



competitiontribunal
SOUTH AFRICA

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: CO049Jun20

In the matter between:

The Competition Commission

Applicant

And

Farpoint Trading 31 CC t/a Mica
Durban North

Respondent

Panel : E Daniels (Presiding Member)
: Y Carrim (Tribunal Member)
: H Cheadle (Tribunal Member)

Heard on : 06 July 2020

Decided on : 06 July 2020

CONSENT AGREEMENT

The Tribunal hereby confirms the consent agreement as agreed to and proposed by the Competition Commission and Farpoint Trading 31 CC t/a Mica Durban North annexed hereto.

**Presiding Member
Mr Enver Daniels**

**06 July 2020
Date**

Concurring: Ms Yasmin Carrim and Prof. Halton Cheadle

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

CT Case No.:

CC Case No.: 2020APRC0668

In the matter between:

COMPETITION COMMISSION

Applicant

and

FARPOINT TRADING 31 CC T/A MICA DURBAN NORTH

Respondent

FILING SHEET

TAKE NOTICE THAT the Applicant files herewith the following documents:

1. Competition Tribunal Form CT 6; and
2. Consent Agreement between the Competition Commission and Farpoint Trading 31 CC trading as Mica Durban North.

DATED AT PRETORIA ON THIS 26th DAY OF JUNE 2020.



COMPETITION COMMISSION

Applicant

77 Meintjies Street
Sunnyside
Pretoria

Tel: 012 394 3527

Ref: Bukhosibakhe Majenge /
Kriska-Leila Goolabjith

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

FARPOINT TRADING 31 CC T/A MICA DURBAN NORTH

Respondent

C/O: LFHP Attorneys - N. Kinsley

Address: 93 Richefond Circle, Ridgeside Office Park, Umhlanga
Rocks, 4319

Tel: 031 534 1600

Email: nic.kinsley@lhfp.co.za / jenny.dayanand@lhfp.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:

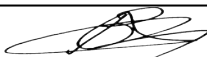
_____ (Applicant)
and _____ (Respondent)

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: 2020APRC0668**

In the matter between:

COMPETITION COMMISSION OF SOUTH AFRICA

Applicant

And

**FARPOINT TRADING 31 CC
TRADING AS MICA DURBAN NORTH**

Respondent

**CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND
FARPOINT TRADING 31 CC TRADING AS MICA DURBAN NORTH 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 Farpoint Trading 31 CC trading as Mica Durban North 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 27(1)(d) read with section 49D of the Competition Act 89 of 1998, as amended ("**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 Mica Durban North;
- 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 **“Mica Durban North”** means Farpoint Trading 31 CC trading as Mica Durban North, a close corporation registered in accordance with the laws of South Africa with registration number 2006/217219/23 with its registered and business address situated at 87 Umhlanga Rocks Drive, Durban North, KwaZulu-Natal, 4051;
- 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, 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 Cooperative Governance and Traditional Affairs (“**COGTA**”) declared a National State of 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, 2002 (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 Annexures A and B list the goods and services that fall to be regulated by the Consumer Protection Regulations. Annexure A lists the goods and services that fall to be regulated by Regulation 4 of 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.
- 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. This nationwide lockdown has been further extended and remains ongoing with some measures of relaxation occurring as and when announced by the Presidency.

3 THE COMMISSION'S INVESTIGATIONS AND FINDINGS

Investigation

- 3.1 In March 2020, the Commission received information in terms of section 49B(2)(a) of the Competition Act, against Mica Durban North in relation to, *inter alia*, the expensive prices of hand sanitisers. According to the

information received, the price of small 50ml hand sanitiser was R49,99 per bottle.

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(c) of the Act, market power can be inferred from the economic behaviour of the firm. In this case, the mere ability to earn significantly higher gross profit margins 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 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.

Findings

3.6 Upon receipt of the information requested from Mica Durban North, the Commission found the following:

3.6.1 Mica Durban North is a close corporation registered in accordance with the laws of South Africa with registration number 2006/217219/23 with its registered and business address situated at 87 Umhlanga Rocks Drive, Durban North, KwaZulu-Natal, 4051;

3.6.2 Mica Durban North is one of the franchisees of the Mica franchise;

3.6.3 Mica Durban North specialises in retail of hardware products;

3.6.4 Mica Durban North did not sell hand sanitisers prior to March 2020;

3.6.5 on or about 17 March 2020, Mica Durban North bought hand sanitisers that came in three different packaging volumes (i.e. 50ml, 1-litre and 5-litre) from various suppliers;

- 3.6.6 Mica Durban North started selling 50ml and 1-litre units of hand sanitisers in mid-March 2020;
- 3.6.7 in addition to the 50ml and 1-litre units, some units of 5-litre hand sanitisers were sold to the public during the period 17 to 26 March 2020;
- 3.6.8 although Mica Durban North is unable to indicate the exact number of units of 5-litre hand sanitiser sold since March, they were able to establish that they had 106 units in stock as of 6 May 2020;
- 3.6.9 on 8 May 2020, Mica Durban North indicated that on 7 May 2020, they donated 9 units of 5-litre hand sanitiser valued at R3510,00 to Zamukhule NGO in Durban; and
- 3.6.10 using the information submitted by Mica Durban North and the stock at hand of 106 units as of 6 May 2020, the Commission estimated the units of 5-litre hand sanitiser sold in March 2020 to be approximately 80 units; and
- 3.6.11 Mica Durban North indicated that the remaining stock is made up of 5-litre hand sanitiser bought for R390,00 meaning that all the units bought for R165,00 have been sold at the price of R490,00.



