



competitiontribunal
SOUTH AFRICA

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

**Case No:
COVCR074Jul20/SA086Aug20**

In the matter between:

The Competition Commission **Applicant**

And

Levtrade International (Pty) Ltd **Respondent**

Panel : E Daniels (Presiding Member)
: H Cheadle (Tribunal Member)
: AW Wessels (Tribunal Member)

Heard on : 19 August 2020

Decided on : 19 August 2020

Settlement Agreement

The Tribunal hereby confirms the settlement agreement as agreed to and proposed by the Competition Commission and Levtrade International (Pty) Ltd annexed hereto.

**Presiding Member
Mr Enver Daniels**

**19 August 2020
Date**

Concurring: Mr Halton Cheadle and Mr Andreas Wessels

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

**CT Case No. COVCR074Jul20
CC CASE NO: 2020May0073**

In the matter between:

COMPETITION COMMISSION

Applicant

and

LEVTRADE INTERNATIONAL (PTY) LTD

Respondent

FILING SHEET

TAKE NOTICE THAT the Applicant files herewith the following documents:

1. Competition Tribunal Form CT 6; and
2. A Confidential Consent Agreement between the Competition Commission and Levtrade International (Pty) Ltd.

DATED AT PRETORIA ON THIS 14th DAY OF August 2020.

COMPETITION COMMISSION

Applicant
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Sunnyside

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TO: THE REGISTRAR

Competition Tribunal

Block C, The dti Campus

77 Meintjies Street

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PeterK@comptrib.co.za / KgothatsoK@comptrib.co.za

AND TO:

Jordaan & Wolberg Attorneys

C/O Levtrade International (Pty) Ltd

Respondent

234a Louis Botha Avenue

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Johannesburg

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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:

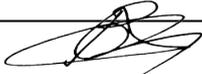
_____ (Applicant)
and _____ (Respondent)

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: _____
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IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT CASE NO:COVCR074Jul20
CC CASE NO: 2020May0073

In re:

COMPETITION COMMISSION OF SOUTH AFRICA

Applicant

and

LEVTRADE INTERNATIONAL (PTY) LTD

Respondent

**SETTLEMENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND
LEVTRADE 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 Levtrade hereby agree that application be made to the Competition Tribunal for the confirmation of this Settlement Agreement as an order of the Tribunal in terms of section 49D read together with 58(1)(b) 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 Settlement Agreement:

- 1.1 “**Act**” means the Competition Act No. 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 “**Complaint**” means the complaint initiated by the Commissioner on 20 May 2020 under case number 2020May0073 against Levtrade for alleged contraventions of section 8(1)(a) of the Act read with regulation 4 of the Consumer Protection Regulations for excessive pricing in respect of the provision of N95 (FFP2) respiratory masks in South Africa and referred to the Tribunal case number COVCR074Jul20;
- 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 **"FFP2 masks"** or **"N95"** or **"respiratory masks"** means the Filtering Facepiece Particles category 2 mask certified by the European Union that serves to protect against particulates such as dust particles and various viruses in the air;
- 1.7 **"Levtrade"** means Levtrade International (Pty) Ltd with registration number 1990/006515/07, a company duly registered and incorporated in accordance with the company laws of the Republic of South Africa, with its principal place of business at 125 Corlett Drive, Waverly, Johannesburg;
- 1.8 **"Settlement Agreement"** means this agreement duly signed and concluded between the Commission and Levtrade;
- 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;
- 1.10 **"Tribunal Directive for Covid-19 Excessive Pricing Complaint Referrals"** means the directive issued by the Tribunal on 6 April 2020; and
- 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 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 (hereafter “state of national disaster”) 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 state of national 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 –*

4.2.1. *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 of the Consumer Protection Regulations 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 the extension of the enforced nationwide lockdown by a further two weeks, until the end of April 2020. This lockdown has since been further extended and, as at the date of this settlement being made a consent order, remains ongoing.

3 THE COMMISSION'S INVESTIGATIONS AND FINDINGS

Investigation

- 3.1 From around and including 28 March 2020 to date, the Commission received several complaints against Takealot, filed by individual members of the public, complaining of the excessive price charged for respiratory masks. These members of the public had complained that Takealot was charging an excessive price for respiratory masks during the national state of disaster and lockdown subsequent to the publication of the Consumer Protection Regulations.

