



competitiontribunal
SOUTH AFRICA

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: CO019May20

In the matter between:

The Competition Commission

Applicant

And

Manhattan Cosmetics CC

Respondent

Panel : E Daniels (Presiding Member)
: I Valodia (Tribunal Member)
: T Vilakazi (Tribunal Member)

Heard on : 14 May 2020

Decided on : 26 May 2020

CONSENT AGREEMENT

The Tribunal hereby confirms the consent agreement as agreed to and proposed by the Competition Commission and Manhattan Cosmetics CC annexed hereto.

**Presiding Member
Mr Enver Daniels**

**26 May 2020
Date**

Concurring: Prof. Imraan Valodia and Dr. Thando Vilakazi

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT CASE NO:
CC CASE NO: 2020APRC0392

In the matter between:

COMPETITION COMMISSION OF SOUTH AFRICA

Applicant

and

MANHATTAN COSMETICS CC

Respondent

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND
MANHATTAN COSMETICS 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 and Manhattan Cosmetics 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 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 Consent 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 Manhattan Cosmetics;
- 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 “**Manhattan Cosmetics**” means Manhattan Cosmetics, a close corporation with principal place of business at shop number 6, Pine City Centre, corner Hill Street and Moodie Street, in Pinetown, KwaZulu-Natal.
- 1.7 “**Tribunal Directive for Covid-19 Excessive Pricing Complaint Referrals**” means the directive issued by the Tribunal on 6 April 2020;
- 1.8 “**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
- 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.

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 During March 2020, the Commission received information in terms of section 49B(2)(a) of the Competition Act, against Manhattan Cosmetics in relation to the inflated prices of hand sanitisers 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 1.3 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 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 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 national state of 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 Manhattan Cosmetics' alleged conduct and found the following:

3.6.1 Manhattan Cosmetics operates in the market for the supply of groceries, cosmetics and hairdressing products;

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

3.6.3 Manhattan Cosmetics entered the market for hand sanitisers, in March 2020, due to the sudden demand and panic-buying brought on by the national state of disaster;

3.6.4 Manhattan Cosmetics' average cost mark-up in respect of hand sanitizers for March was 30.43%, translating to a gross profit margin of 23.33%; and

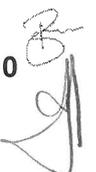
3.6.5 Manhattan Cosmetics sold 563 hand sanitisers and made a total revenue of R 16 890.00 as a result.

3.7 The Commission found that a cost mark-up of 30.43% and a gross profit margin of 23.33% for the sale of hand sanitisers are high and may constitute 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

Manhattan Cosmetics agrees to:

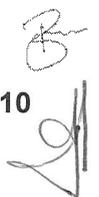
- 4.1 immediately desist from the pricing conduct described above;
- 4.2 reduce the gross profit margin charged in respect of hand sanitizers to 20% or less for the duration of the national state of disaster;
- 4.3 donate, within 7 calendar days of confirmation of this Consent Agreement as an order of the Tribunal, hand sanitisers to the value of R 612.00 (six hundred and twelve Rands), which amount is relative to the overcharge to customers, to Durban Child & Youth Care Centre, based in Durban, at S7 Mangosuthu Highway, Umlazi.
- 4.4 submit proof of donation and an affidavit under oath by a duly authorised representative of Manhattan Cosmetics, testifying that the abovementioned donation has been made to Durban Child & Youth Care Centre within 7 calendar days of such donation, subject to the



restrictions of movement as promulgated by the relevant regulations.

Proof of payment must also be sent to collections@compcom.co.za and this case number must be included in the subject line: 2020APRC0392;

- 4.5 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;
- 4.6 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
- 4.7 to circulate a statement summarising the content of this Consent Agreement to all management and operational staff employed at Manhattan Cosmetics 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 Manhattan Cosmetics 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 Manhattan Cosmetics 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. **2020APRC0392**.

Signed at PINETOWN on this the 30TH day of April 2020.



Mr. Dipesh Kalyan

Duly authorised to sign on behalf of Manhattan Cosmetics CC

Signed at PRETORIA on this the 30TH day of April 2020.



Tembinkosi Bonakele

The Commissioner, Competition Commission of South Africa

