



competitiontribunal
SOUTH AFRICA

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: CO033May20

In the matter between:

The Competition Commission

Applicant

And

██████████ t/a T.N.T Basic Trading

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 ██████████ t/a T.N.T Basic Trading annexed hereto.

**Presiding Member
Mr Enver Daniels**

**Date
02 June 2020**

Concurring: Mr Andreas Wessels and Prof. Imraan Valodia

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

**CT CASE NO:
CC CASE NO: 2020APRC0258**

In the matter between:

COMPETITION COMMISSION OF SOUTH AFRICA

Applicant

and

██████████ TRADING AS T.N.T BASIC TRADING

Respondent

**CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND
██████████ TRADING AS T.N.T BASIC TRADING 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 ██████████ trading as T.N.T Basic Trading 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

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 T.N.T Basic Trading;



- 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 “**T.N.T Basic Trading**” means [REDACTED] trading as T.N.T Basic Trading, a sole proprietor registered in accordance with the laws of South Africa with business address situated at 37 View Point Road, Unit B10, Bartlett, Boksburg;
- 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 Cooperative Governance and Traditional Affairs (“**COGTA**”) declared a National State of 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, 2002 (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 Annexures A and B list the goods and services that fall to be regulated by the Consumer Protection Regulations. Annexure A lists the goods and services that fall to be regulated by Regulation 4 of 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 The investigation into the conduct of T.N.T Basic Trading stems from another Commission investigation into a customer of T.N.T Basic Trading.



- 3.2 The Commission initiated a complaint on the basis of the information it had which indicated that T.N.T Basic Trading significantly increased prices of its respiratory protection masks (FFP2). Information in the Commission's possession suggested that in January 2020, T.N.T Basic Trading charged R3,60 per respiratory protection mask (FFP2). In February 2020, following the WHO declaration of Covid-19 as a global pandemic, T.N.T Basic Trading increased its price by approximately 600% to R24,99 per respiratory protection mask (FFP2). The acronym "FFP" is an abbreviation for the words 'Filtering Face Piece'. Filtering face pieces are made of fabric designed to filter air of impurities and are rated by the level of protection they offer. FFP2 masks have a minimum of 94% filtration percentage and maximum 8% leakage to the inside. They are mainly used in construction, agriculture, and by healthcare professionals against influenza viruses. These face masks are currently used for protection against the coronavirus.
- 3.3 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.
- 3.4 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 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. Due to the national lockdown, the scope of the geographic market is narrow as citizens' movements are heavily restricted.

3.6 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.

Findings

3.7 Following the information gathered in its investigation of T.N.T Basic Trading's customer, the Commissioner initiated an investigation into T.N.T Basic Trading's alleged conduct and found the following:

3.7.1 T.N.T Basic Trading is a sole proprietor registered in accordance with the laws of South Africa with its business address situated at 37 View Point Road, Unit B10, Bartlett, Boksburg;

- 3.7.2 T.N.T Basic Trading is a bulk supplier of personal protection and safety equipment products intended for use in the workplace;
- 3.7.3 T.N.T Basic Trading supplies a variety of products, including respiratory face masks (FFP2);
- 3.7.4 T.N.T Basic Trading does not manufacture the respiratory face masks (FFP2), but rather purchases them from a number of local suppliers and then on-sells the masks in bulk to its customers who are mainly located in Gauteng province;
- 3.7.5 since the outbreak of Covid-19, T.N.T Basic Trading has significantly increased prices of its respiratory face masks (FFP2);
- 3.7.6 in January 2020, T.N.T Basic Trading charged R3,60 per respiratory face mask (FFP2 mask);
- 3.7.7 in February 2020, following the WHO declaration of Covid-19 as a global pandemic, T.N.T Basic Trading increased its price by approximately 600% to R24,99 per respiratory face mask (FFP2 mask);

3.7.8 during the month of March 2020, T.N.T Basic Trading charged its customer an average price of R26,50 per respiratory face mask (FFP2); and

3.7.9 based on pricing information supplied by T.N.T Basic Trading, its prices for respiratory face masks (FFP2) increased by at least by 594% from R3,60 in January 2020 to R24,99 per mask in February 2020. This resulted in T.N.T Basic Trading increasing its mark-ups from 11,80% to 71,23% and gross profit margins from 11% to 42% from January 2020 to February 2020.