- 3.2 The Commission directed an email to Takealot on 27 March 2020 in relation to these complaints, querying its material price increase and requesting cost justifications and information in respect thereof.
- 3.3 Takealot responded to this email on 29 March 2020, indicating *inter alia* that:
- 3.3.1 The price increase in February/March 2020 on packs of 20 respiratory masks was due to the increase occasioned by various suppliers, one of which was Levtrade.
- 3.4 The Commission sent a letter to Levtrade based on the submissions made by Takealot on 30 March and 01 April 2020, querying its material price increase and requesting cost justifications and information in respect thereof.
- 3.5 Levtrade responded to these letters on 30, 31 March and 2 April 2020. Relying on the information provided by Levtrade and Takealot, the Commission initiated a complaint against Levtrade for excessive pricing on 20 May 2020 under case number: 2020May0073.
- 3.6 Facial 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. The Commission is of the view that regulation 4 of the Consumer Protection Regulations is therefore applicable to the conduct described in this Settlement Agreement.
- 3.7 In terms of Section 7(c) of the Act, market power can also be inferred from the economic behaviour of the firm. In this case, the Commission's view is that



Levtrade's 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 appreciably independently of competitors and customers.

3.8 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 Commission views the scope of the geographic market as narrow because citizens' movements are heavily restricted.

3.9 According to recent jurisprudence from the Tribunal, 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.

Findings

3.10 The Commission conducted an investigation into Levtrade's alleged conduct and found the following:

3.10.1 Levtrade conducts business in *inter alia* wholesale distribution of all-purpose range of Medical products for First Aid, Trauma and Sport kits and is based in Johannesburg, Gauteng. These products are

distributed to various industries throughout South Africa including, Medical and Sports Professional, Pharmacies, Retail, RSA Military, Hospitals and Emergency services;

3.10.2 Levtrade largely distributes its products to retail stores and pharmacies such as [REDACTED], [REDACTED], [REDACTED] and [REDACTED];

3.10.3 Part of the medical and hygiene products distributed by Levtrade included N95 (FFP2) respiratory masks, which are the subject of this complaint referral; and

3.10.4 Levtrade has market power in the market for the provision of N95 (FFP2) respiratory masks to customers and consumers during the national disaster, given the current circumstances occasioned by the pandemic and state of national disaster, in that Levtrade possesses the ability to control prices and/or behave appreciably independently of competitors and customers.

3.11 In respect of the complaint pertaining to the excessive pricing of the N95 (FFP2) respiratory masks, the Commission found, *inter alia*, that:

3.11.1 In January 2020, Levtrade procured a bulk consignment of N95 (FFP2) respiratory masks at a cost price of R3.95 for each respiratory mask or R79.00 for a box of 20 N95 (FFP2) respiratory masks;

3.11.2 During the complaint period, being February and March 2020, Levtrade sold the N95 (FFP2) respiratory masks at prices outlined below;

- 3.11.2.1 Between 07 and 18 February 2020, a box containing 20 N95 (FFP2) respiratory masks was sold for R139.00 (excl VAT);
- 3.11.2.2 From 19 to 27 February 2020 the price of a box containing 20 N95 (FFP2) respiratory masks increased from R139.00 and was sold for R170.00 (excl VAT). An effective price increase of R31.00; and
- 3.11.2.3 From 28 February to 05 March 2020, the price of a box containing 20 N95 (FFP2) respiratory masks further increased from R170.00 (excl VAT) to R310.00 (excl VAT). An effective price increase of R140.00.

3.12 The Investigation found that the cost price did not change over the period. The margins increased from an initial 76% in February 2020 to a material increase of 292% in March 2020. Levtrade's mark-ups increased materially without any concomitant increase in costs. The below table sets out the mark-ups effected by Levtrade.

Table 1

	Price	Cost	Gross Mark-up	Cumulative Price Increase
07 Feb to 18 Feb	R139.00	R79.00	76%	
19 Feb to 04 March	R170.00	R79.00	115%	22%

5 March	R310.00	R79.00	292%	123%
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3.13 Following the investigation the Commission has concluded that Levtrade's conduct of charging excessive prices for N95 (FFP2) respiratory masks to consumers and customers amounts to a contravention of section 8(1)(a) of the Act read together with Regulation 4 of the *Consumer Protection Regulations*.

3.14 The Commission found that as a result of the afore-mentioned conduct, Levtrade received an overcharge profit of approximately R37,493 (thirty-seven thousand, four hundred and ninety-three rand).

3.15 Levtrade disputes the Commission's factual, legal and economic findings. Levtrade is entering into this Settlement Agreement in order to avoid protracted litigation, and nothing in this Settlement Agreement should be construed as an admission of the statements set out in section 4 above, or an admission of liability for a contravention of the Consumer Protection Regulations or section 8(1)(a) of the Act read together with Regulation 4 of the Consumer Protection Regulations.

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, Levtrade 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 R50 000,00 (fifty thousand Rand).

