



**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: CO186Jan21

In the matter between:

The Competition Commission

Applicant

and

Oak Medical and Laboratory Supplies CC

Respondent

Panel	:	AW Wessels (Presiding Member) E Daniels (Tribunal Member) A Ndoni (Tribunal Member)
Heard on	:	22 January 2021
Signed addendum filed on	:	28 January 2021
Decided on	:	04 February 2021

Order: Consent Agreement

The Competition Tribunal hereby confirms the consent agreement as agreed to and proposed by the Competition Commission and Oak Medical and Laboratory Supplies CC annexed hereto, including the addendum to the agreement dated 28 January 2021, annexed hereto marked as Annexure "A".

**Presiding Member
Mr A W Wessels**

04 February 2021
Date

Concurring: Mr Enver Daniels and Ms Andiswa Ndoni

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

CC CASE NO: 2020Aug0024

CT CASE NO:

In the matter between:

COMPETITION COMMISSION OF SOUTH AFRICA

Applicant

and

OAK MEDICAL AND LABORATORY SUPPLIES CC

Respondent

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND
OAK MEDICAL AND LABORATORY SUPPLIES 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 Oak Medical and Laboratory Supplies 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

For the purposes of this Consent Agreement the following definitions shall apply:

- 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 Oak Medical and Laboratory Supplies CC;
- 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 **“NHLS”** means the National Health Laboratory Services;
- 1.7 **“Oak Medical”** means Oak Medical and Laboratory Supplies CC, a close corporation duly incorporated as such in accordance with the applicable laws of the Republic of South Africa, with its principal place of business at 20 Downie Crescent, Queensburgh, KwaZulu-Natal;
- 1.8 **“Respondent”** means Oak Medical;
- 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, 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 authorised the Minister of Trade, Industry and Competition 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, Industry and Competition 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 2020, 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. This lockdown has since been further extended and remains ongoing.

3. THE COMMISSION'S INVESTIGATIONS AND FINDINGS

Investigation

3.1 On 7 August 2020, the Commissioner initiated an investigation against the Respondent for alleged excessive pricing in that it may have been selling tongue depressors to the national Government at substantially high prices. The information in the Commission's possession suggested that the Respondent charged the NHLS R0.90 (ninety cent) per unit in the sale and supply of tongue depressors, when its competitors charged prices as low as R0.29 (twenty nine cent) for the same product, a 210% (two hundred and ten percent) difference. This conduct was alleged to potentially be in contravention of section 8(1)(a) of the Act.

3.2 A tongue depressor (sometimes called a spatula) is a tool used in medical practice to depress the tongue to allow for examination of the mouth and throat. In the context of the COVID-19 pandemic, tongue depressors may, amongst other uses, be used as essential medical equipment to depress a person's tongue during the taking of a throat swab. The swab is used to collect saliva or mucus to test for the presence of the coronavirus.



- 3.3 Tongue depressors fall under the category of 'medical and hygiene supplies' in Annexure A of the Consumer Protection Regulations. Regulation 4 of the Consumer Protection Regulations is therefore applicable to the conduct described in this Consent Agreement.
- 3.4 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 mere ability to charge prices that are unreasonably higher than competitive benchmarks 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.
- 3.5 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.

Findings

- 3.6 The Commission conducted an investigation into Oak Medical's alleged conduct and found the following:



- 3.6.1 The Respondent primarily operates in the market for the supply of medical disposables, laboratory equipment, chemicals, and glassware. On 7 May 2020, the Respondent supplied 200 000 (two hundred thousand) tongue depressors once-off to the NHLS at R0.90 (ninety cent) per unit whereas the cost price for each tongue depressor was R0.16 (sixteen cent), and its competitors charged prices as low as R0.29 (twenty nine cent) for the same product (a 210% difference);
- 3.6.2 The Respondent's total sales amounted to R180 000 (one hundred and eighty thousand Rand) excluding VAT, while costs were R31 000 (thirty one thousand Rand) excluding VAT.
- 3.6.3 The Respondent applied a 'cost mark-up percentage of 463% (four hundred and sixty three percent), and the gross profit margin earned was 83% (eighty-three percent);
- 3.6.4 The Respondent charged an excess profit of R0.72 (seventy two cent) per unit above the reasonable price of R0.18 per unit (which price allows for a reasonable gross profit margin of 15%);
- 3.6.5 The total value of the transaction amounted to R180 000 (one hundred and eighty thousand Rand), which is the amount the NHLS paid to the Respondent.



Determination of excessive price

3.7 The tables below reflect the Commission's determination of the alleged excessive prices charged by the Respondent.

Table 1: Mark-ups and gross profit margins

Date	Units	Cost Price	Selling Price	% Mark-up	% Margin
06-May-20	200 000	R0,16	R0,90	463%	83%

Table 2: Overcharge based on benchmark price

Cost per unit ex. VAT	Selling price @ 15% gross margin ex. VAT	Actual selling price to NHLS ex. VAT	Excess price per unit	Excess profits on 200 000 units
R0,16	R0,18	R0,90	R0,72	R143 200

3.8 The Commission considered that the reasonableness benchmark for gross profit margin, as used by the Commission in previous similar referrals, is 15%.

