



competitiontribunal
SOUTH AFRICA

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: CR032May20/SA045Jun20

In the matter between:

The Competition Commission

Applicant

And

Caprichem (Pty) Ltd

Respondent

Panel : E Daniels (Presiding Member)
: A Ndoni (Tribunal Member)
: F Tregenna (Tribunal Member)

Heard on : 06 July 2020

Decided on : 06 July 2020

Settlement Agreement (Redacted)

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

**Presiding Member
Mr Enver Daniels**

06 July 2020
Date

Concurring: Ms Andiswa Ndoni and Prof. Fiona Tregenna

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT CASE NO: CR032MAY20
CC CASE NO: 2020MarC0191

In re:

COMPETITION COMMISSION OF SOUTH AFRICA

Applicant


and

CAPRICHEM (PTY) LTD
(Reg No. 1998/016011/07)

Respondent

**SETTLEMENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND
CAPRICHEM 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 CapricheM hereby agree that application be made to the Competition Tribunal for the confirmation of this Settlement Agreement as an order of the Tribunal in terms of sections read with 49D read together with 58(1)(b) of the Competition Act 89 of 1998, as amended ("the Act"), in respect of an alleged 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

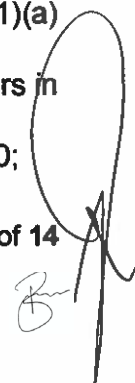


Gazette No 43205 on 3 April 2020, and the *Tribunal Directive for Covid-19 Excessive Pricing Complaint Referrals*, on the terms set out below:

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:

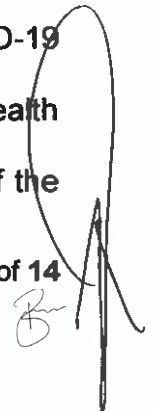
- 1.1 **“Act”** means the Competition Act No. 89 of 1998, as amended;
- 1.2 **“Caprichem”** means Caprichem (Pty) Ltd with registration number 1998/016011/07, a company duly registered and incorporated in accordance with the company laws of the Republic of South Africa, with its principal place of business at 45 Sysen Road, Blackheath, Cape Town;
- 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 **“Complaint”** means the complaint filed by a member of the public on or around 30 March 2020 against Caprichem for alleged contraventions of section 8(1)(a) of the Act for excessive pricing in respect of the provision of hand sanitisers in South Africa and referred to the Tribunal under case number CR032May20;



- 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 **“Settlement Agreement”** means this agreement duly signed and concluded between the Commission and Caprichem;
- 1.8 **“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;
- 1.9 **“Tribunal Directive for Covid-19 Excessive Pricing Complaint Referrals”** means the directive issued by the Tribunal on 6 April 2020; and
- 1.10 **“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

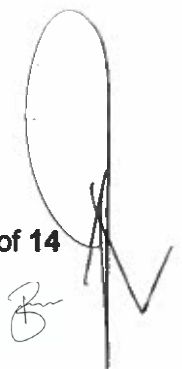
- 2.1 On 15 March 2020, given the magnitude and severity of the COVID-19 outbreak, which had been declared a global pandemic by the World Health Organisation (WHO) and classified as a national disaster by the Head of the



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 (hereafter “state of national disaster”) 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 state of national 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.

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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."

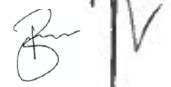
2.5 Annexure A of the Consumer Protection Regulations lists the goods and services that fall to be regulated by the Consumer Protection Regulations.

- 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, President of the Republic of South Africa announced the 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 or around 30 March 2020 the Commission received a complaint against Caprichem, from a member of the public, complaining of the excessive price charged by Caprichem for hand sanitizer. In the complaint, it is alleged that Caprichem increased its price for 5 litre hand sanitiser from R262.00 to R527.00 inclusive of VAT during the national state of disaster and lockdown and subsequent to the publication of the Consumer Protection Regulations.
- 3.2 Hand sanitisers fall under the category of "medical and hygiene supplies" in Annexure A as well as item 1.2 of Annexure B of the Consumer Protection



Regulations. Regulation 4 of the Consumer Protection Regulations is therefore applicable to the conduct described in this Settlement Agreement.

