



**competitiontribunal**  
SOUTH AFRICA

**COMPETITION TRIBUNAL  
REPUBLIC OF SOUTH AFRICA**

**Case No: CO036Jun20**

In the matter between:

The Competition Commission

And

Samys Wholesalers CC

**Applicant**

**Respondent**

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Panel : Enver Daniels (Presiding Member)  
: Andreas Wessels (Tribunal Member)  
: Fiona Tregenna (Tribunal Member)  
Considered in chambers on : 11 June 2020  
Decided on : 11 June 2020

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**Consent Order**

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The Tribunal hereby confirms the consent agreement as agreed to and proposed by the Competition Commission and Samys Wholesalers CC, attached hereto as “Annexure A”, subject to:

1. the amendment of the reference to clauses 4.2 and 4.3 in clause 3.8 to reflect clause 5.2 and 5.3 respectively.
2. the clarification that, in table A, the 28% mark up relates to the 50ml hand sanitizers and the 26% mark-up relates to the 200ml hand sanitizer.

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**Enver Daniels**  
**Presiding Member**

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**11 June 2020**  
**Date**

**Concurring: Mr AW Wessels and Prof. F Tregenna**

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT CASE NO:

CC CASE NO: 2020AprC0072

In the matter between:

COMPETITION COMMISSION OF SOUTH AFRICA

Applicant

And

SAMYS WHOLESALERS CC

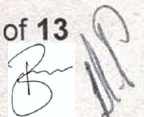
Respondent

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CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND  
SAMYS WHOLESALERS CC 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

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The Competition Commission and Samys Wholesalers CC 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 27(1)(d) read with 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

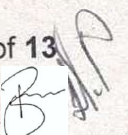


March 2020, as well as the *Regulations on Competition Tribunal Rules for COVID-19 Excessive Pricing Complaint Referrals* published in Government Gazette No 43205 on 3 April 2020 and the *Tribunal Directive for Covid-19 Excessive Pricing Complaint Referrals* on the terms set out below:

## 1 DEFINITIONS

The following words shall, unless otherwise stated or inconsistent with the context in which they appear, bear the following meanings in this Settlement 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 Samys;
- 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 **"Samys"** means Samys Wholesalers CC with registration number 2004/0976/66, a Close Corporation with limited liability and duly incorporated in accordance with the laws of South Africa, with its registered address being at 76-78 Phakamile Mabija Road Kimberley, Northern Cape, 8301;
- 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, 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.

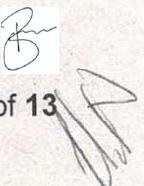
2.8 On 9 April 2020, the President of the Republic of South Africa announced an extension of the enforced nationwide lockdown by a further two weeks, until the end of April 2020.

### 3 THE COMMISSION'S INVESTIGATIONS AND FINDINGS

3.1 On or around 24 March 2020, the Commission received information in terms of section 49B(2)(a) of the Competition Act, against Samys in relation to the inflated prices of the 200ml and 50ml versions of the Dettol hand sanitiser that it was charging its customers in March 2020.

3.2 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.

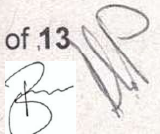
3.5 In a state of national disaster, an established test within the assessment of excessive pricing under the Act is determining whether price increases have a corresponding cost justification. This is because an excessive profit margin is detectable if the ordinary prices are increased materially absent cost increases.

3.6 Following receipt of the information, the Commission conducted an investigation into Samys' alleged conduct and found the following:

3.6.1 In March 2020, Samys operated in, *inter alia*, the market for the supply of hand sanitisers to consumers in the Kimberly Central Business district;

3.6.2 Samys has market power in the abovementioned market, given the current pandemic and state of national disaster;

3.6.3 Samys procured the Dettol hand sanitiser at a unit price of R23.34 per 50ml unit and R67.66 per 200ml unit (both VAT Inclusive);





3.6.4 Samysthen sold the Dettol hand sanitiser at R35.00 per 50ml unit and R100.00 per 200ml unit (both VAT inclusive).The mark-ups over invoice prices are approximately 50% (50ml unit) and 48% (200ml unit) respectively;

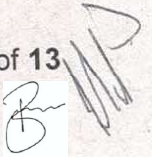
3.6.5 By comparison the prices charged by Samysfor 50ml Dettol hand sanitiser in March 2020against other significant suppliers of Dettol hand sanitisers, as of March 2020 indicates that Samys charged significantly higher prices overother retailers such as Clicks, Game and Makro;

3.6.6 On average, Samys charged a mark-up of 24% higher than the prices charged by comparable suppliers of 50ml Dettol hand sanitiser in March 2020;

3.6.7 The price comparator analysis shows a similar trend for the same period for the 200ml Dettol hand sanitiser, in that Samys also charged significantly higher pricethanother retailers such as Dischem, Game, Makro and Takealot;

3.6.8 On average, Samys charged a mark-up of 32% higher than the prices charged by comparable suppliers for 200ml Dettol hand sanitiser during the same period.

