

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: COVCO142Dec21

In the matter between:

Competition Commission

Applicant

And

Drs Dietrich, Voigt, Mia & Partners and Dr WJH
Vermaak Incorporated ("jointly referred to as
PathCare")

Respondent

Panel: M Mazwai (Presiding Member)
Y Carrim (Tribunal Panel Member)
A Wessels (Tribunal Panel Member)

Heard on: 15 December 2021
Decided on: 15 December 2021

Consent Order

The Tribunal hereby confirms, in terms of section 58(1)(b) of the Competition Act, 89 of 1998 as amended, the consent agreement as agreed to and proposed by the Competition Commission and Drs Dietrich, Voigt, Mia & Partners and Dr WJH Vermaak Incorporated ("jointly referred to as PathCare") annexed hereto.



Ms Mondo Mazwai
Presiding Member

15 December 2021

Date

Concurring: Ms Yasmin Carrim and Mr Andreas Wessels

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA**CT CASE NO:****CC CASE NO: 2021Oct0017**

In the matter between:

COMPETITION COMMISSION OF SOUTH AFRICA**Applicant**

And

Drs Dietrich, Voigt, Mia & Partners

and

**Dr WJH Vermaak Incorporated (“jointly referred to as
PathCare”)****Respondents**

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND**DRS DIETRICH, VOIGT, MIA & PARTNERS AND DR WJH VERMAAK
INCORPORATED (“PATHCARE”) 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**

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**REGULATIONS AND DIRECTIONS PUBLISHED IN GOVERNMENT GAZETTE
NO 43116 ON 19 MARCH 2020**

The Competition Commission (“**Commission**”) and Drs Dietrich, Voigt, Mia & Partners and Dr WJH Vermaak Incorporated (“**PathCare**”) 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 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 “**Agreement**” means the Consent Agreement concluded between the Competition Commission of South Africa and Drs Dietrich, Voigt, Mia & Partners and Dr WJH Vermaak Incorporated (“**PathCare**”);


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- 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 PathCare;
- 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 PCR Test**” refers to a polymerase chain reaction test which is a molecular test that analyses a specimen taken from a patient’s upper respiratory tract and tests for genetic material of SARS-CoV-2;
- 1.8 “**Disaster Management Act**” means the Disaster Management Act, 57 of 2002;
- 1.9 “**PathCare**” means Drs Dietrich, Voigt, Mia & Partners t/a PathCare a common law partnership and Dr WJH Vermaak a company registered



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in terms of the company laws of South Africa with both entities having their head office situated at Pathcare Business Centre, Pathcare Park Neels Bothma Street N1 City 7460;

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; and

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



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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.



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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.



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- 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 this context. In the main, it was alleged that private laboratories have experienced substantial cost reductions in conducting COVID-19 PCR tests, were processing significant volumes of tests and have achieved economies of scale, yet the price charged by the private pathology laboratories for COVID-19 PCR tests remained persistently high and unchanged at R850.
- 2.8 The Commission subsequently engaged in extensive consultations and engagements with the relevant stakeholders in the healthcare sector regarding the pricing of Covid-19 PCR tests. A recurring theme in these engagements was concerns on the persistence of the high price of COVID-19 PCR tests despite the apparent reduction in costs. As a result, the Commission decided to pursue the investigation of the pricing of Covid-19 PCR tests on an expedited basis.

3 COVID-19 PCR 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



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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 RT-PCR test (or reverse transcription-polymerase chain reaction tests or simply PCR-test) is a molecular test that analyses a specimen taken from a patient's upper respiratory tract and tests for genetic material, such as the RNA of SARS-CoV-2 (the virus itself). Scientists use the PCR technology to amplify small amounts of RNA from specimens into DNA, which is replicated until SARS-CoV-2 is detectable. The PCR test has been the gold standard test for diagnosing COVID-19 since it was authorized for use in early 2020. This consent agreement relates to the pricing of PCR tests.

