

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CO009Apr20

In the matter between:

Competition Commission

Applicant

And

Evergreens Fresh Market (Pty) Ltd

Respondent

Panel : Y Carrim (Presiding Member)
: E Daniels (Tribunal Panel Member)
: F Tregenna (Tribunal Panel Member)
Heard on : 30 April 2020
Decided on : 30 April 2020

Consent Agreement

The Tribunal hereby confirms the consent agreement as agreed to and proposed by the Competition Commission and Evergreens Fresh Market (Pty) Ltd annexed hereto.

Presiding Member
Ms Yasmin Carrim

30 April 2020

Date

Concurring: Mr Enver Daniels and Prof. Fiona Tregenna

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

**CT CASE NO:
CC CASE NO: 2020APRC0224**

In the matter between:

COMPETITION COMMISSION OF SOUTH AFRICA

Applicant

and

EVERGREENS FRESH MARKET (PTY) LTD

Respondent

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION OF SOUTH AFRICA AND EVERGREENS FRESH MARKET (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 Evergreens Fresh Market (Pty) Ltd 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 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 Consent Agreement:

- 1.1 **“Act”** means the Competition Act 89 of 1998, as amended;
- 1.2 **“Evergreens Fresh Market”** means Evergreens Fresh Market (Pty) Ltd, a private company incorporated in accordance with the company laws of the Republic of South Africa, with its principal place of business at 1846 Rooiberg Place, Witfontein X52, Kempton Park, Gauteng, South Africa;
- 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 Evergreens Fresh Market;

- 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 authorised the Minister of Trade, Industry and Competition 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, Industry and Competition 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 2020, the Tribunal Directive for Covid-19 Excessive Pricing Complaint Referrals was issued.

3 THE COMMISSION'S INVESTIGATIONS AND FINDINGS

3.1 On 20 March 2020, the Commission received information in terms of section 49B(2)(a) of the Act, against Evergreens Fresh Market in relation to the inflated prices of Alphasel hand sanitisers that it was charging its customers in March 2020.

3.2 Hand sanitisers fall under the category of 'medical and hygiene supplies' in Annexure A as well as item 1.2 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. In this case, 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 Evergreens Fresh Market's alleged conduct and found the following:

3.6.1 Evergreens Fresh Market is a hybrid store that trades in the Kempton Park area offering fresh produce to both retail and wholesale customers. The stores generally sell perishable and non-perishable food items;

3.6.2 Evergreens Fresh Market operates in the market for the supply of fresh perishable and non-perishable produce to retail and wholesale consumers in the Kempton Park central business district. Evergreens Fresh Market is therefore a new entrant in the market for the supply of medical and hygiene supplies, specifically hand sanitisers.

- 3.6.3 Evergreens Fresh Market has temporal market power in the abovementioned market, given the current pandemic and state of national disaster;
- 3.6.4 During March 2020, in light of the COVID-19 pandemic and upon the request from its customers, Evergreens Fresh Market ordered hand sanitisers from a supplier, Work Cloud (Pty) Ltd, with the intention to resell to its customers;
- 3.6.5 Evergreens Fresh Market purchased the product from the supplier for R110 excluding VAT, R126.50 with VAT and sold it to its customers for R189.95;
- 3.6.6 Evergreens Fresh Market sold a total number of 45 units of 500ml bottles of Alphacel hand sanitisers to its customers for R189.95 each and made a gross profit of R2 855,25 (R189.95 minus R126.5 multiplied by 45 units)
- 3.6.7 Evergreens Fresh Market's mark-up on hand sanitisers, is 50.1% and gross profit margin of 33.4%. Evergreens maintains that 33.4% margin is consistent with its other products which do not fall under the disaster Regulations;
- 3.6.8 Evergreens Fresh Market did not sell hand sanitisers before March 2020. However, due to the sudden demand by its customers, Evergreens Fresh Market had to source hand sanitisers from a supplier named Work Cloud; and

3.6.9 Evergreens Fresh Market's average margin in respect of hand sanitisers for March 2020 was approximately 33.4%;

3.7 The Commission found that the gross profit margin of 33.4% in respect of hand sanitisers for March 2020 is not reasonable. The average margins of sanitisers from a number of retailers are between 20% to 25% which the Commission deem to be reasonable.

3.8 Evergreens Fresh Market enters into this Consent Agreement to avoid protracted litigation and nothing in this Consent Agreement should be construed as an admission of liability for the alleged contravention of the Act by Evergreens Fresh Market.

4 AGREEMENT REGARDING FUTURE CONDUCT

Evergreens Fresh Market agrees to:

- 4.1 immediately desist from the above-mentioned pricing conduct described above;
- 4.2 reduce its margin on hand sanitisers to 25% or lower with immediate effect;
- 4.3 donate hand sanitisers amounting to the value of R1 800 which is calculated as follows:

Original price = R189.95

Price with 25% margin = R149.95

Overcharge per unit = R40

Number of units sold at 189.95 = 45 units

Total overcharge (R40X 45 units) = R1 800

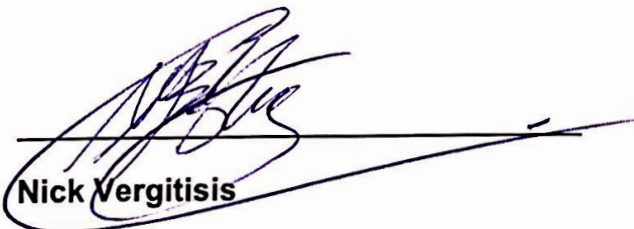
- 4.4 within 7 calendar days of confirmation of this Consent Agreement as an order of the Tribunal, donate hand sanitisers to Tembisa Provincial Hospital;
- 4.5 submit proof of the donation by the general manager of Evergreens Fresh Market to the Commission by email confirming that the above-mentioned donation has been made to Tembisa Provincial Hospital within 7 calendar days of the donation being made; and
- 4.6 develop, implement and monitor a competition law compliance programme incorporating corporate governance designed to ensure that its employees, management, directors and agents are familiar with the Act. In particular, such compliance programme will include a mechanism for the monitoring and detection of any contravention of the Act;
- 4.7 to submit a copy of a compliance programme to the Commission within 60 working days of the date of confirmation of the Consent Agreement as an order by the Tribunal; and

4.8 to circulate a short statement summarising the content of this Consent Agreement to all management staff employed at Evergreens Fresh Market within 60 working days from the date of confirmation of this Consent Agreement by the Tribunal.

5 FULL AND FINAL SETTLEMENT

This Consent Agreement is entered into in full and final settlement and concludes all proceedings between the Commission and Evergreens Fresh Market 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. **2020APRC0224**.

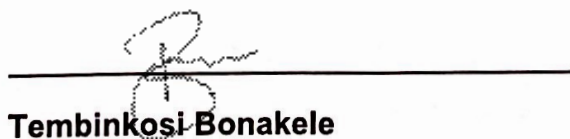
Signed at Kempton on this the 24th day of April 2020.



Nick Vergitis

General Manager, Evergreens Fresh Market

Signed at PRETORIA on this the 24TH day of April 2020.



Tembinkosi Bonakele

The Commissioner, Competition Commission of South Africa