



competitiontribunal
SOUTH AFRICA

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: CO126Sep20

In the matter between:

Competition Commission of South Africa

Applicant

And

Swift Chemicals (Pty) Ltd

Respondent

Panel : M Mazwai (Presiding Member)
: Y Carrim (Tribunal Member)
: F Tregenna (Tribunal Member)

Heard on : 07 October 2020

Decided on : 07 October 2020

CONSENT AGREEMENT

The Tribunal hereby confirms the consent agreement between the Competition Commission and Swift Chemicals (Pty) Ltd annexed hereto.

**Presiding Member
Ms Mondo Mazwai**

08 October 2020

Date

Concurring: Ms Yasmin Carrim and Prof. Fiona Tregenna

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT CASE NO:
CC CASE NO: 2020APRC0057

In the matter between:

COMPETITION COMMISSION OF SOUTH AFRICA

Applicant

And

SWIFT CHEMICALS (PTY) LTD

Respondent

FILING SHEET

PLEASE TAKE NOTICE THAT the Competition Commission ("**Commission**") herewith files the following Document:

1. Consent Agreement between the Commission and Swift Chemicals (Pty) Ltd.

DATED AT PRETORIA ON THIS 23rd DAY OF SEPTMEBER 2020.

COMPETITION COMMISSION

Applicant

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Sunnyside

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TO: THE REGISTRAR
Competition Tribunal
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77 Meintjies Street
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Pretoria
Tel: 012 394 3300/3468
Email: ctsa@comptirb.co.za

AND TO: Swift Chemicals (Pty) Ltd
4 Downie Crescent
Queenmead Industrial
Queensburg, Durban, Sandton
Email: finance@swiftchemicals.co.za /
vijan@swiftchemicals.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: 23 September 2020 **File #** _____

To: The registrar of the Competition Tribunal

Concerning the matter between:

THE COMPETITION COMMISSION _____ (Applicant)
and SWIFT CHEMICALS (PTY) LTD _____ (Respondent)

Take notice that the APPLICANT intends to apply to the Tribunal for the following order:

Confirming that the attached consent agreement entered into between the Applicant and Respondent as an order of the Competition 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 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.

Name and Title of person authorised to sign:

Bukhosibakhe Majenge - Chief Legal Counsel

Authorised Signature:

Date:

23 September 2020

For Office Use Only:

Tribunal file number: _____

Date filed: _____

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT CASE NO:
CC CASE NO: 2020APRC0057

In the matter between:

COMPETITION COMMISSION OF SOUTH AFRICA

Applicant

And

SWIFT CHEMICALS (PTY) LTD

Respondent

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND SWIFT CHEMICALS 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 Swift Chemicals (Pty) Ltd 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 Swift Chemicals;
- 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 "**Disaster Management Act**" means the Disaster Management Act, 57 of 2002;



- 1.7 **"Essential products"** means basic food and consumer items listed in Annexure B of the Consumer Protection Regulations;
- 1.8 **"Swift Chemicals"** means Swift Chemicals (Pty) Ltd, a private company registered in accordance with the laws of South Africa with registration number 2011/100404/04 and its head office situated at 4 Downie Crescent, Queenmead Industrial, Queensburgh, Durban, South Africa;
- 1.9 **"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; and
- 1.10 **"Tribunal Directive for Covid-19 Excessive Pricing Complaint Referrals"** means the directive issued by the Tribunal on 6 April 2020;
- 1.11 **"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

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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 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.

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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 –*

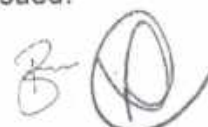
4.2.1. *does not correspond to or is not equivalent to the increase in the cost of providing that good or service; or*

4.2.2. *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 and B 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. The lockdown has subsequently been further extended.