4.2 Levtrade will pay the above administrative penalty on or before, but no later than 15 September 2020.

4.3 Levtrade shall remit the payment of the administrative penalty, in one instalment, into the following bank account:

Name of account holder:	COMPETITION COMMISSION
Bank name:	ABSA BUSINESS BANK
Account number:	4087641778
Branch code:	632005
Reference:	Levtrade/2020May0073

4.4 The Commission confirms that the above settlement agreement does not exceed the statutory limit of 10% of Levtrade'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 Commission undertakes to pay the settlement amount into the National Revenue Fund in accordance with the standard practice of the Commission and as enjoined by section 59(4) of the Act.



5 CONTRIBUTION TO THE SOLIDARITY FUND

- 5.1 Levtrade will further, in addition to its undertaking listed in clause 4 above, make a monetary contribution in the amount of R10 000,00 (ten thousand Rand) to the Solidarity Fund.
- 5.2 Levtrade will pay the amount set out in 5.1 above to the Solidarity Fund within on or before, but no later than 15 September 2020.
- 5.3 The contribution as set out in 5.1 above will be made in one instalment directly into the Solidarity Fund's bank account, the details of which are as follows:

Name of account holder:	SOLIDARITY FUND
Bank name:	STANDARD BANK
Account number:	023 070 021
Branch code:	051001
SWIFT code:	SBZAZAJJ
Payment reference:	Compcom 2020May0073/Levtrade

6 DONATION TO NON-PROFIT-ORGANISATION

- 6.1 Levtrade further undertakes to donate essential goods, including surgical facial masks and hand sanitisers to the total value of R25 000.00 (twenty-five thousand Rand) to the Johannesburg Children's Home¹ non-profit organisation.

¹ A registered NPO under NPO number 001-034 NPC, whose vision includes Young people achieving their potential and making positive contributions to their future and society.

6.2 Levtrade will make such donation, in accordance with 6.1 above, within 14 calendar days of confirmation of this Settlement Agreement as an order of the Tribunal.

7 AGREEMENT REGARDING FUTURE CONDUCT

7.1 Levtrade further agrees:

7.1.1 that with effect from the date of signature of this Settlement Agreement and for the duration of the national state of disaster, Levtrade shall charge a gross profit margin on its N95 (FFP2) respiratory masks that does not exceed 20%;

7.1.2 to develop, implement, and monitor a competition law compliance programme incorporating corporate governance designed to ensure that its employees, management, directors, and agents comply with the Act. Insofar as necessary, the competition law compliance programme will be developed in conjunction with a staff member of the Commission, and shall include a mechanism for the monitoring and detection of any contravention of the Act;

7.1.3 to submit a copy of a compliance programme to the Commission within 60 business days of the date of confirmation of the Settlement Agreement as an order by the Tribunal or such longer period as may be agreed with the Commission depending on the duration of any

lockdown imposed in terms of the legislation and directions referred to in paragraphs 2.1, 2.2, 2.6 and 2.8 above;

7.1.4 to circulate a statement summarising the content of this Settlement Agreement to all management and operational staff employed at Levtrade within 14 calendar days from the date of confirmation of this Settlement Agreement by the Tribunal and notifying the Commission by submitting an affidavit under oath by the CEO of Levtrade confirming compliance with this undertaking; and

7.1.5 to submit an affidavit under oath by the CEO of Levtrade, accompanied by the relevant proof of payments, to the Commission confirming compliance with the payment undertakings as listed in clause 4, 5 and 6 above, within 7 (seven) days of the expiration of the time periods set out in clause in such clauses, and further to send such proof of payments to collections@compcom.co.za within the same time-period as listed herein.

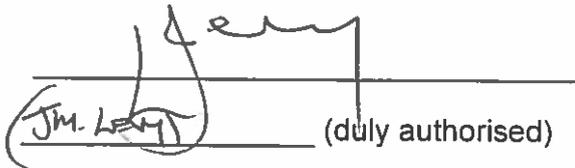
8 FULL AND FINAL SETTLEMENT

8.1 This Settlement 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 Levtrade relating to the alleged contraventions 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 are the



subject of all the Commission's investigations under Commission Case No.
2020May0073.

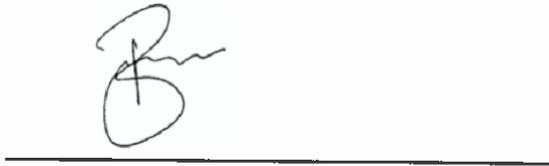
Signed at WANDERLUS on this the 13th day of August 2020.



(J.M. LEM) (duly authorised)

Levtrade (Pty) Ltd

Signed at PRETORIA on this the 14th day of August 2020.



Tembinkosi Bonakele

The Commissioner, Competition Commission of South Africa