3.7 The Commission found, based on the analysis of the mark-ups and the pricing comparator analysis of comparative mark-ups for 50ml Dettol hand sanitiser and 200ml Dettol hand sanitiser in March 2020, that the mark-up in respect of 50ml Dettol hand sanitiser and 200ml Dettol hand sanitiser for March 2020 by Samys is a contravention of



section 8(1)(a) of the Act read together with Regulation 4 of the *Consumer Protection Regulations*.

3.8 In addition, the Commission also considered the harm that Samys caused by charging such prices for 50ml Dettol hand sanitisers and 200ml Dettol hand sanitisers. To estimate the level of harm by Samys, the Commission calculated the overcharge amount. In calculating the overcharge amount, the Commission utilised the maximum agreed to pricing structure below (at paragraphs 4.2 and 4.3) and calculated the differences between the new prices that Samys will charge and the excessive prices previously charged to estimate the overcharge price per unit. To estimate the overcharge amount, the Commission multiplied the overcharge prices per unit by the volumes of 50ml Dettol hand sanitisers and 200ml Dettol hand sanitisers sold at the overcharge prices. The results can be tabulated follows:

**Table A: Overcharge amount**

	Invoice price (R/unit)	Overcharge selling price (R/unit)	New selling price (R/unit)	Units sold at overcharge price	Price overcharge (R/unit)	Overcharge amount (Rand)
50 ml	23.34	35	29.99	597	5.01	2 990.97
200 ml	67.66	100	85.00	80	15.00	1 200.00
<b>Total</b>	-	-	-	-	-	<b>4 190.97</b>

3.9 As shown, the overcharge amount for 50ml Dettol hand sanitisers is R2 990.97 and that for 200ml Dettol hand sanitisers is R1 200.00. This translates to total overcharge amount of R4 190.97. This is the amount that the Commission estimates to be the total harm (in

monetary terms) that Samys prejudiced customers as a result of the contravention.

#### 4 **ADMISSION**

4.1 Samys admits that it engaged in the conduct of excessive pricing in contravention of section 8(1)(a) of the Act read together with Regulation 4 of the *Consumer Protection Regulations*.

#### 5 **AGREEMENT REGARDING FUTURE CONDUCT**

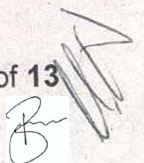
Samys agrees to:

5.1 immediately desist from the excessive pricing conduct described above;

5.2 reduce its mark-up on 50ml Dettol hand sanitisers to a maximum of 26% (Vat Incl.) with immediate effect for the duration of the state of the national disaster;

5.3 reduce its mark-up on 200ml Dettol hand sanitisers to a maximum of 28% (Vat Incl.) with immediate effect for the duration of the state of the national disaster;

5.4 in an attempt to rectify the harm of overcharge as quantified above, donate, within 7 calendar days of confirmation of this Consent Agreement as an order of the Tribunal, hand sanitisers amounting to



a total value of R4000.00, to the following non-profit organisations/not-for profit entities;

5.4.1 Rest haven Kimberly, situated in 16/18 Church Road Kimberley, 8300;

5.4.2 Hellen Bishop Home Kimberly, situated in 36 Church Road, Kimberley, 8300;

5.4.3 St Theresa's Hospice, situated at 156 du Toitspan Road, Kimberley, 8300;

5.4.4 Meals on Wheels Kimberly, situated at 21a Francey St, New Park, 8301.

5.5 submit an affidavit under oath by the Managing Member and/or owner of Samys testifying that the abovementioned donations have been made within 7 calendar days of such donation;

5.6 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;

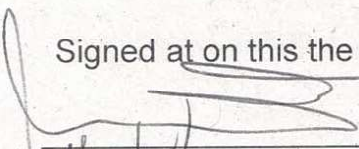
5.7 to submit a copy of a compliance programme to the Commission within 60 business days of the date of confirmation of the Consent Agreement as an order by the Tribunal; and

5.8 to circulate a statement summarising the content of this Consent Agreement to all management and operational staff employed at Samys 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 the Managing Member and/or owner of Samys 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 Samys 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. **2020AprC0072**

Signed at on this the day of April 2020.

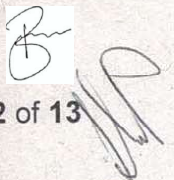
  
\_\_\_\_\_  
(Name in print)

24/4/2020

Manager (Designation)

**Samys Wholesalers CC**

Signed at on this the day of April 2020.





02 JUNE 2020

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**Tembinkosi Bonakele**

**The Commissioner, Competition Commission of South Africa**