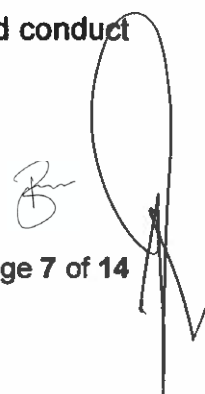
3.3 In terms of Section 7(c) of the Act, market power can also be inferred from the economic behaviour of the firm. In this case, Caprichem's ability to raise prices is indicative of market power as it demonstrates a lack of constraints such that there is an ability to control prices and/or behave appreciably 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.

Findings

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

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- 3.6.1 Caprichem is a manufacturer of industrial chemicals based in Cape Town, Western Cape;
- 3.6.2 Caprichem supplies different types of chemical agents for cleaning and surface treatment to various industries, such as automotive, construction, hospitality, laundry, personal care, food and beverages, etc. These chemical cleaning products include hand sanitisers;
- 3.6.3 Caprichem operates in, *inter alia*, the market for the provision of hand sanitiser (including 5L hand sanitiser) to customers in and surrounding Cape Town, Western Cape; and
- 3.6.4 Caprichem has market power in the market for the provision of hand sanitiser to customers in and surrounding Cape Town, Western Cape during the national disaster, given the current circumstances occasioned by the pandemic and state of national disaster, in that Caprichem possesses the ability to control prices and/or behave appreciably independently of competitors and customers.

3.7 In respect of the complaint pertaining to the excessive pricing of the 5L variant of hand sanitiser, the Commission found, *inter alia*, that:

- 3.7.1 On or about 16 March 2020, Caprichem materially increased its prices for 5L hand sanitiser from R262.00 to R527.00 (including VAT). This increase amounts to a 101.15% increase;
- 3.7.2 Caprichem, prior to the state of national disaster (i.e. before 15 March 2020) sold the 5L hand sanitiser at a gross profit margin of 31.4% and a net profit margin of 2.2%;

3.7.3 After it increased its prices shortly after the declaration of the state of national disaster (i.e. after 15 March 2020), Caprichem sold its 5L hand sanitiser at a gross profit margin of 60.1% and a net profit margin of 44.4%; and

3.7.4 The increase constitutes a 91% increase in gross profit margin and a 1918% increase in net profit margin.

3.8 The Commission found that Caprichem's conduct of charging excessive prices for 5L hand sanitisers from 16 March 2020 amounts to a contravention of section 8(1)(a) of the Act read together with Regulation 4 of the *Consumer Protection Regulations*.

3.9 Caprichem is entering into this Consent Agreement in order to avoid protracted litigation and nothing in this consent agreement should be construed as an admission of liability for a contravention of the Consumer Protection Regulations or section 8(1)(a) of the Act read together with Regulation 4 of the Consumer Protection Regulations.

4 ADMINISTRATIVE PENALTY

4.1 Having regard to the above, and without any admission that it contravened section 8(1)(a) of the Act, read with Regulation 4 of the Consumer Protection Regulations, Caprichem 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 R500 000,00 (five hundred thousand Rand).

4.2 Caprichem 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 Caprichem shall remit the payment of the administrative penalty, in one instalment, into the following bank account:

Name of account holder:	COMPETITION COMMISSION
Bank name:	ABSA BUSINESS BANK
Account number:	4087641778
Branch code:	632005
Reference:	Caprichem/2020MarC0191

4.4 The Commission confirms that the above settlement agreement does not exceed the statutory limit of 10% of Caprichem'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*.

4.5 The Commission undertakes to pay the settlement amount into the National Revenue Fund in accordance with the standard practice of the Commission and as enjoined by section 59(4) of the Act.



