

COMPETITION LAW

ALERT

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Unmasking excessive pricing: The Competition Tribunal decision of CC and Tsutsumani Business Enterprises

On 28 April 2022, the Competition Tribunal (Tribunal) handed down its decision on an excessive pricing case referred to the Tribunal by the Competition Commission (Commission) in the context of a tender process during the COVID-19 pandemic. This also happens to be the first case to be determined under the Consumer and Customer Protection and Disaster Management Regulations promulgated under section 78 and 8(3)(f) of the Competition Act 89 of 1998, read with section 8(1)(a) of the Competition Act, which came into effect on 19 March 2020.



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The Tribunal found that a face mask supplier to the South African Police Service (SAPS), Tsutsumani Business Enterprises (Tsutsumani) charged SAPS excessive prices for the supply, on an urgent basis, of 500,000 face masks in April 2020, during the hard lockdown period, in contravention of section 8(1)(a) of the Competition Act, read with Regulation 4 of the Consumer Protection Regulations (Regulations).

On 5 May 2020, a complaint was lodged with the Commission against Tsutsumani relating to the matter. Tsutsumani is a general trader registered on National Treasury's Central Supplier Database and supplies a range of products on the basis of tenders issued by government departments and municipalities.

The Tribunal found that during the hard lockdown, SAPS was in desperate need of face masks for its members who were at the frontline of efforts to contain the escalation of the

pandemic. Accordingly, SAPS required 9 million face masks to protect its members from contracting COVID-19.

In the Tribunal's press release, it stated that:

"The Tribunal has concluded that Tsutsumani enjoyed market power during the complaint period and was dominant in the market for the emergency procurement of masks by SAPS from suppliers registered on National Treasury's Central Supplier Database who were able to satisfy the requirements of SAPS' request for quotations, to supply the masks within a very short time period."

Therefore, the Tribunal found that Tsutsumani exploited its market power during the complaint period, considering the increased demand for masks during the hard lockdown period, the volume of masks required, and the fact that the masks were required on an urgent basis to aid in the frontline defence against the COVID-19 pandemic.

Tsutsumani subsequently charged SAPS R16,25 million for the bulk supply of 500,000 surgical face masks. Accordingly, the Tribunal found that Tsutsumani charged SAPS an excessive price of R32.50 (inclusive of value-added tax) per mask. In the Commission's papers before the Tribunal, it was alleged that Tsutsumani purchased the masks from its suppliers at an average cost of R17.35 per mask. Thus, having calculated Tsutsumani's costs for the masks compared to what SAPS was charged, Tsutsumani applied a markup of 87% on the cost price (which represents a gross margin of 46%) per mask. The Commission estimated that the excessive profits earned by Tsutsumani amounted to R5,3 million.

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Tsutsumani was fined the maximum administrative penalty of 10% of the relevant turnover for the sale of the face masks which is equal to a total sum of R3,441,689.10.

This decision, together with the precedent created in the *Babelegi* decision, serves as a reminder to firms of the serious consequences of excessive pricing findings and the novel approach to these types of cases as far as market power is concerned.

The conduct complained of in *Babelegi* occurred prior to the date on which the Regulations came into place and therefore could not be determined in terms of the Regulations. This is therefore the first case determined under the Regulations.

**ANDRIES LE GRANGE,
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