



competitiontribunal
SOUTH AFRICA

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: CO011Apr20

In the matter between:

The Competition Commission

Applicant

And

Van Heerden Pharmacy Rosslyn

First Respondent

Van Heerden Pharmacy Lyttleton

Second Respondent

Van Heerden Pharmacy Phalaborwa

Third Respondent

Panel : E Daniels (Presiding Member)
: M Mazwai (Tribunal Member)
: T Vilakazi (Tribunal Member)

Heard on : 04 May 2020

Decided on : 06 May 2020

CONSENT AGREEMENT

The Tribunal hereby confirms the consent agreement as agreed to and proposed by the Competition Commission and Van Heerden Pharmacy Rosslyn; Van Heerden Pharmacy Lyttleton; Van Heerden Pharmacy Phalaborwa annexed hereto marked "A", as well as an addendum to the consent agreement marked "B".

**Presiding Member
Mr Enver Daniels**

**Date
6 May 2020**

Concurring: Ms Mondo Mazwai and Dr. Thando Vilakazi

**IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
(HELD IN PRETORIA)**

"A"

CT Case No.

CC Case No. 2020AprC0369

In the matter between:

COMPETITION COMMISSION

Applicant

and

VAN HEERDEN PHARMACY ROSSLYN

First Respondent

VAN HEERDEN PHARMACY LYTTLETON

Second Respondent

VAN HEERDEN PHARMACY PHALABORWA

Third Respondent

FILING SHEET

TAKE NOTICE THAT the Applicant files herewith the following documents:

1. Competition Tribunal Form CT 6; and
2. A Confidential Consent Agreement between the Competition Commission and Van Heerden Pharmacy Group.

DATED AT PRETORIA ON THIS 28th DAY OF APRIL 2020.

COMPETITION COMMISSION

Applicant

77 Meintjies Street

Sunnyside

Pretoria

Tel: 012 394 3527

Ref: Bakhe Majenge / Maya Swart /

Luke Rennie

E-mail: BakheM@compcom.co.za/

MayaS@compcom.co.za /

LukeR@compcom.co.za

TO:

THE REGISTRAR

Competition Tribunal

Block C, The dti Campus

77 Meintjies Street

Sunnyside

Pretoria

Tel: 012 394 3355

Email: ctsa@comptrib.co.za/ registry@comptrib.co.za

AND TO:

Kingsbury Graça Attorneys

C/o VAN HEERDEN PHARMACY GROUP

1st to 3rd Respondents

85 Newton Road

Meadowdale

Gauteng

Tel: 011 974 0429 / 082 332 6613

Email: jeremy@kigr.co.za



competitiontribunal

SOUTH AFRICA

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:

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT CASE NO:
CC CASE NO: 202APRC0369

In the matter between:

COMPETITION COMMISSION OF SOUTH AFRICA

Applicant

And

VAN HEERDEN PHARMACY ROSSLYN (PTY) LTD **First Respondent**

VAN HEERDEN PHARMACY LYTTLETON (PTY) LTD **Second Respondent**

VAN HEERDEN PHARMACY PHALABORWA (PTY) LTD **Third Respondent**

**CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND
VAN HEERDEN PHARMACY GROUP 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**

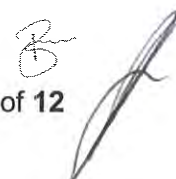
The Competition Commission and Van Heerden Pharmacy Group hereby agree that application be made to the Competition Tribunal for the confirmation of this Consent Agreement as an order of the Tribunal in terms of section 49D of the Competition Act 89 of 1998, as amended ("**the Act**"), in respect of a 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 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 **“Consent Agreement”** means this agreement duly signed and concluded between the Commission and Van Heerden 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 “**FFP2 masks**” means the Filtering Facepiece Particles category 2 mask certified by the European Union that serves to protect against particulates such as dust particles and various viruses in the air;
- 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;
- 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; and
- 1.10 “**Van Heerden Pharmacy**” means the Van Heerden Pharmacy Group which consists of the 1st to 3th respondents being the three registered companies with a number of branch pharmacies including its branch pharmacy at Sonpak, Nelspruit, Mpumalanga Province. The three registered entities are Van Heerden Pharmacy Rosslyn with registration number 2017/1860/35, Van Heerden Pharmacy Lyttelton with registration number 2019/2117/92 and Van Heerden Pharmacy

