



competitiontribunal
SOUTH AFRICA

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: CO034May20

In the matter between:

The Competition Commission

Applicant

And

Auction and Salvage Net (Pty) Ltd

Respondent

Panel : E Daniels (Presiding Member)
: AW Wessels (Tribunal Member)
: I Valodia (Tribunal Member)

Heard on : 02 June 2020

Decided on : 02 June 2020

CONSENT AGREEMENT

The Tribunal hereby confirms the consent agreement as agreed to and proposed by the Competition Commission and Auction and Salvage Net (Pty) Ltd annexed hereto marked "A".

**Presiding Member
Mr Enver Daniels**

**02 June 2020
Date**

Concurring: Mr Andreas Wessels and Prof. Imraan Valodia

"A"

IN THE COMPETITON TRIBUNAL OF SOUTH AFRICA

CT CASE NO:
CC CASE NO: 2020APRC0286

In the matter between:

COMPETITION COMMISSION OF SOUTH AFRICA

Applicant

and

AUCTION AND SALVAGE NET (PTY) LTD

Respondent

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND
AUCTION AND SALVAGE NET 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 Auction and Salvage Net (Pty) Ltd hereby agree that an 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

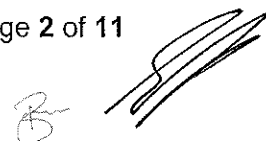


as the *Regulations on Competition Tribunal Rules for COVID-19 Excessive Pricing Complaint Referrals* published in Government Gazette No 43205 on 3 April 2020 and the *Tribunal Directive for Covid-19 Excessive Pricing Complaint Referrals* on the terms set out below:

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:

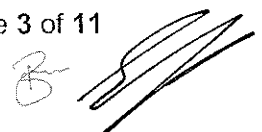
- 1.1 **"Act"** means the Competition Act 89 of 1998, as amended;
- 1.2 **"Auction and Salvage Net"** means Auction and Salvage Net (Pty) Ltd with registration number 2011/137605/07 situated at 105 Rustenburg Road, Krugersdorp, Gauteng;
- 1.3 **"Commission"** means the Competition Commission of South 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 Auction and Salvage Net;



- 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, given the magnitude and severity of the COVID-19 outbreak which had been declared a global pandemic by the World Health Organisation (**“WHO”**) and classified as a national disaster by the Head of the National Disaster Management Centre, 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 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.

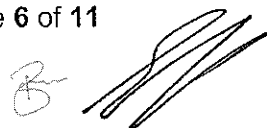
2.6 On 23 March 2020, the President of the Republic of South Africa announced the enforcement of a nationwide lockdown for 21 days with effect from midnight on Thursday, 26 March 2020.

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 early March 2020, the Commission received information in terms of section 49B(2)(a) of the Competition Act, against Auction and Salvage Net in relation to the inflated prices it was charging for facial masks, namely, FFP1 masks for the period March 2020.
- 3.2 Facial 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 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 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 Auction and Salvage Net's alleged conduct and found as follows:

3.6.1 Auction and Salvage Net is an individual hardware store that is based in Krugersdorp (Mogale City), Gauteng.

3.6.2 Auction and Salvage Net specialises in the retail of tools, machinery, hardware, building equipment, furniture and other products to the general public as well as to wholesalers. Auction and Salvage Net sources these products locally and internationally.

3.6.3 In December 2019, Auction and Salvage Net started selling face/dust masks in addition to the above products. Auction and Salvage Net does not manufacture the masks itself. It

purchases the masks from a supplier based in Germiston, Gauteng, and then on-sells them to end-customers.

3.6.4 Auction and Salvage Net has market power in the market for the sale of face masks, given the current pandemic and state of national disaster.

3.6.5 During March 2020, Auction and Salvage Net realised a mark-up and gross margin as depicted in the table 1 below.

Table 1:

Period	invoice price exc VAT (Rand)	invoice price incl VAT (Rand)	selling price excl VAT (Rand)	selling price incl VAT (Rand)	mark-up	gross margins	boxes sold	Gross Profit @ excessive price (Rand)	Gross Profit @ 20% margin – (Rand)	Excess Profits (Rands)
March 2020	400,00	460,00	565,22	650,00	41,3%	29,2%	146	24 121,74	14 600,00	9 521,74

3.7 During March 2020 Auction and Salvage Net's gross margin was in excess of the average 20% gross profit margin, which is generally regarded as fair and reasonable on the sale of face masks.

3.8 The Commission found that the gross profit margin earned by Auction and Salvage Net of approximately 29.2% in respect of the sale of face masks during March 2020 is excessive and in contravention of section 8(1)(a) of the Act read together with Regulation 4 of the *Consumer Protection Regulations*.

3.9 Auction and Salvage Net does not admit that the conduct set out above constitutes excessive pricing in terms of Section 8(1)(a) of the Act, read with Regulation 4 of the Consumer Protection Regulations. After

engaging with the Commission, Auction and Salvage Net nevertheless agrees to resolve the complaint on the terms set out below.

4 AGREEMENT REGARDING FUTURE CONDUCT AND DONATION TO THE SOLIDARITY FUND

Auction and Salvage Net agrees to:

- 4.1 immediately desist from the excessive pricing conduct described above;
- 4.2 reduce its gross profit margin on facial masks to 20% with immediate effect for the duration of the state of the national disaster;
- 4.3 pay **R 9 521,74** in the form of a donation to the Solidarity Fund within 7 (Seven) calendar days from the date of confirmation of this Consent Agreement as an order by the Tribunal. The contribution must be paid into the Solidarity Fund's bank account which is as follows:

NAME: Solidarity Fund

BANK: Standard Bank

ACCOUNT NUMBER: 023 070 021

ACCOUNT TYPE: Current account

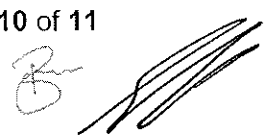
BRANCH CODE: 051001

SWIFT CODE: SBZAZAJJ

PAYMENT REF: 2020AprC0286/AuctionSalvage



- 4.4 submit within a period of 7 (Seven) calendar days, an affidavit under oath by the Manager of Auction and Salvage Net testifying that the abovementioned donation has been made to the Solidarity Fund in line with paragraph 4.3;
- 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 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 circulate a statement summarising the content of this Consent Agreement to all management and operational staff employed at Auction and Salvage Net 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 Manager of Auction and Salvage Net confirming compliance with this undertaking.

A handwritten signature in black ink, consisting of a stylized initial 'B' followed by several sweeping, overlapping strokes.

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 Auction and Salvage Net 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. 2020APRC0286.


Signed at Krugersdorp on this the 27th day of May 2020.



Bernard Steenkamp

Manager, Auction and Salvage Net

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



Tembinkosi Bonakele

The Commissioner, Competition Commission of South Africa