



competitiontribunal
SOUTH AFRICA

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: CO053Jun20

In the matter between:

The Competition Commission

Applicant

And

Eldoram Dienste CC t/a Eldopark
Pharmacy

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 Eldoram Dienste CC t/a Eldopark Pharmacy annexed hereto.

**Presiding Member
Mr AW Wessels**

**08 July 2020
Date**

Concurring: Ms Y 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: 2020AprC0387

In the matter between:

COMPETITION COMMISSION OF SOUTH AFRICA

Applicant

and

ELDORAM DIENSTE CC t/a ELDOPARK PHARMACY

Respondent

SETTLEMENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND ELDORAM DIENSTE CC t/a ELDOPARK 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 Dienste CC t/a Eldopark Pharmacy hereby agree that application be made to the Competition Tribunal for the confirmation of this Settlement 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. "**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. "**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;

1.5. "**Eldopark Pharmacy**" means Eldorama Dienste a close corporation with registration number 1998/036110/23 situated at 186 Springbok Street, Wierda Park Shopping Centre, Wierda Park, Centurion, Gauteng;

1.6. "**Settlement Agreement**" means this agreement duly signed and concluded between the Commission and Eldopark Pharmacy;

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. On 9 April 2020, the President of the Republic of South Africa announced the extension of the enforced nationwide lockdown by a further two weeks, until the end of April 2020. This lockdown has since been further extended and it remains ongoing.

3. THE COMMISSION'S INVESTIGATION AND FINDINGS

Investigation

- 3.1. On 1 April 2020, the Commission received information regarding the inflated prices of face masks charged by Eldopark Pharmacy. Based on this information, the Commissioner, acting in terms of section 49B(1) of the Act initiated a complaint against Eldopark Pharmacy for alleged excessive pricing of face masks that it was charging its customers during March and April 2020.

- 3.2. Face 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 Settlement 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. 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.
- 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.

Findings

- 3.6. Following receipt of the information, the Commission investigated Eldopark Pharmacy’s alleged conduct and, *inter alia*, found the following:

3.6.1. Eldopark Pharmacy is a community pharmacy that trades in the Wierda Park area, Centurion.

3.6.2. Eldopark Pharmacy is involved in the retailing of pharmaceutical and hygiene products (which include face masks);

3.6.3. Eldopark Pharmacy had market power in the market for 3 Ply Loop surgical face masks and 3 Ply KN90 Grade surgical face masks as well as FFP1 face masks, given the current pandemic and state of national disaster;

3.6.4. The Commission's investigation revealed that Eldopark Pharmacy charged excessive prices when selling 3 Ply Loop surgical face masks, 3 Ply KN90 Grade surgical masks and FFP1 face masks during the national disaster;

3.6.5. In respect 3 Ply Loop surgical face masks, the Commission, *inter alia*, found that:

3.6.5.1. In April 2020 Eldopark Pharmacy purchased 3 Ply Loop 50 in a box masks at a cost price of R990 (excl VAT) per box. The cost price for a single mask of this type of mask was R19.80 (excl VAT).

3.6.5.2. Eldopark Pharmacy then sold these surgical masks to its customer for R1521 (excl VAT) per box and R30.43 (excl VAT) per mask in the process adding a mark-up of 54% per box and 54% per mask during the month of April 2020;

- 3.6.5.3. Eldopark Pharmacy, mark-ups for 3 Ply surgical Loop face masks (per box and per mask) increased from 39% charged in January 2020 to 54% in April 2020.
- 3.6.6. In respect of 3 Ply KN90 Grade surgical face masks which Eldopark started selling in March 2020, the Commission found that Eldopark Pharmacy bought these face masks from Fordel Retail (Pty) Ltd t/a Fordel Technologies at a cost price of R21.74 (excl VAT) per mask and added a mark-up of 52%. This resulted in a selling price of R33.04 (excl VAT) per mask.
- 3.6.7. In respect of the FFP1 face masks, the Commission also found that Eldopark Pharmacy started selling this type of face masks in March 2020. The investigation revealed that Eldopark Pharmacy sourced six boxes of FFP1 face masks from Arrie Pharmacy at a cost price of R31.99 (excl VAT) per mask and sold them to customers at R43.48 (excl VAT) per mask. This is a mark-up of 36%.
- 3.6.8. The Commission found that Eldopark Pharmacy's mark-up on the face masks identified above are unreasonably high and therefore fall foul of section 8(1)(a) of the Act read together with Regulation 4 of the *Consumer Protection Regulations*.

4. ADMISSION OF LIABILITY

- 4.1. Eldopark Pharmacy admits that its mark-up for 3 Ply Loop surgical face masks, 3 Ply KN90 Grade surgical face masks and FFP1 face masks during March and April 2020 are in contravention of section 8(1)(a) of the Act read together with Regulation 4 of the Consumer Protection Regulations.

5. CONTRIBUTION TO THE SOLIDARITY FUND

- 5.1. Eldopark Pharmacy undertakes to pay a contribution in the amount of R5500.00 (**five thousand five hundred Rand**) to the Solidarity Fund.
- 5.2. Eldopark Pharmacy will pay the amount set out above to the Solidarity Fund within 7 (seven) days from the date of the confirmation of this Settlement Agreement as an order by the Tribunal.
- 5.3. This contribution must be made into the Solidarity Fund's bank account, details of which are as follows:

Account holder	: Solidarity Fund
Bank Name	: Standard Bank
Account number	: 023 070 021
Branch code	: 051001
Swift Code	: SBZAZAJJ
Payment reference	: Compcom2020AprC0387

6. AGREEMENT REGARDING FUTURE CONDUCT

Eldopark Pharmacy agrees to:

- 6.1. immediately desist from the excessive pricing conduct described above;
- 6.2. reduce its mark-ups on 3 Ply Loop surgical face masks, 3ply KN90 Grade surgical face masks and FFP1 face masks to a maximum of 20%, with immediate effect, for the duration of the state of the national disaster;

- 6.3. submit an affidavit under oath by the owner of Eldopark Pharmacy confirming that the abovementioned contribution has been made to the Solidarity Fund within 7 calendar days of such contribution;
- 6.4. 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;
- 6.5. to submit a copy of a compliance programme to the Commission within 60 business days of the date of confirmation of the Settlement Agreement as an order by the Tribunal or such longer period as may be agreed with the Commission depending on the duration of any lockdown imposed in terms of the legislation and directions referred to in paragraphs 2.1 and 2.2 above; and
- 6.6. to circulate a statement summarising the content of this Settlement Agreement to all management and operational staff employed at Eldopark Pharmacy within 7 calendar days from the date of confirmation of this Settlement Agreement by the Tribunal and notifying the Commission by submitting an affidavit under oath by the owner of Eldopark Pharmacy confirming compliance with this undertaking.

7. FULL AND FINAL SETTLEMENT

This Settlement 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 Eldopark 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 **Case No. 2020AprC0387**.

For Eldopark Pharmacy

Signed at Cenburia on this the 12th day of June 2020.



Jacobus Nicolaas Bester

Manager, Eldopark Pharmacy

For the Commission

Signed at PRETORIA on this the 19TH day of June 2020.



Tembinkosi Bonakele

Commissioner,