3.9 In determining the excess profits on the 200 000 units sold by the Respondent to the NHLS, the Commission considered the following:

3.9.1 The Respondent earned an excess gross profit of R143 200 (one hundred and forty three thousand Rand) on the 200 000 units supplied to the NHLS; an 83% gross profit margin, which is above the reasonableness benchmark of 15%;

3.9.2 However, the Respondent also suffered a loss of R33 427.16 on this transaction, when the courier company that the respondent used to ship its initial stock lost the entire shipment of 200 000 tongue depressors.

The Respondent had to source another batch of goods before finally supplying the NHLS with a single batch of 200 000 units. The Commission confirmed that the initial shipment was uninsured (by either the respondent or the courier company) and that the initial courier company has not reimbursed the respondent for the value of the lost goods.

3.10 In determining the appropriate settlement, the Commission considered that the value of the transaction was limited to R180 000 and, in favor of achieving settlement, the loss suffered by the Respondent is considered as a mitigating factor when calculating the excessive profits. As such, the loss suffered by the respondent was subtracted from the excess revenue earned from this transaction. The calculations, as set out in the table below, show the excess profits amount as R109 772.84 (one hundred and nine thousand, seven hundred and seventy two Rand and eighty four cent).

Table 3: Overcharge based on benchmark price (excluding lost shipment costs)

Cost per unit ex. VAT	Selling price @ 15% gross margin ex. VAT	Actual selling price to NHLS ex. VAT	Excess price per unit	Excess profits on 200,000 units	Less lost stock and additional transport cost	Excessive profit
R0,16	R0,18	R0,90	R0,72	R143 200	R33 427,16	R109 772,84

3.11 The Respondent does not admit that the above conduct constitutes excessive pricing in terms of section 8(1)(a) of the Act read together with Regulation 4 of the Consumer Protection Regulations. After engaging with the Commission, the Respondent nevertheless agrees to resolve the complaint on the terms set out below.

4. AGREEMENT REGARDING FUTURE CONDUCT

The Respondent agrees to:

- 4.1 immediately desist from the excessive pricing conduct described above;
- 4.2 reduce its mark-up for tongue depressors to [REDACTED] or lower with immediate effect;
- 4.3 restitution measures to the NHLS in the form of a credit note to the NHLS to the value of the calculated overcharge of R109 772.84 within 7 calendar days of confirmation of this Consent Agreement as an order of the Tribunal;
- 4.4 submit an affidavit under oath by the owner of Oak Medical testifying that the credit note has been made to the NHLS, within 7 days of delivery of such credit note to the NHLS;
- 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 working 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 Oak Medical within 60 working days from the date of confirmation of this Consent Agreement by the Tribunal.

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 Oak Medical 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.:2020Aug0024.

Signed at Queensburgh on this the 09 day of November 2020.



Name : Mr Rubendra Venketsamy Nagiah

Position : Director

Oak Medical and Laboratory Supplies CC

Signed at _____ on this the _____ day of November 2020.



Tembinkosi Bonakele

The Commissioner, Competition Commission of South Africa

Signed at PRETORIA on this the 27TH day of November 2020.

A handwritten signature in black ink, consisting of a stylized, cursive 'M' or similar character.

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

**CT Case No: CO186Jan21
CC Case No: 2020Aug0024**

In the matter between

COMPETITION COMMISSION

Applicant

and

OAK MEDICAL AND LABORATORY SUPPLIES CC

Respondent

**ADDENDUM TO CONSENT AGREEMENT BETWEEN THE COMPETITION
COMMISSION AND OAK MEDICAL AND LABORATORY SUPPLIES CC IN TERMS
OF SECTION 27(1)(d) READ WITH SECTION 49D OF THE COMPETITION ACT 89
OF 1998, AS AMENDED**

1. Terms and abbreviations used in this document ("the Addendum") shall have the meaning assigned to them in the parties in the Consent Agreement concluded between the Commission and Oak Medical and filed with the Competition Tribunal on 13 January 2021, which is amended as follows:

PURPOSE

2. The purpose of this addendum is to amend paragraph 4.2 in order to limit the duration of the Future Conduct in order for the undertaking to be applicable for the

duration of the state of national disaster.

AMENDMENT TO CLAUSE 4.2

3. Clause 4.2 is amended by inserting, after the first sentence, the following sentence
"Such reduced mark-up will be applicable for the duration of the state of national disaster" so that the amended paragraph reads as follows:

"4.2 reduce its mark-up for tongue depressors to [REDACTED] or lower with immediate effect. Such reduced mark-up will be applicable for the duration of the state of national disaster."

4. This Addendum forms an amendment to and an integral part of the Consent Agreement, the terms of which remain otherwise unchanged.

Dated and signed in QUEENSBURGH on this the 27 day of January 2021.



Duly authorised signatory
Oak Medical and Laboratory Supplies CC

Name in full: MR RUBENDRA VENKESAMY NAGIAH

Authority: DIRECTOR

Dated and signed in Pretoria on this the 28th day of January 2021.



Tembinkosi Bonakele
The Commissioner: Competition Commission