COMPETITION TRIBUNAL

REPUBLIC OF SOUTH AFRICA

Case No: COVCO155Dec21

In the matter between:

The Competition Commission of South Africa	**Applicant**
And	
Drs Mauff AC and Partners t/a Lancet Laboratories	**Respondent**

Panel:	E Daniels (Presiding Member) M Mazwai (Tribunal Member) A Wessels (Tribunal Member)
Heard on:	23 December 2021
Decided on:	23 December 2021

CONSENT AGREEMENT

The Tribunal hereby confirms, in terms of section 58(1)(b) of the Competition Act, 89 of 1998 as amended, the consent agreement concluded between the Competition Commission and Drs Mauff AC and Partners t/a Lancet Laboratories annexed hereto.

Signed by:Enver Daniels
Signed at:2021-12-23 12:15:56 +02:00
Reason:Witnessing Enver Daniels

Enver Daniels

Presiding Member
Mr Enver Daniels

23 December 2021
Date

Concurring: Ms Mondo Mazwai and Mr Andreas Wessels

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT CASE NO:

CC CASE NO: 2021Dec0028

In the matter between:

COMPETITION COMMISSION OF SOUTH AFRICA **Applicant**

And

DRS MAUFF AC & PARTNERS T/A LANCET LABORATORIES **Respondent**

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND DRS MAUFF AC & PARTNERS T/A LANCET LABORATORIES 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 ("**Commission**") and Drs Mauff AC & Partners t/a Lancet Laboratories ("**Lancet**") hereby agree that application be made to the Competition Tribunal ("**Tribunal**") for the confirmation of this Consent Agreement ("**Agreement**") as

an order of the Tribunal in terms of section 49D read with section 58(1)(b) of the Competition Act 89 of 1998, as amended ("**the Act**"), in respect of 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 "**Agreement**" means the Consent Agreement concluded between the Competition Commission of South Africa and Drs Mauff AC & Partners t/a Lancet Laboratories;

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 Lancet;

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 **"Covid-19 Rapid Antigen test"** means a type of immunoassay test (i.e. biochemical test that measures the presence or concentration of a macromolecule) to detect the presence of the SARS-CoV-2 virus, which implies current viral infection;

1.8 "**Disaster Management Act**" means the Disaster Management Act, 57 of 2002;

1.9 "**Lancet**" means Drs Mauff AC & Partners t/a Lancet Laboratories with its head office situated at Lancet Corner Building, 21 Cnr Stanley Avenue & Menton Road, Richmond, Johannesburg;

1.10 "**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;

1.11 "**Tribunal Directive for Covid-19 Excessive Pricing Complaint Referrals**" means the directive issued by the Tribunal on 6 April 2020;

1.12 "**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, given the magnitude and severity of the COVID-19 outbreak which had been declared a global pandemic by the World Health Organisation (WHO) and classified as a national disaster by the Head of the National Disaster Management Centre, 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. 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 The failure to reduce prices in the context of reductions in costs is the flip side of the Consumer Protection Regulations as it results in the same effect, namely an increase in the margin earned for an essential product.

2.6 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.

2.7 Between September and October 2021 the Commission was alerted through a number of meetings and telephonic discussions (including discussions with the Department of Health and healthcare funders) of possible pricing abuse in the context of Covid-19 polymerase chain reaction (PCR) test prices. In the main, it was alleged that service providers have experienced substantial cost reductions in conducting Covid-19 tests, were processing significant volumes of tests and have achieved economies of scale, yet the price charged for Covid-19 tests remained persistently high.

2.8 The Commission subsequently engaged in extensive consultations and engagements with the relevant stakeholders in the healthcare sector regarding the pricing of PCR tests. A recurring theme in these engagements was concerns on the persistence of the high price of Covid-19 tests despite the apparent reduction in costs applicable to PCR tests.

2.9 It was during the investigation relating to PCR tests (which was concluded by consent orders, including with Lancet) that the Commission became aware that similar concerns may exist in relation to Covid-19 Rapid Antigen tests.

2.10 Following a complaint received from Dr Barry Kistnasamy, the Compensation Commissioner and Coordinator: Occupational Health and Safety, Covid-19 response for the National Department of Health, in respect

of the alleged excessive pricing of Covid-19 Rapid Antigen tests, the Commission decided to investigate the pricing of Covid-19 Rapid Antigen tests specifically.

2.11 Subsequently, the Commission's investigation to date revealed that the cost of Covid-19 Rapid Antigen tests kits have decreased over the last twelve months. While prices have also steadily declined, the Commission formed the view that the price decreases were not satisfactory when compared to the current cost of the tests.

2.12 As indicated above, in December 2021 settlement agreements were concluded with three private pathology laboratories, including Lancet, directed at ensuring a price for Covid-19 polymerase chain reaction (PCR) tests that is not excessive, and such were confirmed by the Tribunal.

3 COVID-19 ANTIGEN TESTS

3.1 Covid-19 tests can detect either SARS-CoV-2, the virus that causes Covid-19, or antibodies that the body generates following a Covid-19 infection. The type of tests which detect an infection of the SARS-CoV-2 virus is called a viral test. Antigen and Nucleic Acid Amplification Tests (NAATs) are viral tests. Viral tests come in two formats: rapid tests and laboratory tests. Rapid

tests (which include antigen and some NAATs) can usually be done in minutes (and results take up to an hour).

