



**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: CO047Jun20

In the matter between:

The Competition Commission

Applicant

And

Sanitech- A Division of Waco Africa
(Pty) Ltd

Respondent

Panel : Enver Daniels (Presiding Member)
: Andiswa Ndoni (Tribunal Member)
: AW Wessels (Tribunal Member)

Considered in chambers on : 2 July 2020

Decided on : 2 July 2020

Consent Order

The Tribunal hereby confirms the consent agreement as agreed to and proposed by the Competition Commission and Sanitech- A Division of Waco Africa (Pty) Ltd hereto attached as 'Annexure A'

Enver Daniels

**Enver Daniels
Presiding Member**

**2 July 2020
Date**

Concurring: Mr AW Wessels and Ms A Ndoni

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

**CT CASE NO:
CC CASE NO: 2020Jun0034**

In the matter between:

COMPETITION COMMISSION OF SOUTH AFRICA

Applicant

and

SANITECH A DIVISION OF WACO AFRICA (PTY) LTD

Respondent

**CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND
SANITECH A DIVISION OF WACO AFRICA (PTY) LTD 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 Sanitech a Division of Waco Africa (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 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 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 Sanitech a Division of Waco Africa (Pty) Ltd;
- 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 **"Sanitech a Division of Waco Africa (Pty) Ltd"** means company duly incorporated in accordance with the laws of the Republic of South Africa with registration number 2012/000665/07. Sanitech a Division of Waco Africa (Pty) Ltd has approximately 25 branches in South Africa. The branches are in towns such as Potchefstroom, Rustenburg, Durban, Cape Town, Secunda and Polokwane. Its head office is located at 17 Wrench Rd, Isando, Kempton Park, 1600;
- 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 In March 2020, the Commission received information in terms of section 49B(2)(a) of the Competition Act, against Sanitech a Division of Waco Africa (Pty) Ltd in relation to the alleged inflated prices it was charging for hand sanitizers, namely, 5 litre hand sanitizers for the period March and April 2020.

- 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 Consent 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, 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.
- 3.4 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 Sanitech a Division of Waco Africa (Pty) Ltd.'s alleged conduct and found the following:

3.6.1 Sanitech a Division of Waco Africa (Pty) Ltd has approximately 25 branches in South Africa. The branches are located in towns such as Potchefstroom, Rustenburg, Durban, Cape Town, Secunda and Polokwane.

3.6.2 Sanitech a Division of Waco Africa (Pty) Ltd is a supplier of sanitation facilities and offers professional washroom hygiene services. Sanitech a Division of Waco Africa (Pty) Ltd offers a comprehensive range of hygiene products and services. These services include, but are not limited to, supplying hand sanitisers, wipes, toilet tissue dispensers, sanitary bins, hand washing, hand drying components, providing daily cleaning, deep cleaning, pest control services, and laundry services.

3.6.3 During March 2020, in light of the COVID-19 pandemic, Sanitech a Division of Waco Africa (Pty) Ltd ordered hand sanitisers with the intention to resell to its customers, from different suppliers throughout South Africa. Sanitech incurred transport costs in a form of collecting the hand sanitizers from the suppliers and in some instances also delivering the hand sanitizers to its customers.

- 3.6.4 Out of the 25 Branches that Sanitech a Division of Waco Africa (Pty) Ltd has, 11 branches sold 5 litres hand sanitisers during March 2020 and April 2020 wherein they had collection customers and delivery customers.
- 3.6.5 Sanitech a Division of Waco Africa (Pty) Ltd has market power in the market for the sale of hand sanitizers given the current pandemic and state of national disaster;
- 3.6.6 Sanitech a Division of Waco Africa (Pty) Ltd did not sell 5 litres hand sanitisers before March 2020. However, due to the sudden demand and panic-buying brought on by the state of national disaster, Sanitech a Division of Waco Africa (Pty) Ltd decided to source hand sanitisers from different suppliers.
- 3.6.7 The Commission assessed average gross margins for hand sanitisers and masks combined from the data collected by the Commission. The assessment showed an overall view of gross margins across different retailers and pharmacies for which the Commission has data. The average across the retailers and or pharmacies is 22% prior to the declaration of a national disaster.
- 3.6.8 The Commission used 20% to 25% gross-profit margin as a benchmark in this matter since the retailer has no comparative history of supplying hand sanitisers. The branches of Sanitech

a Division of Waco Africa (Pty) Ltd which sold hand sanitizer at a gross profit margins in excess of 25% are depicted below (Table 1 and Table 2).

**Table 1: Sanitech Gross Profit Margin and Mark-up (Including Collection Costs):
Customer Collection Sales**

Branches	Month	Selling Price per Unit Excl VAT	Cost of Sales per Unit Excl VAT	Quantity Sold	Gross Profit	Mark-up	Gross Profit @ Excessive Price (Rand)	Gross Profit @ 25% - margin (Rand)	Excess Profits (Rand)
Total									R5 243

**Table 2: Sanitech Gross Profit and Mark-up (Including Collection and Delivery Costs):
Customer Delivery Sales**

Branches	Month	Selling Price per Unit Excl VAT	Cost of Sales per Unit Excl VAT	Quantity Sold	Gross Profit	Mark-up	Gross Profit @ Excessive Price (Rand)	Gross Profit @ 25% - margin (Rand)	Excess Profits (Rand)
Total									R59 785

3.6.9 The Commission thus found that where Sanitech a Division of Waco Africa (Pty) Ltd's sold hand sanitizer at a gross profit margin of above 25% during March 2020 and April 2020 in

respect of 5 litre hand sanitizers, the conduct is a contravention of section 8(1)(a) of the Act read together with Regulation 4 of the Consumer Protection Regulations.

3.6.10 Sanitech a Division of Waco Africa (Pty) Ltd does not admit that the conduct above 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, Sanitech a Division of Waco Africa (Pty) Ltd nevertheless agrees to resolve the complaint on the terms set out below.

4 CONTRIBUTION TO THE SOLIDARITY FUND

4.1 Sanitech a Division of Waco Africa (Pty) Ltd undertakes to pay a contribution in the amount of R65 028 to the Solidarity Fund.

4.2 Sanitech a Division of Waco Africa (Pty) Ltd will pay the amount set out above to the Solidarity Fund within Seven calendar days from the date of confirmation of this Consent Agreement as an order by the Tribunal.

4.3 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

FD

BRANCH CODE: 051001

SWIFT CODE: SBZAJJ

PAYMENT REF: 2020Jun0034/Sanitech

5 AGREEMENT REGARDING FUTURE CONDUCT

Sanitech a Division of Waco Africa (Pty) Ltd agrees to:

- 5.1 immediately desist from the excessive pricing conduct described above;
- 5.2 reduce its gross profit margin on hand sanitisers to a maximum of 25% with immediate effect for the duration of the state of the national disaster;
- 5.3 submit an affidavit under oath by the owner or director of Sanitech a Division of Waco Africa (Pty) Ltd 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;
- 5.4 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;

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- 5.5 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
- 5.6 to circulate a statement summarising the content of this Consent Agreement to all management and operational staff employed at Sanitech a Division of Waco Africa (Pty) Ltd 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 or director of Sanitech a Division of Waco Africa (Pty) Ltd 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 Sanitech a Division of Waco Africa (Pty) Ltd 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's Case No 2020Jun0034.

Signed at DURBAN on this the 24 day of JUNE 2020.


Duly authorised signatory

Sanitech a Division of Waco Africa (Pty) Ltd

Name in full: FAIZAL DOCKRAT

Authority: _____

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

Tembinkosi Bonakele

The Commissioner, Competition Commission of South Africa