3. THE COMMISSION'S INVESTIGATIONS AND FINDINGS

Investigation

- 3.1 In April 2020, the Commission received information in terms of section 49B(2)(a) of the Competition Act, regarding excessive prices charged by Swift Chemicals for, *inter alia*, its high purity isopropanol (IPA) and n-propanol (NPA).
- 3.2 IPA and NPA are intermediate inputs into essential products as listed in Annexure A and B of the Consumer Protection Regulations, namely hand sanitizer and disinfectants.
- 3.3 One of the main ways of combating the spread of the pandemic is through the use of a minimum of a 70% alcohol-based hand-sanitizers and disinfectants which can be made from either propyl alcohol, propanol alcohol, or ethyl alcohol (commonly referred to as ethanol). As such hand sanitizers and disinfectants have specifically been listed as essential goods in terms of Annexure A and B of the Consumer Protection

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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(c) 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. In the context of abnormal market conditions amid the Covid-19 crisis, a firm's own conduct therefor is the best available proxy for market power if the market is distorted by the crises.
- 3.6 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.

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Findings

3.7 The Commission conducted an investigation into Swift Chemical's alleged conduct and found the following:

3.7.1 Swift Chemicals is a leading distributor of all industrial solvents for paint, ink and printing. The products supplied by Swift Chemicals include, *inter-alia*, Benzine, Ethanol 95, Iso Propyl 85% and 99% ("IPA"), N Propanol ("NPA"), Lacquer Thinners, Acetone.

3.7.2 Swift Chemicals is based in Durban, KwaZulu Natal.

3.7.3 The Commission's findings relate to IPA and NPA products sold by Swift Chemicals.

3.7.4 Based on pricing and cost information supplied by Swift Chemicals in relation to IPA and NPA, the Commission found the following:

3.7.4.1 Swift Chemicals has effected significant price increases and realised material increases in gross margins on IPA and NPA products sold following the covid-19 outbreak.

3.7.4.2 The Commission's analysis is based on Swift Chemical's transactional information, particularly sales volumes, prices, and costs for both IPA and NPA. In this regard the Commission was able to analyse gross



margins over time. Therefore, the Commission used December 2019 to February 2020 as the comparator period. The gross margin analysis revealed that for the comparator period (i.e. December 2019 to February 2020), the gross margins for IPA were [REDACTED] and for NPA were [REDACTED].

- 3.7.4.3 The Commission established that the benchmark gross profit margins for December 2019 to February 2020 (comparator period) is [REDACTED] for IPA and [REDACTED] for NPA. Accordingly, the benchmark is the gross profit margins generated by Swift Chemicals prior to the Covid-19 outbreak.
- 3.7.4.4 On or about 20 March 2020, Swift Chemicals increased the price of IPA from [REDACTED] per unit to [REDACTED] per unit thus making a gross profit margin of [REDACTED], in excess of the [REDACTED] benchmark gross margin of the comparator period, which is generally regarded as the benchmark percentage for this category of products and regarded as fair and reasonable.
- 3.7.4.5 Furthermore, during the period March 2020, Swift Chemicals increased its sales of IPA by approximately 479%.

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- 3.7.4.6 Accordingly, Swift Chemicals derived an estimated excess profits equivalent to R303 376,71 for IPA calculated on a [REDACTED] benchmark gross profit margins derived by the Commission for the comparator period.
- 3.7.4.7 During or about 20 March 2020, Swift Chemicals increased the price of NPA from [REDACTED] per unit to [REDACTED] per unit thus making a gross profit margin of [REDACTED] in excess of the [REDACTED] benchmark gross margin of the comparator period, which is generally regarded as the benchmark percentage for this category of products and regarded as fair and reasonable.
- 3.7.4.8 In April 2020, Swift Chemicals increased the price of NPA from [REDACTED] to [REDACTED] per unit thus making a gross profit margin of [REDACTED] in excess of the [REDACTED] benchmark gross margin of the comparator period, which is generally regarded as the benchmark percentage for this category of products and regarded as fair and reasonable.
- 3.7.4.9 Accordingly, Swift Chemicals derived an estimated excess profits equivalent to R436 046,78 for NPA calculated on a [REDACTED] benchmark gross profit margins derived by the Commission for the comparator period.

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3.7.4.10 Swift derived R739 423.49 as excess profits from charging excessive prices on IPA and NPA between the period March 2020 and April 2020.

