



**competitiontribunal**  
SOUTH AFRICA

**COMPETITION TRIBUNAL  
REPUBLIC OF SOUTH AFRICA**

**Case No: CO057Jul20**

In the matter between:

The Competition Commission

**Applicant**

And

Stelkor Pharmacy (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 Stelkor Pharmacy annexed hereto.

---

**Presiding Member  
Mr Enver Daniels**

---

**Date  
13 July 2020**

**Concurring: Ms Yasmin Carrim and Mr Andreas Wessels**

**IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA**

**CT CASE NO:  
CC CASE NO: 2020AprC0090**

In the matter between:

**COMPETITION COMMISSION OF SOUTH AFRICA**

**Applicant**

and

**STELKOR PHARMACY (PTY) LTD**

**Respondent**

---

**CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND  
STELKOR PHARMACY 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 Stelkor Pharmacy 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 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*

*BC*  
*EST*

*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. "Stelkor Pharmacy (Pty) Ltd" means Stelkor Pharmacy a public company duly incorporated in accordance with the laws of the Republic of South Africa with registration number 2012/077471/07 situated at 34 Piet Retief Street, Stellenbosch, Cape Town, 7600;
- 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 Stelkor Pharmacy;

- 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. **“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. 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.

2.9. In terms of Section 7(3) of the Act, market power can also be inferred from the economic behaviour of the firm. The mere ability of the firm 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.

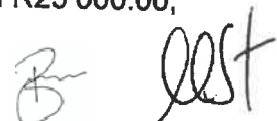
2.10. In a state of national disaster, an established test within the assessment of excessive pricing under the Act is determining whether price increases have a corresponding cost justification. This is because an excessive profit margin is detectable if the ordinary prices are increased materially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

### **3. THE COMMISSION'S INVESTIGATION AND FINDINGS**

3.1. On 04 April 2020, the Commission received information in terms of section 49B(2)(a) of the Competition Act, against Stelkor Pharmacy in relation to the inflated prices of 3 PLY tie back surgical mask that it was charging its customers in April 2020.



- 3.2. Surgical 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. Regulation 4 of the Consumer Protection Regulations is therefore applicable to the conduct described in this Consent Agreement.
- 3.3. Following receipt of the information, the Commission investigated Stelkor Pharmacy alleged conduct and found the following:
- 3.3.1. Stelkor Pharmacy is a community pharmacy and operates as a franchisee of The Local Choice (Pty) Ltd;
- 3.3.2. Stelkor Pharmacy is involved in the retail of the pharmaceutical products and services. It also offers personal care and beauty products, health care and nutrition products. It further offers ancillary services such as clinics and impulse products such as soft drinks;
- 3.3.3. Stelkor Pharmacy had market power in the abovementioned market for the supply of medical and hygiene supplies (facial masks), given the current pandemic and state of national disaster;
- 3.3.4. Stelkor Pharmacy did not sell these facial masks before March 2020;
- 3.3.5. Due to the sudden demand and panic-buying of masks brought on by the state of national disaster, Stelkor Pharmacy sourced 25 boxes of 50PC per box of 3 PLY tie back surgical masks from Vitacare Pharmacy at a cost price of R20.00 per mask and for a total amount of R25 000.00;

Two handwritten signatures in black ink are located at the bottom right of the page. The first signature is a stylized 'B' and the second is 'Jest'.



- 3.3.6. During April 2020, Stelkor Pharmacy sold a total of 1250 masks from this stock at a price of R30.00 per mask and generated a mark-up of approximately 50%;
- 3.3.7. Stelkor Pharmacy generated a gross profit of R12 500.00 from the sales of the 1250 facial masks;
- 3.4. The Commission found that the mark-up of approximately 50% in respect of facial masks during April 2020 by Stelkor Pharmacy is in contravention of section 8(1)(a) of the Act read together with Regulation 4 of the *Consumer Protection Regulations*.

#### 4. AGREEMENT REGARDING FUTURE CONDUCT

Stelkor Pharmacy agrees to:

- 4.1. immediately desist from the excessive pricing conduct described above during the period of the national disaster;
- 4.2. reduce its mark-up on facial masks to 20% with immediate effect for the duration of the state of the national disaster;
- 4.3. pay an amount of R12 500 as a contribution into the Solidarity Fund; This amount does not exceed the statutory limit of 10% of the Stelkor Pharmacy's annual turnover in the Republic during Stelkor Pharmacy's preceding financial year.



4.4. Stelkor Pharmacy shall pay the abovementioned amount to the Solidarity Fund within 7 calendar days from the date of confirmation of this consent agreement as an order of the Tribunal.

4.5. The contribution shall be paid into the Solidarity Fund's bank account, details of which are as follows:

**Bank name:** Standard Bank

**Account holder:** Solidarity Fund

**Account number:** 023 070 021

**Branch Code:** 051001

**Swift Code:** SBZAZAJJ

**Reference:** Compcom 2020AprC0090 / Stelkor Pharmacy

Stelkor Pharmacy further agrees:

- 4.6. to 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;
- 4.7. 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
- 4.8. to circulate a statement summarising the content of this Consent Agreement to all management and operational staff employed at Stelkor



Pharmacy 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 owner of Stelkor Pharmacy 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 Stelkor Pharmacy 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 Case No. 2020AprC0090.

Signed at Stellenbosch on this the 23 day of June 2020.



**Maren Stallmann**

**Director, Stelkor Pharmacy**

Signed at PRETORIA on this the 29<sup>TH</sup> day of June 2020.



**Tembinkosi Bonakele**

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