



competitiontribunal
SOUTH AFRICA

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: CO065Jul20

In the matter between:

The Competition Commission

Applicant

And

Food Lovers Holdings (Pty) Ltd

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 Food Lovers Holdings (Pty) Ltd annexed hereto.

**Presiding Member
Mr Enver Daniels**

**13 July 2020
Date**

Concurring: Ms Yasmin Carrim and Mr Andreas Wessels

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT CASE NO:

CC CASE NO: 2020MAY0032

In the matter between:

COMPETITION COMMISSION OF SOUTH AFRICA

Applicant

And

FOOD LOVERS HOLDINGS (PTY) LTD

Respondent

**CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND
FOOD LOVER'S MARKET 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 Food Lover's Market 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, Roodepoort, 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 Food Lover’s Market;
- 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, Roodepoort, 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 “**Food Lover’s Market**” means the Food Lovers Holdings (Pty) Ltd, a company duly registered in terms of the company laws of South Africa, with registration number 2015/365671/07, with their registered place of business at London Circle, Brackengate Business Park, Brackenfell, Western Cape, 7560.

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. Since then the nationwide lockdown has been extended further.

3 THE COMMISSION'S INVESTIGATIONS AND FINDINGS

3.1 On or around 14 May 2020, the Commission received information in terms of section 49B(2)(a) of the Competition Act, against Food Lover's Market complaining of the excessive price charged per kilogram of raw ginger at the Food Lover's Market at its Hillfox and Westgate branches.

3.2 Ginger fall under the category of 'basic food and consumer items' in Annexure A 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 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.

3.4 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.

3.6 Following receipt of the information, the Commission conducted an investigation into Food Lover's Market's alleged conduct and found the following in relation, specifically, to the Westgate branch in Roodepoort:

3.6.1 Food Lover's Market (Westgate) remains open for business as it may be designated as providing essential services and/or essential products;

3.6.2 Food Lover's Market is a retailer which generally operates in the market for the supply of essential products like fresh produce and other grocery products to consumers in the Westgate area of Roodepoort in Gauteng;

3.6.3 Food Lover's Market (Westgate) also supplies, during the normal course of business, *inter alia*, raw ginger products to the consumers in and surrounding its branch in the Westgate area, Roodepoort, Gauteng;

3.6.4 It was established that prior to the COVID-19 pandemic in South Africa and prior to May 2020 Food Lover's Market (Westgate) earned gross profit margins on raw ginger of between 23% and 25%. The mark-up on raw ginger was between 31% and 49%. Sold approximately 68kg of raw ginger in February 2020. In March 2020, subsequent to the national lockdown, the store sold approximately 303kg of raw ginger.

Table 1: Price cost assessment of Food Lover's Market raw ginger- Westgate

	Average Cost Price (R/Kg)	Average Retail Price(R/Kg)	%Mark-up	%Margin
Dec-19	No ginger sales			
Jan-20	No ginger sales			
Feb-20	71,06	92,49	31%	23%
Mar-20	80,96	105,38	36%	24%
Apr-20	106,275	142,49	49%	25%
May-20	76,38	143,99	92%	47%

Source: Based on Food Lover's submission

3.6.5 Food Lover's Market has market power in the market for the supply of raw ginger, given the current pandemic and state of national disaster;

3.6.6 During May 2020, Food Lover's Market (Westgate) sold approximately 442kg of ginger and derived a total revenue of

approximately R63 643.58. This resulted to an average mark-up of 92% and a gross profit margin of 47% in May.

3.7 The Commission found, and Food Lover's Market admits, that the average mark-up of 92% and gross profit margins of 47% for raw ginger, in May 2020 by Food Lover's Market (Westgate) is unreasonably high for an essential product during the period of National State of Disaster when compared to the mark-up and gross profit margin in the preceding period and may amount to a contravention of section 8(1)(a) of the Act read together with Regulation 4 of the *Consumer Protection Regulations*. There was no cost increase to justify the higher margin.

4 AGREEMENT REGARDING FUTURE CONDUCT

Food Lover's Market agrees to:

- 4.1 immediately desist from the excessive pricing conduct described above;
- 4.2 reduce the Food Lover's Market (Westgate) gross profit margin on raw ginger to a maximum of 25% 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, essential goods, contained in the Consumer Protection Regulations list of goods, to the value of R18 579 (eighteen thousand five hundred and seventy-nine), which is at cost price



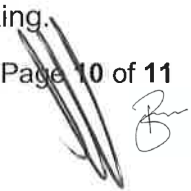
and not selling price, to Mohlakeng Old Age Home situated at 3431 Nhlapo Street, Mohlakeng, Randfontein. This amount is based on, amongst others, the additional income derived by Food Lovers as a result of the significant increase in margins in May.

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 Food Lover's Market testifying that the abovementioned donation has been made;

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 Food Lover's Market (Westgate) 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 Food Lover's Market 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 Food Lover's Market 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 Food Lover's Market in Westgate, Roodepoort that is the subject of the Commission's investigation under Commission Case No. **2020MAY0032**.

Signed at CAPE TOWN on this the 3 day of ~~June~~ ^{JULY} 2020.

~~Ms Mirella Gastaldi~~

Nigel Kevin Meintjes
Duly authorised to sign on behalf of Food Lover's Market

Signed at PRETORIA on this the 7TH day of ~~June~~ ^{JULY} 2020.

Bonakele
Tembinkosi Bonakele

The Commissioner, Competition Commission of South Africa