Phalaborwa with registration number 2018/6238/37, all companies duly incorporated in accordance with the laws of the Republic of South Africa, with their registered place of business at 10 Industria Road, Bela Bela.

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.

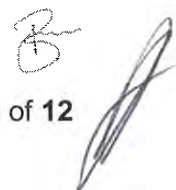
4.1. In terms of section 8(1) of the Competition Act a dominant firm may not charge an excessive price to the detriment of consumers or customers.

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 an extension of the enforced nationwide lockdown by a further two weeks, until the end of April 2020.

3 THE COMMISSION'S INVESTIGATIONS AND FINDINGS

- 3.1 On or around 24 March 2020, the Commission received information in terms of section 49B(2)(a) of the Competition Act, against Van Heerden Pharmacy complaining of the excessive price charged by the Respondent for, *inter alia*, FFP2 masks at the Van Heerden Pharmacy in Sonpark, Nelspruit branch.
- 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 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 Van Heerden Pharmacy's alleged conduct and found the following:

3.6.1 Van Heerden Pharmacy is a pharmacy which generally operates in the market for the supply of pharmaceutical products to consumers;

3.6.2 Van Heerden Pharmacy, does operate in the market for the supply of face masks, including, *inter alia*, the FFP2 masks to the consumers in and surrounding its branch in Sonpark, Nelspruit;

3.6.3 Van Heerden Pharmacy has market power in the abovementioned market, given the current pandemic and state of national disaster;

3.6.4 Van Heerden Pharmacy sells the FFP2 masks in boxes of 5's, 20's and singles masks;

3.6.5 Van Heerden Pharmacy does not manufacture the masks, but rather purchases them from various suppliers and then on sells the masks to its customers;

3.6.6 Van Heerden Pharmacy increased its pricing on FFP2 masks by more than 10% from prices charged in February 2020, to prices charged in March 2020, as set out in table 1 below;

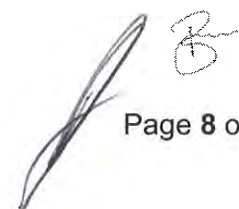


Table 1: Invoice prices of the varieties of masks in rand, the selling prices in rand and the mark-ups for van Heerden (February - March 2020)

Varieties of face masks	Invoice price/unit	Selling price/unit	Mark-up/unit (invoice)	% increase in mark-up over invoice prices from Feb to March	Gross margins	Increase in gross margins
C-Mask FFP2 5's (Feb)	R50.00	R79.01	R29.01	327%	58.0%	12.3%
C-Mask FFP2 5's (Mar)	R175.00	R298.90	R123.9		70.3%	
C-Mask FFP2 20's (Feb)	200.00	299.00	R99	395%	49.5%	20.5%
C-Mask FFP2 20's (Mar)	700.00	1190.00	R490		70.0%	
C-Mask FFP2 Single (Feb)	10.00	15.90	R5.9	322%	59.0%	12.1%
C-Mask FFP2 Single (Mar)	35.00	59.90	R24.9		71.1%	

3.6.7 Table 1 above shows that Van Heerden Pharmacy has significantly increased its prices of C-Mask FFP2 5's, C-Mask FFP2 20's and C-Mask FFP2 Single following the COVID-19 outbreak. The table above shows that the Van Heerden Pharmacy's mark-up has increased by over 300% between February and March 2020. It is also clear from the above table that the Van Heerden Pharmacy has increased its margins quite significantly;

3.6.8 Van Heerden Pharmacy's supplier had only increased its price by 250% between February and March 2020 and that there accordingly appears to be no justification for the significant price increases effected by the Respondent between February 2020 and March 2020.