3.2 Antigen tests typically take only 15 minutes to administer, and results can be received within minutes (but up to 2 hours). While polymerase chain reaction (PCR) tests remain the gold standard for detecting and diagnosing Covid-19, antigen tests cost less and can have a role to play in regular or mass-testing scenarios. The lower cost of antigen tests also makes them a suitable, albeit less accurate, alternative to PCR tests.

4 THE COMMISSION'S INVESTIGATION AND FINDINGS

4.1 On 13 December 2021 Dr Barry Kistnasamy of the Department of Health lodged a complaint in terms of section 49B of the Competition Act against service providers delivering Covid-19 Rapid Antigen tests in South Africa to consumers.

4.2 Dr Kistnasamy alleges that Covid-19 Rapid Antigen test prices are around R350 in the private sector, whereas Covid-19 Rapid Antigen tests are R150 in the NHLS (public sector). He alleges that UNICEF's website shows that Covid-19 Rapid Antigen test kits are currently available for R50. Dr Kistnasamy and the Department of Health believe that prices charged in the private sector for Covid-19 Rapid Antigen tests, that exceed R150, may be excessive.

4.3 The Commission decided to pursue the investigation, on an expedited basis, to determine whether the pricing of Covid-19 Rapid Antigen tests may amount to an excessive price in contravention of section 8(1)(a) of the Competition Act read with paragraph 4 of the Regulations.

4.4 On 14 December 2021 the Commission directed Requests for Information to various private pathology laboratories, including Lancet, in order to establish whether the prices charged for Covid-19 Rapid Antigen tests are excessive.

4.5 In the result and following an investigation, the Commission found that *prima facie* pathology groups including Lancet have engaged in a contravention of section 8(1)(a) of the Act.

4.6 Lancet has indicated to the Commission that it is willing to immediately reduce the cost of Covid-19 Rapid Antigen tests to no more than R150 inclusive of VAT. Consequently, the Commission and Lancet have concluded this Consent Agreement.

5 PRICE REDUCTION OF COVID-19 RAPID ANTIGEN TESTS

5.1 Lancet agrees and undertakes that it shall upon signature of this agreement-

5.1.1 Cease to charge the price of R350 (VAT inclusive) for Covid-19 Rapid Antigen tests; or R250 (VAT inclusive) which is the price charged since 12 December 2021;

5.1.2 Reduce the price of Covid-19 Rapid Antigen tests to a price no more than R150 (VAT inclusive);

5.1.3. For avoidance of doubt, the price of R150 inclusive of VAT is a maximum price cap and Lancet may charge or negotiate a price below the maximum price of R150 (VAT inclusive).

6 DURATION OF THE PRICE REDUCTION

The price reduction set out in paragraph 5 of this consent agreement shall endure for a period of two (2) years from the date of confirmation of this consent agreement by the Tribunal as its order.

7 TRANSPARENCY OF COVID-19 RAPID ANTIGEN TESTS

Lancet agrees and undertakes that it shall upon signature of this agreement-

7.1 disclose to all consumers of Covid-19 Rapid Antigen tests, the name of the Covid-19 Rapid Antigen test kit used, in order that consumers may be able to identify the type of antigen test provided; and

7.2 this information should also be reflected on any test certification provided to the consumer.

8 DURATION OF THE TRANSPARENCY OF COVID-19 RAPID ANTIGEN TESTS

The transparency undertaking set out in paragraph 7 of this Consent Agreement shall endure for so long as Lancet provides Covid-19 Rapid Antigen tests.

9 MONITORING

9.1. Lancet shall submit a compliance report, setting out, *inter alia*, the prices charged for Covid-19 Rapid Antigen tests and any material changes in costs, to the Commission every three (3) months from the date of confirmation of this consent agreement as an order of the Tribunal reporting on compliance with this consent agreement.

9.2. The Commission shall be entitled at any time to request any data relating to Lancet's compliance with this Consent Agreement and Lancet shall comply with the Commission's request for data within a reasonable time.

10 NO ADMISSION

10.1 Nothing in this Consent Agreement amounts to or should be construed as an admission of any facts, conduct, liability or wrongdoing on the part of Lancet specifically the admission that it charged exorbitant and/or excessive prices in contravention of section 8(1)(a) of the Act read together with Regulation 4 of the Consumer Protection Regulations.

11 VARIATION

11.1 Lancet shall be entitled to bring an application to the Tribunal for variation, waiver or relaxation of this agreement upon an extraordinary and unforeseeable change in market circumstances that imposes an undue economic hardship on Lancet.

11.2 The Commission, Dr Kistnasamy and/or the Department of Health shall have the right to oppose such an application for variation of this agreement.

12 FULL AND FINAL SETTLEMENT

This Consent Agreement, upon confirmation as an order by the Tribunal, is entered into in full and final settlement of and concludes all proceedings between the Commission and Lancet relating to the complaint lodged by Dr Kistnasamy, under

case number 2021Dec0028, relating to alleged excessive pricing of Covid-19 Rapid Antigen tests in 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.

Signed at Johannesburg on this the 22 day of December 2021.

Full names: Hendrick Emanuel van Deventer

Designation: Managing Partner

Duly authorised representative of **Lancet**

Signed at PRETORIA on this the 23 day of December 2021.

Tembinkosi Bonakele

The Commissioner, Competition Commission of South Africa