Market

3.8 The Commission found that T.N.T Basic Trading –

3.8.1 is active in the market for the supply of face masks in the Gauteng province; and

3.8.2 has market power in the abovementioned market, given the current pandemic and national state of disaster, and its ability to significantly escalate its mark-ups.

Determination of excessive price

3.9 The table below reflects the Commission's determination of the excessive price charged by T.N.T Basic Trading:

Month	Average Unit Cost	Average Price	Mark-up %	Gross profit margins
January 2020	R3,22	R3,60	11,80%	11%
February 2020	R14,60	R24,99	71,23%	42%
March 2020	R■■■■■	R■■■■■	■■■■■%	■■■■■%

3.10 The Commission found that the increase in mark-up from 11,8% to 71,23% and increase in the gross profit margin from 11% to 42% by T.N.T Basic Trading in respect of respiratory face masks (FFP2) from January to February 2020 is a contravention of section 8(1)(a) of the Act.

3.11 In assessing the reasonableness of the margins realized by T.N.T Basic Trading, the Commission had regard to its historic margins for the sale of masks. The above table shows that the gross profit margins realized increased significantly in the month of February 2020, from 11% (in January 2020) to 42% (in February 2020). Following the increase in margins realized in February, the margins decreased significantly to ■■■% in March 2020. Thus, given the margins realized in January 2020 and March 2020, the higher gross profit margins realized in February 2020 do not appear to correspond with the increase in cost.

4 ADMISSION

T.N.T Basic Trading admits that it significantly increased its mark-up and gross profit margin on respiratory face masks (FFP2) from January 2020 to February 2020 in contravention of section 8(1)(a) of the Act.

5 AGREEMENT REGARDING FUTURE CONDUCT

T.N.T Basic Trading agrees to:

- 5.1 immediately desist from the excessive pricing conduct described above;
- 5.2 reduce its mark-up on respiratory face masks (FFP2) to a maximum of ■% with immediate effect for the duration of the state of national disaster;
- 5.3 donate 182 boxes of 3-ply surgical face masks, with each box consisting of 50 masks, equating to a total donation of 9100 units of 3-ply surgical face masks, which amounts to a total cost price value of R150 150,00 (one hundred and fifty thousand one hundred and fifty Rand);
- 5.4 within 7 calendar days of confirmation of this Consent Agreement as an order of the Tribunal, donate the abovementioned essential goods as follows:
 - 5.4.1 3000 units of 3-ply surgical face masks (60 boxes of 50 per a box) to Tsakane Society for the Care of the Aged (001-961 NPO) situated at 8648 Letswalo Street, Tsakane, 1550;
 - 5.4.2 3000 units of 3-ply surgical face masks (60 boxes of 50 per a box) to Elethu Daveyton Cheshire Home (009-311 NPO) situated at 071183 Sihloko Street, extension 2 Daveyton;



- 5.4.3 3100 units of 3-ply surgical face masks (62 boxes of 50 per a box) to Bophelong – Empilweni - New Life Community Project (013-499 NPO) situated at 152 Nkanyamba Street, Mqantsa Section, Tembisa, 1632;
- 5.5 submit an affidavit under oath by the owner of T.N.T Basic Trading testifying that the abovementioned undertakings have been adhered to within 7 calendar days of confirmation of the Consent Agreement as an order by the Tribunal;
- 5.6 develop, implement and monitor a competition law compliance programme incorporating corporate governance designed to ensure that its employees, management 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;
- 5.7 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
- 5.8 to circulate a statement summarising the content of this Consent Agreement to all management and operational staff employed at T.N.T Basic Trading 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 T.N.T Basic Trading confirming compliance with this undertaking.

6 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 T.N.T Basic Trading 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. 2020APRC0258.

Signed at Benoni on this the 27 day of May 2020.



Natalie Bhabikan

Owner and duly authorised to sign on behalf of T.N.T Basic Trading

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



Tembinkosi Bonakele

The Commissioner, Competition Commission of South Africa