3.7 The Commission found that the increase in the average mark-up in respect of the FFP2 masks in March 2020 by Van Heerden Pharmacy



is 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

Van Heerden Pharmacy agrees to:

- 4.1 immediately desist from the excessive pricing conduct described above;
- 4.2 reduce its mark-up on all masks to 20% with immediate effect for the duration of the state of the national disaster;
- 4.3 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;
- 4.4 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
- 4.5 to circulate a statement summarising the content of this Consent Agreement to all management and operational staff employed at Van

Heerden 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 the CEO and/or owner and/or managing director of Van Heerden Pharmacy confirming compliance with this undertaking.

5 SETTLEMENT AMOUNT

5.1 Van Heerden Pharmacy undertakes to pay an amount of R30 000.00 (thirty thousand rand), an amount agreed on the basis of, *inter alia*, importance of the products during the period and the extra income Van Heerden Pharmacy made as a result the contravention.

5.2 Van Heerden Pharmacy will pay the amount set out in clause 5.1 above to the Commission in one instalment directly into the Commission's bank account within 30 calendar days from the date of confirmation of this Consent Agreement by the Tribunal.

5.3 The settlement amount must be paid into the Commission's bank account which is as follows:

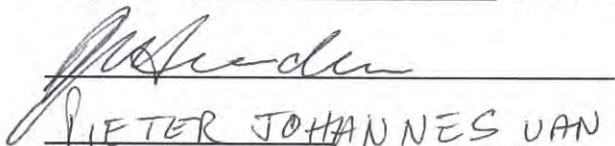
Name:	THE COMPETITION COMMISSION
Bank:	ABSA BANK BUSINESS BANK
Account Number:	40-8764-1778
Branch Code:	632005
Payment Ref:	VANHEERDEN202APRC0369



6 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 Van Heerden 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 at Van Heerden Pharmacy in Sonpark, Nelspruit that is the subject of the Commission's investigation under Commission Case No. **202APRC0369**

Signed at TZANEEN on this the 23 day of April 2020.



PIETER JOHANNES VAN HEERDEN

(Name in print)

Duly authorised to sign on behalf of Van Heerden Pharmacy

Signed at PRETORIA on this the 23RD day of April 2020.



Tembinkosi Bonakele

The Commissioner, Competition Commission of South Africa

"B"

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
(HELD IN PRETORIA)

CT Case No: CO011Apr20

CC Case No: 2020AprC369

In the matter between

COMPETITION COMMISSION

Applicant

and

VAN HEERDEN PHARMACY ROSSLYN (PTY) LTD **First Respondent**

VAN HEERDEN PHARMACY LYTTLETON (PTY) LTD **Second Respondent**

VAN HEERDEN PHARMACY PHALABORWA (PTY) LTD **Third Respondent**

**ADDENDUM TO THE CONSENT AGREEMENT BETWEEN THE COMPETITION
COMMISSION AND VAN HEERDEN PHARMACY GROUP 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**


- 1 Terms and abbreviations used in this document ("**the Addendum**") shall have the meaning assigned to them in the parties' Consent Agreement dated 23 April 2020 ("**the Consent Agreement**").



- 2 The parties agree to supplement the Consent Agreement by confirming that the mark-up referred to in paragraph 4.2 of the consent agreement means gross profit margin.
- 3 This Addendum forms an amendment to and an integral part of the Consent Agreement, the terms of which remain otherwise unchanged.

Dated and signed at Bela Bela on the 6 day of May 2020

For Van Heerden Pharmacy



Duly authorised to sign on behalf of Van Heerden Pharmacy

Mr Pieter Johannes Van Heerden

Dated and signed at PRETORIA on the 6TH day of MAY 2020

For the Commission



The Competition Commissioner