

NON-CONFIDENTIAL



competitiontribunal
SOUTH AFRICA

COMPETITION TRIBUNAL REPUBLIC OF SOUTH AFRICA

Case No: CO176Dec20

In the matter between:

The Competition Commission

Applicant

And

Crest Chemicals (Pty) Ltd

Respondent

Panel : AW Wessels (Presiding Member)
: E Daniels (Tribunal Member)
: A Ndoni (Tribunal Member)

Heard on : 22 January 2021

Decided on : 22 January 2021

CONSENT AGREEMENT

The Tribunal hereby confirms the consent agreement as agreed to and proposed by the Competition Commission and Crest Chemicals (Pty) Ltd annexed hereto.

Signed by: Andreas Wessel Wessels
Signed at: 2021-01-22 13:07:23 +02:00
Reason: Witnessing Andreas Wessel We

Andreas Wessel Wessels

Presiding Member
Mr Andreas Wessels

22 January 2021

Date

Concurring: Mr Enver Daniels and Ms Andiswa Ndoni

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA**CT CASE NO:****CC CASE NO: 2020AUG0071**

In the matter between:

COMPETITION COMMISSION OF SOUTH AFRICA**Applicant**

And

CREST CHEMICALS (PTY) LTD**Respondent**

**CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND
CREST CHEMICALS 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 Crest Chemicals (Pty) Ltd 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 complaint based on 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 Crest Chemicals;
- 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;

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- 1.6 **“Crest Chemicals”** means Crest Chemicals (Pty) Ltd, a private company registered in accordance with the laws of South Africa with registration number 1952/001517/07 and its head office situated at 247 15th Road, Randjespark, Midrand, Gauteng.
- 1.7 **“Disaster Management Act”** means the Disaster Management Act, 57 of 2002;
- 1.8 **“Essential products”** means basic food and consumer items listed in Annexure A & B of the Consumer Protection Regulations.
- 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;
- 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, 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. 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 –

4.2.1. does not correspond to or is not equivalent to the increase in the cost of providing that good or service; or

4.2.2. 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 and B 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 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. The lockdown has subsequently been further extended.

3. THE COMMISSION'S INVESTIGATIONS AND FINDINGS

Investigation

- 3.1 In April 2020, the Commission received information in terms of section 49B(2)(a) of the Competition Act, regarding excessive prices charged by Crest Chemicals for, *inter alia*, its high purity isopropanol (IPA) and n-propanol (NPA).
- 3.2 IPA and NPA are intermediate inputs into essential products as listed in Annexure A and B of the Consumer Protection Regulations, namely hand sanitizer and disinfectants.

A handwritten signature in black ink, appearing to be 'LWB' followed by a stylized flourish.

- 3.3 One of the main ways of combating the spread of the pandemic is through the use of a minimum of a 70% alcohol-based hand-sanitizers and disinfectants which can be made from either propyl alcohol, propanol alcohol, or ethyl alcohol (commonly referred to as ethanol). As such hand sanitizers and disinfectants have specifically been listed as essential goods in terms of Annexure A and B of the Consumer Protection Regulations. Regulation 4 of the Consumer Protection Regulations is therefore applicable to the conduct described in this Consent Agreement.
- 3.4 In terms of Section 7(c) 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.
- 3.5 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. In the context of abnormal market conditions amid the Covid-19 crisis, a firm's own conduct therefore is the best available proxy for market power if the market is distorted by the crises.
- 3.6 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.

Findings

3.7 The Commission investigated Crest Chemical's alleged conduct and maintains the following:

3.7.1 Crest Chemicals distributes chemical raw materials to various industries such as food, pharmaceuticals, personal care, industrial coatings and construction.

3.7.2 Crest Chemicals purchases a majority of its IPA product from Sasol Chemical Industries (Pty) (Ltd) (Sasol). The products are collected or delivered in bulk tanker loads from Sasol in Gauteng to a drumming service provider in Durban, KZN. Drum pack sizes include 25Lt, 164kg and 210Lt metal drums. The repacked goods are then warehoused and distributed nationally for sale to customers.

3.7.3 Crest Chemicals sells IPA 99% formulation in 164Kg. Crest also sells its IPA 85% formulation in both litres (220Lt and 25Lt) and Kilograms (164Kg).

3.7.4 The Commission's findings relate to the following products:



- i) 164kg IPA 85% formulation;
- ii) 210Lt IPA 85% formulation; and
- iii) 25LT IPA 85% formulation.

3.7.5 Based on pricing and cost information supplied by Crest Chemicals in relation to IPA 85% formulation, the Commission found the following:

3.7.5.1 Crest Chemicals has effected significant price increases and realised material increases in gross margins on its IPA 85% formulation products sold following the covid-19 outbreak.

3.7.5.2 The Commission's analysis is based on Crest Chemical's transactional information, particularly sales volumes, prices, and costs for IPA 85% formulation. In this regard the Commission was able to analyse gross margins over time. Therefore, the Commission used December 2019 to February 2020 as the comparator period. The gross margin analysis revealed that for the comparator period (i.e. December 2019 to February 2020), the average gross margins for:

- i) 164kg IPA 85% formulation was ■■■%;
- ii) 210Lt IPA 85% formulation was ■■■% and
- iii) 25LT IPA 85% formulation was ■■■%.

3.7.5.3 Accordingly, the benchmark is the gross profit margins generated by Crest Chemicals during December 2019 to February 2020.

