



competitiontribunal
SOUTH AFRICA

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: CO014Apr20

In the matter between:

The 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

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 (Pty) Ltd; Van Heerden Pharmacy Lyttleton (Pty) Ltd; Van Heerden Pharmacy Phalaborwa (Pty) Ltd annexed hereto marked "A".

**Presiding Member
Mr Enver Daniels**

**Date
6 May 2020**

Concurring: Ms Mondo Mazwai and Dr. Thando Vilakazi

"A"

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT CASE NO:

CC CASE NO: 2020AprC388

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 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 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 **“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;
- 1.7 **“Tribunal Directive for Covid-19 Excessive Pricing Complaint Referrals”** means the directive issued by the Tribunal on 6 April 2020;
- 1.8 **“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
- 1.9 **“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 Lynnridge Mall, in the Lynnwood area, in Gauteng. 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 03 April 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 for



250ml sized hand sanitisers at the Van Heerden Pharmacy in its Lynnwood, Pretoria branch.

3.2 It is specifically recorded that this complaint is independent and distinct from a complaint originating in Nelspruit, Mpumalanga against the same Van Heerden Pharmacy group under CC case number 2020APRC0369.

3.3 Hand sanitizers 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.

3.4 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.

3.5 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.

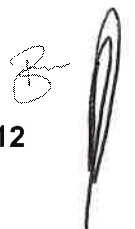
3.6 In a national state of disaster, an established test within the assessment of excessive pricing under the Act is determining whether price increases have a corresponding cost justification. This is because an excessive profit margin is detectable if the ordinary prices are increased materially absent cost increases.

3.7 Following receipt of the information, the Commission conducted an investigation into Van Heerden Pharmacy's alleged conduct and found the following in relation, specifically, to the Lynnwood branch in Pretoria:

3.7.1 Van Heerden Pharmacy (Lynnwood) remains open for business as it may be designated as providing essential services and/or essential products;

3.7.2 Van Heerden Pharmacy (Lynnwood) is a pharmacy which generally operates in the market for the supply of pharmaceutical products to consumers in the Lynnwood area of Pretoria in Gauteng;

3.7.3 Van Heerden Pharmacy (Lynnwood) also supplies, during the normal course of business, *inter alia*, hand sanitizer products to the consumers in and surrounding its branch in the Lynnwood area, Pretoria, Gauteng;



3.7.4 It was established that prior to the COVID-19 pandemic in South Africa, Van Heerden Pharmacy (Lynnwood) only sold two (2) hand sanitizer products viz. Dettol Hand Sanitizer 200ml Original; and Dettol Hand Sanitizer 50ml Original. However, subsequent to the COVID-19 pandemic in South Africa in March 2020, Van Heerden Pharmacy began selling an additional eight (8) hand sanitizer products;

3.7.5 Van Heerden Pharmacy has market power in the supply of hand sanitizers market, given the current pandemic and state of national disaster;

3.7.6 During March 2020, Van Heerden Pharmacy (Lynnwood) sold approximately 676 units of various hand sanitizer products and derived a total revenue of approximately R 27 351.62. This equates to an average cost mark-up of 42% and a gross profit margin of 29%.

3.8 The Commission found that the average cost mark-up of 42% and gross profit margin of 29% for hand sanitisers, in March 2020 by Van Heerden Pharmacy (Lynnwood) is unreasonably high for an essential product during the period of National State of Disaster and 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

Van Heerden Pharmacy agrees to:

- 4.1 immediately desist from the excessive pricing conduct described above;
- 4.2 reduce its gross profit margin on all essential products, as defined by the Consumer Protection Regulations to 20% or less with immediate effect for the duration of the national state of 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 R3 875 (three thousand eight hundred and seventy five 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

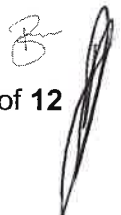
Account Number: 023 070 021

Account Type: Current account

Branch Code: 051001

SWIFT Code: SBZAZAJJ

- 4.4 within 7 calendar days of making the donation referred to in paragraph 4.3 above, submit an affidavit under oath by a duly authorised representative of Van Heerden Pharmacy (Lynnwood) 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 **2020AprC388** 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 this 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 Van Heerden Pharmacy (Lynnwood) 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 Van Heerden 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 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 Lynnwood, Pretoria that is the subject of the Commission's investigation under Commission Case No. **2020AprC388**.

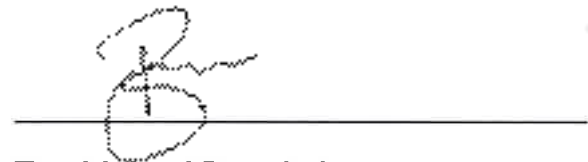
Signed at Bela Bela on this the 29 day of April 2020.



Pieter van Heerden

Duly authorised to sign on behalf of Van Heerden Pharmacy

Signed at PRETORIA on this the 29TH day of April 2020.



Tembinkosi Bonakele

The Commissioner, Competition Commission of South Africa