



competitiontribunal
SOUTH AFRICA

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: CR CO007Apr20

In the matter between:

The Competition Commission

Applicant

And

Main Hardware (Pty) Ltd

Respondent

Panel : Enver Daniels (Presiding Member)
: Yasmin Carrim (Tribunal Member)
: Fiona Tregenna (Tribunal Member)

Considered in chambers on : 23 April 2020

Decided on : 23 April 2020

Consent Order

The Tribunal hereby confirms the consent agreement as agreed to and proposed by the Competition Commission and Main Hardware (Pty) Ltd subject to the insertion of the following as para 4.3.1:

The respondent must refund the customers contemplated in para 4.3 above within 72 hours of date of approval. Where customers cannot be traced the respondent will donate the refund amounts into the Solidarity Fund established by the President of the Republic in response to the Covid-19 pandemic, the details of which are to be supplied by the Commission.

Signed by: Enver Daniels
Signed at: 2020-04-23 19:58:40
Reason: Witnessing Enver

Enver Daniels

**Enver Daniels
Presiding Member**

**23 April 2020
Date**

Concurring: Ms Y. Carrim and Prof. F Tregenna

IN THE COMPETITON TRIBUNAL OF SOUTH AFRICA

CT CASE NO:
CC CASE NO: 2020Mar0063

In the matter between:

COMPETITION COMMISSION OF SOUTH AFRICA

Applicant


and

MAIN HARDWARE PTY (LTD)

Respondent

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND
MAIN HARDWARE 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

The Competition Commission ("**the Commission**") and Main Hardware Pty (Ltd) ("**Main Hardware**") 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 Main Hardware;
- 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 “**Main Hardware**” means Main Hardware Pty (Ltd), a company trading within the Republic of South Africa, with its place of business at 45 Heidelberg Road, Johannesburg, Gauteng.
- 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.



3 THE COMMISSION'S INVESTIGATIONS AND FINDINGS

- 3.1 In March 2020, the Commission received information in terms of section 49B(2)(a) of the Competition Act, against Main Hardware in relation to the inflated prices of surgical gloves that it was charging its customers in March 2020.
- 3.2 Surgical gloves fall under the category of 'medical and hygiene supplies' in Annexure A as well as item 1.5 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 Main Hardware's alleged conduct and found the following:

3.6.1 Main Hardware is a hardware store that trades in central Johannesburg, Gauteng;

3.6.2 Main Hardware operates in the market for the supply of a large range of industrial consumables, power tools, machinery, paint and general hardware to industry and individuals;

3.6.3 Main Hardware also operates in the market for the supply of surgical gloves to consumers in central Johannesburg;

3.6.4 Main Hardware has market power in the supply of surgical gloves market, given the current pandemic and state of national disaster;

3.6.5 Main Hardware normally purchases small quantities (maximum 10 boxes) of surgical gloves on a regular basis from Kendon Medical. It only ordered 78 additional boxes after the



announcement of the national disaster from a non-regular supplier, by the name of Controversy.

3.6.6 Main Hardware bought 7 boxes of surgical gloves from Controversy at R56.00 per box on 18 March 2020, and 71 boxes from the same supplier at R86.50 per box on 20 March 2020.

3.6.7 Main Hardware subsequently increased its retail price for surgical gloves by 71% in a space of 2 days, namely from R99.00 per box on 18 March 2020 to R170.00 per box on 20 March 2020. This price increase amounted to an increase in mark-up of 19.75%.

3.6.8 Main Hardware earned a mark-up of 76.78% on the sales of surgical glove prior to the national disaster. Main Hardware increased its mark-up to 96.53% following an increase in the price which it was charged by a non-regular supplier, Controversy.

3.7 The Commission found that the increase in the mark-up of 19.75% in respect of surgical gloves for March 2020 is unreasonable and is a contravention of section 8(1)(a) of the Act read together with Regulation 4 of the *Consumer Protection Regulations*.



4 AGREEMENT REGARDING FUTURE CONDUCT

Main Hardware agrees to:

- 4.1 immediately desist from the excessive pricing conduct described above;
- 4.2 reduce its net mark-up on surgical gloves and cap it at 10% during the COVID-19 pandemic period and for a period of 6 months thereafter, to make the products affordable to customers;
- 4.3 refund all its customers that purchased surgical gloves at R170 per box the amount paid which exceeded the net margin of 10% per box;
- 4.4 to circulate a statement summarising the content of this Consent Agreement to all management and operational staff employed at Main Hardware within 7 calendar days from the date of confirmation of this Consent Agreement by the Tribunal, and to notify the Commission by submitting an affidavit under oath by the owner of Main Hardware 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 Main Hardware 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. 2020MarC0063.

Signed at Johannesburg on this the 22 day of April 2020.



Jeff Sidersky

Owner, Main Hardware

Signed at PRETORIA on this the 22ND day of April 2020.



Tembinkosi Bonakele

The Commissioner, Competition Commission of South Africa

