



competitiontribunal
SOUTH AFRICA

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: CO056Jul20

In the matter between:

The Competition Commission

Applicant

And

D I Fraser CC t/a Umhlanga Medisport
Pharmacy

Respondent

Panel : E Daniels (Presiding Member)
: Y Carrim (Tribunal Member)
: AW Wessels (Tribunal Member)

Heard on : 13 July 2020

Decided on : 13 July 2020

CONSENT AGREEMENT

The Tribunal hereby confirms the consent agreement as agreed to and proposed by the Competition Commission and D I Fraser CC t/a Umhlanga Medisport Pharmacy annexed hereto.

Presiding Member
Mr Enver Daniels

Date
13 July 2020

Concurring: Ms Yasmin Carrim and Mr Andreas Wessels

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

CT Case No.

CC Case No. 2020Mar0205

In the matter between:

COMPETITION COMMISSION

Applicant

and

D I FRASER CC t/a UMHLANGA MEDISPORT PHARMACY

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 D I Fraser CC t/a Umhlanga Medisport Pharmacy

DATED AT PRETORIA ON THIS 1st DAY OF JULY 2020.

COMPETITION COMMISSION

Applicant

77 Meintjies Street
Sunnyside
Pretoria

Tel: 012 394 3589

Ref: Nelly Sakata /
Namhla Pakade

Email: NellyS@compcom.co.za /
NamhlaP@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:

GAILLARD SANDISON ASSOCIATES

For the Respondent

P.O. Box 677

Kloof

3640

KwaZulu-Natal

Tel: 031 764 0805

Ref: Frank Gaillard

Email: fgaillard@gsassoc.co.za



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: 2020MarC0205

In the matter between:

COMPETITION COMMISSION OF SOUTH AFRICA

Applicant

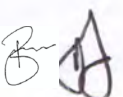
and

D I FRASER CC t/a UMHLANGA MEDISPORT PHARMACY

Respondent

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND
UMHLANGA MEDISPORT PHARMACY 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 ("**the Commission**") and Umhlanga Medisport Pharmacy ("**Medisport**") 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 an alleged 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 Medisport;
- 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 “**Medisport**” means D I Fraser cc (ck 2001/040079/23) t/a Umhlanga Medisport Pharmacy, with its place of business at Protea Mall, Chartwell Drive, Umhlanga, KwaZulu-Natal.

- 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 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.

3 THE COMMISSION'S INVESTIGATIONS AND FINDINGS

- 3.1 In March 2020, the Commission received information in terms of section 49B(2)(a) of the Competition Act, against Medisport in relation to the inflated prices of face masks and hand sanitiser that it was charging its customers in March and April 2020.
- 3.2 Face 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. 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 Medisport's alleged conduct and found the following:

3.6.1 Medisport is a pharmacy which operates 365 days a year supplying a wide range of health and sporting supplements to the general public, including face masks and hand sanitisers, and also offers delivery services. Medisport is based at Protea Mall, Chartwell Drive, Umhlanga Rocks, KwaZulu-Natal.

3.6.2 Medisport has alleged market power in the market for the supply of face masks and hand sanitiser in the area where it operates, given the current pandemic and state of national disaster;

Face masks

3.6.3 Medisport procured face masks from its supplier on 28 February 2020 and started selling them to customers during March 2020. Between 28 February 2020 and 13 April 2020, Medisport made eight bulk purchases of face masks from

various suppliers at different prices. The table below depicts Medisport's mark-ups during this specific period.

Table 1:

Date	Suppliers and units supplied	Cost/box (R)	Selling Price/box (R)	Mark-up (%)
28 February 2020	██████████ 30 boxes	██████████	██████████	191.67%
11 March 2020	██████████ 100 boxes	██████████	██████████	86.34%
13 March 2020	██████████ 50 boxes	██████████	██████████	56.52%
14 March 2020	██████████ 60 boxes	██████████	██████████	86.34%
24 March 2020	██████████ 160 boxes	██████████	██████████	13.25%
1 April 2020	██████████ 40 boxes	██████████	██████████	80.00%
9 April 2020	██████████, 40 boxes	██████████	██████████	50.00%
13 April 2020	██████████ 40 boxes	██████████	██████████	50.00%

3.6.4 Table 1 above shows that Medisport earned an initial mark-up of 191.67 % on its initial sale of the 3ply face masks of 50 units per box. When Medisport's supplier increased its prices during the month of March 2020, Medisport's mark-up ranged between 13.25% and 86.34%. ██████████

██████████ Following the commencement of the

Commission's investigation, Medisport limited its mark-up to 50% during April 2020.

