section 8(1)(a) of the Act read together with Regulation 4 of the Consumer Protection Regulations.

4. AGREEMENT REGARDING FUTURE CONDUCT

Mica Barberton agrees to:

- 4.1. immediately desist from the excessive pricing conduct described above;
- 4.2. reduce its mark-up on facial masks to 20% with immediate effect for the duration of the state of the national disaster;
- 4.3. pay a contribution in the total amount of R10 000.00 (**Ten Thousand Rands**) to the Solidarity Fund. This amount does not exceed the statutory limit of 10% of the Mica Barberton's annual turnover in the Republic for its preceding financial year;
- 4.4. Mica Barberton shall pay the abovementioned amount to the Solidarity Fund within 7 calendar days from the date of confirmation of this consent agreement as an order of the Tribunal.



4.5. The contribution shall be paid into the Solidarity Fund's bank account, details of which are as follows:

Bank name: Standard Bank
Account holder: Solidarity Fund
Account number: 023 070 021
Branch Code: 051001
Swift Code: SBZAZAJJ
Reference: Compcom 2020AprC0040 / Mica Barberton

4.6. Mica Barberton further agrees to:

- 4.6.1. 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;
- 4.6.2. 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
- 4.6.3. to circulate a statement summarising the content of this Consent Agreement to all management and operational staff employed at Mica Barberton 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 Mica Barberton confirming compliance with this undertaking.



5. FULL AND FINAL SETTLEMENT

5.1. 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 Mica Barberton 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 Case No. 2020AprC0040.

For Mica Barberton

Signed at Barberton on this the 30th day of May 2020.



Anton Erasmus

Owner, Mica Barberton

For the Commission

Signed at PRETORIA on this the 30TH day of May 2020.



Tembinkosi Bonakele

Commissioner