3.8 The Commission found that the conduct by Swift Chemicals, of escalating its price and gross profit margins on IPA and NPA products without corresponding increases in costs, during the period of March and April 2020, is a contravention of section 8(1)(a) of the Act read together with Regulation 4 of the *Consumer Protection Regulations*.

3.9 Swift Chemicals does not admit that the conduct set out above constitutes excessive pricing in terms of section 8(1)(a) of the Act read together with Regulation 4 of the *Consumer Protection Regulations*. Notwithstanding the above, in order to avoid protracted litigation and costs, Swift Chemicals agrees to resolve the complaint on the terms set out below.

4. ADMINISTRATIVE PENALTY

4.1 Having regard to the above, and without any admission that it contravened section 8(1)(a) of the Act, read with Regulation 4 of the *Consumer Protection Regulations*, Swift Chemicals undertakes to pay an administrative penalty, in terms of section 58(1)(a)(iii) read with sections 59(1)(a) and 59(3) of the Act, in the amount of R300 000,00 (three hundred thousand Rand).

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- 4.2 Swift Chemicals will pay the above administrative penalty within 7 (seven) days from the date of confirmation of this Settlement Agreement as an order by the Tribunal.
- 4.3 Swift Chemicals shall remit the payment of the administrative penalty, in one instalment the Commission's bank account which is as follows:

Name: The Competition Commission Fee Account
Bank: ABSA bank, Pretoria
Account Number: 4050778576
Branch Code: 323 345
Reference: Swift Chemicals/2020APRC0057

- 4.4 The Commission confirms that the above settlement agreement does not exceed the statutory limit of 10% of Swift's annual turnover in the Republic and their exports from the Republic respectively, during the firms' preceding financial year, as provided for in section 59(2) of the Act read with regulation 7.2.2 of the *Consumer Protection Regulations*.
- 4.5 The penalty will paid be over by the Commission to the National Revenue Fund in accordance with the provisions of section 59(4) of the Act.

5. AGREEMENT REGARDING FUTURE CONDUCT

Swift Chemicals agrees that:



- 5.1 It will immediately desist and refrain from the excessive pricing conduct described above;
- 5.2 It will ensure its gross profit margins on IPA does not exceed [REDACTED] and gross profit margins on NPA does not exceed [REDACTED] with immediate effect and for the duration of the state of national disaster;
- 5.3 It will 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;
- 5.4 It will 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
- 5.5 It will circulate a statement summarising the content of this Consent Agreement to all senior management and senior operational staff employed at Swift Chemicals within 7 calendar days from the date of confirmation of this Consent Agreement by the Tribunal.



6. CONTRIBUTION TO THE SOLIDARITY FUND AND OTHER CHARITIES

6.1 In addition to its undertaking listed in clause 4 above, Swift Chemicals has between the period 5 March 2020 to 18 August 2020 made donations amounting to R663 639,85 towards the following organisations and charities:

6.1.1. R300 000 to the Solidarity Fund;

6.1.2. R100 000 to the Nelson Mandela Fund;

6.1.3. R113 624,00 to Wentworth Hospital for the purchase of a specialised life saving ventilator and other consumables;

6.1.4. R76 506,50 towards food hampers; and

6.1.5. R63 509 towards feeding schemes.

6.2 Swift Chemicals undertakes to submit an affidavit under oath confirming the above donations. The Commission is satisfied that Swift Chemicals has repaid the overcharge after having performed the undertakings in clause 4 and donations listed in Clause 6.1.

7. FULL AND FINAL SETTLEMENT

7.1 In an effort to avoid protracted litigation, this Consent Agreement, upon confirmation as an order by the Tribunal, is entered into in full and final settlement, without admitting liability and concludes all proceedings between the Commission and Swift Chemicals 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

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Management Regulations and Directions published in Government Gazette No 43116 on 19 March 2020 that relates to Swift Chemicals and that is the subject of the Commission's investigation under Commission Case No. 2020APRC0057.

Signed at QUEENSBURGH on this the 22 day of September 2020.



Vijan Naidoo

Director: Swift Chemicals (Pty) Ltd

Duly authorised to sign on behalf of Swift Chemicals (Pty)Ltd

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



Tembinkosi Bonakele

The Commissioner, Competition Commission of South Africa