Market

3.7 The Commission found that Mica Durban North:

3.7.1 is active in the market for the sale of hand sanitisers in the Durban North area; and

3.7.2 has market power in the market for the sale of hand sanitiser given the current pandemic and national state of disaster.

Determination of excessive price

3.8 Table 1 depicts Mica Durban North's gross profit margins between March 2020 and April 2020 for hand sanitisers sold in excess of a 20% gross profit margin i.e. in March 2020 it was 54% for 50ml hand sanitiser; in April 2020 it was 33% for 1 litre hand sanitiser; and in March 2020 it was 61% for 5 litre hand sanitiser.

Table 1:

Period	Size of hand sanitizers	Cost Price excl. VAT (Rand)	Selling price excl. VAT (Rand)	Quantity Sold (Q)	Gross Profit	Mark-up	Gross Profit @ Excessive Price (Rand)	Gross Profit @ 20% - margin (Rand)	Excess Profits (Rand)
March 2020	50ml hand sanitiser	R20	R43	528	54%	117%	R12 392	R2 640	R9 752
April 2020	1 litre hand sanitizer	R35	R52	57	33%	49%	R979	R499	R480
March 2020	5 litre hand sanitizer	R165	R426	50	61%	158%	R13 055	R2 063	R10 992
	Total								R21 224

3.9 During March and April 2020, the gross profit margin of Mica Durban North was in excess of a 20% gross profit margin, which gross profit margin is generally regarded as fair and reasonable.

3.10 The Commission found that Mica Durban North's average gross profit margin of above 20% during March 2020 and April 2020 in respect of hand sanitisers sold by Mica Durban North is a contravention of section 8(1)(a) of the Act read together with Regulation 4 of the Consumer Protection Regulations.

3.11 Mica Durban North does not admit that the conduct above constitutes excessive pricing in terms of section 8(1)(a) of the Act read together with Regulation 4 of the Consumer Protection Regulations. However, after engaging with the Commission, Mica Durban North agrees to resolve the complaint on the terms set out below.

4 AGREEMENT REGARDING FUTURE CONDUCT

Mica Durban North agrees to:

- 4.1 immediately desist from the excessive pricing conduct described above;
- 4.2 reduce its gross profit margin on hand sanitisers to 20% with immediate effect for the duration of the state of national disaster;
- 4.3 donate 722 units of 50ml hand sanitisers valued at a cost price of R14 400 and 50 units of 5-litre hand sanitisers valued at a cost price of R19 500;



4.4 within 7 calendar days of confirmation of this Consent Agreement as an order of the Tribunal, donate the abovementioned essential goods in paragraph 4.3 above to:


4.4.1 15 (fifteen) units of 5 litre hand sanitisers to The Wellness Centre Trust (146-495 NPO), situated at 79 Acutt Ave, Park Hill, Durban North, 4051;

4.4.2 15 (fifteen) units of 5 litre hand sanitisers to Action in Autism (047-002 NPO) situated at 105 Haih Road, Parkhill, Durban North, 4051;

4.4.3 15 (fifteen) units of 5 litre hand sanitisers to The Baby Home Durban North (088-756 NPO) situated at 11 Pigeonwood CL, Glen Anil, Durban North, 4051; and

4.4.4 5 (five) units of 5 litre hand sanitisers and 722 (seven hundred and twenty-two) units of 50ml hand sanitisers to Khulani Children Shelter (024-573 NPO) situated at 33 Grove Cres, Park Hill, Durban North, 4051;

4.5 submit an affidavit under oath by the owner of Mica Durban North testifying that the abovementioned undertakings have been adhered to within 7 calendar days of confirmation of the Consent Agreement as an order by the Tribunal;



4.6 develop, implement and monitor a competition law compliance programme incorporating corporate governance designed to ensure that its employees, management 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;

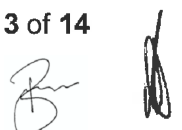
4.7 to submit a copy of a compliance programme to the Commission within 60 business days of the date of confirmation of the Consent Agreement as an order by the Tribunal; and

12 staff
+ 2 managers

4.8 to circulate a statement summarising the content of this Consent Agreement to all management and operational staff employed at Mica Durban North 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 owner of Mica Durban North 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 Mica Durban North 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. 2020APRC0668 .

Signed at Ridgside on this the 24th day of June 2020.



Andre Dennis Lindeque

Owner and duly authorised to sign on behalf of Farpoint Trading 31 CC trading as Mica Durban North

Signed at PRETORIA on this the 26TH day of June 2020.



Tembinkosi Bonakele

The Commissioner, Competition Commission of South Africa