4 THE COMMISSION'S INVESTIGATION AND FINDINGS

- 4.1 On 8 October 2021 the Council for Medical Schemes ("**CMS**") lodged a complaint in terms of section 49B of the Competition Act. The CMS alleged that private laboratories were charging between R850-R900 for a COVID-19-tests. The CMS believes that these prices are exorbitant and unjustifiable.
- 4.2 The Commission's investigation revealed that prices have decreased across pathology suppliers, i.e. the suppliers who supply PathCare have lower prices, thus reducing PathCare's costs.



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- 4.3 The Commission's investigation also revealed that the pathology groups have been earning significant profits since March 2020, especially in the current financial year to date
- 4.4 The above significant increases in profitability indicated to the Commission that excessive pricing on COVID-19 PCR tests may be present.
- 4.5 Whilst the investigation was under way, and following preliminary discussions with PathCare, PathCare voluntarily reduced the price it charged for a COVID-19 PCR test to R750 (VAT inclusive) on 29 November 2021. However, an assessment of PathCare's costs in providing COVID-19 PCR tests by the Commission concluded that PathCare was capable of profitably selling tests at R500 (VAT inclusive).
- 4.6 In the result and following an investigation, the Commission found that *prima facie* pathology groups including PathCare have engaged in a contravention of section 8(1)(a) of the Act. On 08 December 2021, the Commission sent letters of demand to the pathology groups including PathCare to immediately reduce the cost of COVID -19 PCR tests to no more than R500 inclusive of VAT, failing which the Commission indicated that it would launch an urgent application in the Tribunal for appropriate relief aimed at the reduction of COVID-19 PCR tests to R500 inclusive of VAT



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4.7 On 13 December 2021 PathCare responded to the Commission's request and agreed to a reduction in the price for COVID-19 PCR tests to a price of no more than R500 inclusive of VAT. Consequently, the Commission and PathCare concluded this consent agreement.

5 PRICE REDUCTION OF COVID-19 PCR TESTS

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

5.1.1 cease to charge the price of R850 (VAT incl.) forming the subject-matter of CMS' complaint, or R750 (VAT incl.) which is the price charged since 1 December 2021;

5.1.2 reduce the price of Covid-19 PCR tests to a price no more than R500 inclusive of VAT;

5.1.3. For avoidance of doubt, the price of R500 inclusive of VAT is a maximum price cap and PathCare may charge or negotiate a price below the maximum price of R500 inclusive of VAT.

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.



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7 MONITORING

- 7.1. PathCare shall submit a compliance report, setting out, *inter alia*, the prices charged for PCR 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.
- 7.2. The Commission shall be entitled at any time to request any data relating to PathCare's compliance with this consent agreement and PathCare shall comply with the Commission's request for data within a reasonable time.

8 NO ADMISSION

- 8.1 Nothing in this Agreement amounts to or should be construed as an admission of any facts, conduct, liability or wrongdoing on the part of PathCare 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.

9 VARIATION

- 9.1 PathCare shall be entitled to bring an application to the Tribunal for variation, waiver or relaxation of this agreement upon an extraordinary



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and unforeseeable change in market circumstances that imposes an undue economic hardship on PathCare.

9.2 The Commission and/or the CMS shall have the right to oppose such an application for variation of this agreement.

10 FULL AND FINAL SETTLEMENT

This 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 PathCare relating to the complaint lodged by the CMS under case number 2021Oct0017 relating to alleged excessive pricing of COVID-19 PCR 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 Gkhui Gkhui on this the 13 day of December 2021.


 JW Douglass (Dec 13, 2021 12:18 GMT+2)

Full names: Dr JW Douglass

Designation: Chief Executive Officer

Duly authorised representative of **PathCare**


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Signed at _____ on this the _____ day of December 2021.



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The Commissioner, Competition Commission of South Africa






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Final Audit Report

2021-12-13

Created:	2021-12-13
By:	Janine Nainkin (janine.nainkin@pathcare.org)
Status:	Signed
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-  Document e-signed by JwDouglass (john.douglass@pathcare.org)
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