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COMPETITION LAW ALERT

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Making COVID-19 PCR tests more accessible to the public: The Competition Commission concludes consent agreements with Lancet and Ampath

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The consent agreements follow the initiation of an investigation by the Competition Commission into the price of COVID-19 PCR tests that was brought about by a complaint lodged by the Council for Medical Schemes on 8 October 2021 in which the council alleged that private laboratories were charging prices of between R850 and R900 for COVID-19 PCR tests, which it alleged were exorbitant and unjustifiable.

During the investigation the Commission discovered that supplier costs had decreased between March 2020 and September 2021, that supplier groups had been earning significant profits since March 2020, and that costs for private laboratory firms have, in fact, reduced on average, thereby increasing their absolute margins. The Commission's investigation also revealed that the pathology groups have been earning significant profits since March 2020, especially in the current financial year to date.

Initially, Ampath voluntarily reduced its COVID-19 PCR test price to R710 (VAT inclusive) on 29 November 2021 and Lancet voluntarily reduced its test price to R725 (VAT inclusive). However, the Commission concluded an assessment which found that Ampath and Lancet were capable of profitably selling COVID-19 PCR tests at a price of R500 (VAT inclusive).

It is important to note that the price reductions by Ampath and Lancet will be applicable for a period of two years. The price of R500 (VAT inclusive), is a maximum price cap and Ampath and Lancet may charge or negotiate a price below this.

Further, the consent agreements do not include an admission by either Ampath or Lancet that they charged excessive or exorbitant prices in contravention of section 8(1)(a) of the Competition Act 89 of 1998, as amended, read together with Regulation 4 of the Consumer Protection Regulations.

Competition Commissioner Tembinkosi Bonakele stated that COVID-19 PCR tests are essential in the fight against COVID-19 and while there are other forms of testing, PCR tests are required by doctors and various institutions, as well as for travel purposes.

The Commission has confirmed that the case against Pathcare continues and includes a possible interim application for urgent relief at the Tribunal. The Commission has also called upon all laboratories conducting PCR tests to be sensitive of the public during the pandemic and use the consent agreements as guidance.

Amid a fourth wave of COVID-19 infections and a new COVID-19 variant having been found in South Africa and various other countries, the consent agreements are certain to have a positive impact in the fight against COVID-19 by making tests more accessible to the public.

Andries Le Grange, Nelisiwe Khumalo and Shandré Smith

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