Hand sanitisers

3.6.5 Medisport sells various brands of hand disinfectants and sanitisers, some of which Medisport sold prior to the COVID 19 outbreak and continued to supply until 19 March 2020, when its stock ran out.

3.6.6 Medisport included a high mark-up on the initial hand sanitisers which it supplied before the outbreak of the COVID 19 in South Africa (which ranged between 105.13% to 256.56%) and indicated that it used this mark-up as a base to determine the mark-up on the sale of hand sanitisers during the COVID 19 outbreaks.

3.6.7 Medisport added mark-ups on other hand sanitiser and disinfectant products as follows:

3.6.7.1 For Bioscrub 500 ml plus dispenser mark-ups increased in March 2020 between 135.0% to 232.0%;

3.6.7.2 For Biokleen hand disinfectant 500ml: the mark-ups in March and April 2020 were in the range of 63.0% to 143.5%;

- 3.6.7.3 Micro Spray 500ml: the mark-up in March 2020 was 279.5%;
- 3.6.7.4 Hand Sanitiser YDC 500ml: the mark-up in March 2020 was 91.3%;
- 3.6.7.5 Hand Sanitiser Brighten 500ml: the mark-up in April 2020 was 239.1%;
- 3.6.7.6 Anti-bacterial Spray Brighten 500ml: the mark-up in April 2020 was 155.1%;
- 3.6.7.7 D-Germ 500ml with pump: there was an increase in mark-up from 105.13% in January and February 2020 in the range of 78.8% to 212.0% in March 2020.
- 3.7 Based on the evidence from complaint investigations concerning face masks and hand sanitisers, the indications are that at major retailers the mark ups were 20%-25% for face masks & hand sanitisers pre-national disaster. This is the benchmark to be used in cases where the retailer has no comparative history of supplying face masks and hand sanitisers.
- 3.8 The Commission thus found that Medisport's mark-ups for face masks of up to 86.34%, and the mark-ups of up to 279.5% in respect of hand sanitisers for March and April 2020 are unreasonable as they are significantly above the 20% - 25% mark up benchmark, and are therefore a contravention of section 8(1)(a) of the Act read together with Regulation 4 of the *Consumer Protection Regulations*.

4 ADMISSION

Medisport admits for purposes of this Consent Agreement that it has engaged in conduct which could be seen as unreasonable pricing of face masks and hand sanitiser as recorded above, which conduct amounts to a contravention of section 8(1)(a) of the Act.

5 AGREEMENT REGARDING FUTURE CONDUCT

Medisport agrees to:

- 5.1 immediately desist from the excessive pricing conduct described above;
- 5.2 reduce its mark-ups on all face masks and hand sanitisers and disinfectants to 20% with immediate effect for the duration of the state of the national disaster;
- 5.3 within 7 calendar days of confirmation of this Consent Agreement as an order of the Tribunal, make a donation of R20 000 worth of hand sanitisers to a local child support charity called Lungisisa Indlela Village (RF) NPC – PBO No: 930 032 915;
- 5.4 submit an affidavit under oath by the owner of Medisport testifying that the abovementioned donations have been made to the charity referred to at 4.3 above, in accordance with this Consent Agreement;

- 5.5 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;
- 5.6 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
- 5.7 to circulate a statement summarising the content of this Consent Agreement to all management and operational staff employed at Medisport within 7 calendar days from the date of confirmation of this Consent Agreement by the Tribunal, and to notify the Commission by submitting an affidavit under oath by the owner of Medisport confirming compliance with this undertaking.

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 Medisport 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. 2020MarC0205.

Signed at UMHLANGA on this the 26 day of June 2020.



David Fraser

Sole Member - D I Fraser cc t/a Umhlanga Medisport Pharmacy

Signed at PRETORIA on this the 30TH day of June 2020.



Tembinkosi Bonakele

The Commissioner, Competition Commission of South Africa