3.7.5.4 In April to June 2020, Crest Chemicals increased its prices of the above products and realised gross profit margins as depicted in the table below. The table also shows the estimated excess profits realised by Crest.

Table 1: Excess Profits Earned by Crest Chemicals During April to June 2020

Product	Average Price: Dec 2019- Feb 2020	Average Price: Apr 2020	Average Price: May 2020	Average Price: Jun 2020	Average Gross Margin: Dec 2019- Feb 2020 (benchmark)	Average Gross Margin: Apr2020	Average Gross Margin: May2020	Average Gross Margin: Jun2020	Estimated Excess Profit
164Kg IPA 85%	R [REDACTED]	R24,43			[REDACTED] %	[REDACTED] %			R20 278,00
210Lt IPA 85%	R [REDACTED]	R21,55	R26,76	R27,04	[REDACTED] %	[REDACTED] %, [REDACTED] %	[REDACTED] %	[REDACTED] %	R94 545,80
25Lt IPA 85%	R [REDACTED]	R28,12	R28,30	R29,45	[REDACTED] %	[REDACTED] %	[REDACTED] %	[REDACTED] %	R43 713,12
									Total: R158 536,92

3.7.5.5 Crest Chemicals derived approximately R158 536,92 as excess profits from charging excessive prices on 164kg IPA 85%; 210Lt IPA 85% and 25Lt IPA 85% respectively between the period April and June 2020.

- 3.8 The Commission maintains that the conduct by Crest Chemicals, of escalating its price and gross profit margins on its IPA 85% formulation products without corresponding increases in costs, during the period of April and June 2020, is a contravention of section 8(1)(a) of the Act read together with Regulation 4 of the *Consumer Protection Regulations*.
- 3.9 Crest Chemicals does not admit that its conduct under the period of investigation constitutes excessive pricing in terms of section 8(1)(a) of the Act read together with Regulation 4 of the Consumer Protection Regulations. Notwithstanding the above, in order to avoid protracted litigation and costs, Crest Chemicals agrees to resolve the complaint on the terms set out below.

4. ADMINISTRATIVE PENALTY

- 4.1 Crest Chemicals undertakes to pay an administrative penalty, in terms of section 58(1)(a)(iii) read with sections 59(1)(a) and 59(3) of the Act, in the amount of R98 536,92 (Ninety-eight thousand five hundred and thirty six Rand and ninety-two cents, only).
- 4.2 Crest Chemicals will pay the above administrative penalty within 7 (seven) days from the date of confirmation of this Settlement Agreement as an order by the Tribunal
- 4.3 The penalty must be paid to the Commission's bank account which is as follows:

Name: The Competition Commission Fee Account

Bank: ABSA bank, Pretoria



Account Number: 4050778576

Branch Code: 323 345

Reference: Crest Chemicals/2020APRC0057

- 4.4 The penalty will be paid over by the Commission to the National Revenue Fund in accordance with the provisions of section 59(4) of the Act.
- 4.5 The Commission confirms that the above settlement agreement does not exceed the statutory limit of 10% of Crest's annual turnover in the Republic and their exports from the Republic respectively, during the firms' preceding financial year, as provided for in section 59(2) of the Act read with regulation 7.2.2 of the *Consumer Protection Regulations*.

5. AGREEMENT REGARDING FUTURE CONDUCT

Crest Chemicals agrees that:

- 5.1 It will immediately desist and refrain from the alleged excessive pricing conduct..
- 5.2 It will ensure its gross profit margins on IPA 85% formulation does not exceed the average gross margins realised during the comparator period (i.e. December 2019 to February 2020) , as set out below, with immediate effect and for the duration of the state of national disaster;
- i) 164kg IPA 85% formulation was ██████%;
 - ii) 210Lt IPA 85% formulation was ██████% and
 - iii) 25LT IPA 85% formulation was ██████%.



- 5.3 It will 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;
- 5.4 It will 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
- 5.5 It will circulate a statement summarising the content of this Consent Agreement to all senior management and senior operational staff employed at Crest Chemicals within 7 calendar days from the date of confirmation of this Consent Agreement by the Tribunal.

6. CONTRIBUTION TO CHARITIES

- 6.1 In addition to its undertaking listed in clause 4 above, Crest Chemicals has donated hand sanitizers to the value of R60 000,00 to the Utho Ngathi Disability Projects, a Soweto based non-profit company focusing on the upliftment of people with disabilities in Southern Africa.
- 6.2 Crest Chemicals undertakes to submit an affidavit under oath confirming the above donations. The Commission is satisfied that Crest Chemicals has repaid the overcharge after having performed the undertakings in clause 4 and donation in Clause 6.1.

Handwritten signature and initials, possibly 'LW' and 'B', with a large flourish below.

7. FULL AND FINAL SETTLEMENT

In an effort to avoid protracted litigation, this Consent Agreement, upon confirmation as an order by the Tribunal, is entered into in full and final settlement, without admitting liability and concludes all proceedings between the Commission and Crest Chemicals 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 relates Crest Chemicals and that is the subject of the Commission's investigation under Commission Case No. 2020APRC0057.

Signed at Midrand on this the 30 day of November 2020.

 Liza Watson  Michael Thomson

NAME:

Director: Crest Chemicals (Pty) Ltd

Director Crest Chemicals (Pty) Ltd

Duly authorised to sign on behalf of Crest Chemicals (Pty)Ltd

Signed at PRETORIA on this the 4TH day of DECEMBER 2020.



Tembinkosi Bonakele

The Commissioner, Competition Commission of South Africa