5 CONTRIBUTION TO THE SOLIDARITY FUND

- 5.1 Caprichem will further, in addition to its undertaking listed in clause 5 above, make a monetary contribution in the amount of R100 000,00 (one hundred thousand Rand) to the Solidarity Fund.
- 5.2 Caprichem will pay the amount set out in 5.1 above to the Solidarity Fund within 7 (seven) days from the date of confirmation of this Settlement Agreement as an order by the Tribunal.
- 5.3 The contribution as set out in 5.1 above will be made in one instalment directly into the Solidarity Fund's bank account, the details of which are as follows:

Name of account holder:	SOLIDARITY FUND
Bank name:	STANDARD BANK
Account number:	023 070 021
Branch code:	051001
SWIFT code:	SBZAZAJJ
Payment reference:	Compcom 2020MarC0191/Caprichem

6 AGREEMENT REGARDING FUTURE CONDUCT

- 6.1 Caprichem agrees:

- 6.1.1 that with effect from the date of signature of this Settlement Agreement and for the duration of the national state of disaster, Caprichem shall charge a gross profit margin on its 5L hand sanitiser that does not exceed [REDACTED] which gross profit percentage does not include commission payable to Caprichem's sales representatives;
- 6.1.2 to develop, implement, and monitor a competition law compliance programme incorporating corporate governance designed to ensure that its employees, management, directors, and agents comply with the Act. Insofar as necessary, the competition law compliance programme will be developed in conjunction with a staff member of the Commission, and shall include a mechanism for the monitoring and detection of any contravention of the Act;
- 6.1.3 to submit a copy of a compliance programme to the Commission within 60 business days of the date of confirmation of the Settlement Agreement as an order by the Tribunal or such longer period as may be agreed with the Commission depending on the duration of any lockdown imposed in terms of the legislation and directions referred to in paragraphs 2.1 and 2.2 above;
- 6.1.4 to circulate a statement summarising the content of this Settlement Agreement to all management and operational staff employed at Caprichem within 14 calendar days from the date of confirmation of this Settlement Agreement by the Tribunal and notifying the

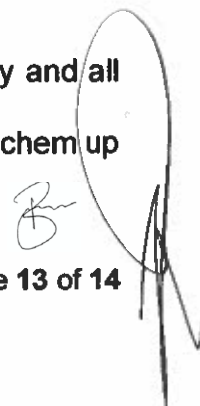
Commission by submitting an affidavit under oath by the CEO of Caprichem confirming compliance with this undertaking; and

6.1.5 to submit an affidavit under oath by the CEO of Caprichem, accompanied by the relevant proof of payments, to the Commission confirming compliance with the payment undertakings as listed in clause 5, and 6 above, within 7 (seven) days of the expiration of the time periods set out in clause 4.2 and 5.2 respectively, and further to send such proof of payments to collections@compcom.co.za within the same time-period as listed herein.

7 FULL AND FINAL SETTLEMENT

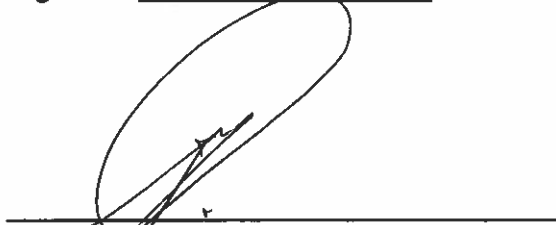
7.1 This Settlement Agreement, upon confirmation as an order by the Tribunal, is entered into in full and final settlement and concludes all proceedings between the Commission and Caprichem relating to the alleged contraventions of section 8(1)(a) the Act read together with Regulation 4 of the *Consumer and Customer Protection and National Disaster Management Regulations and Directions* published in Government Gazette No 43116 on 19 March 2020 that are the subject of all the Commission's investigations under Commission Case No. 2020MarC0191

7.2 For the sake of clarity, this Settlement Agreement envisages that any and all investigations by the Competition Commission into the affairs of Caprichem up

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to an including 10 June 2020 and in respect of hand sanitiser, are hereby concluded.

Signed at Blackheath on this the 18 day of June 2020.

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Robert Jonas (duly authorised)

Caprichem (Pty) Ltd

Signed at PRETORIA on this the 18TH day of June 2020.

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Tembinkosi Bonakele

The Commissioner, Competition Commission of South Africa