IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

HELD AT PRETORIA

Case No:205/CAC/Jul22

In the matter between:

TSUTSUMANI BUSINESS ENTERPRISES CC	**APPLICANT**

and

THE COMPETITION TRIBUNAL	**FIRST RESPONDENT**
MONDO MAZWAI	**SECOND RESPONDENT**
ANDISWA NDONI	**THIRD RESPONDENT**
ANDREAS WESSELS	**FOURTH RESPONDENT**
THE COMPETITION COMMISSION	**FIFTH RESPONDENT**

ORDER

The review application is dismissed with costs.

JUDGMENT

Delivered on: 13 October 2023

Poyo Dlwati AJA (Manoim JP and Masipa AJA concurring)

[1] This review concerns the issue whether the Competition Tribunal (first respondent, referred to herein as the Tribunal) exercised its powers improperly in finding that Tsutsumani Business Enterprises CC (the applicant) engaged in excessive pricing and thereby contravened s 8(1)*(a)* of the Competition Act 89 of 1998 (the Act).[1]

[2] The background to this review is that the Competition Commission (the fifth respondent, referred to herein as the Commission), a regulatory body established in terms of s 19(1) of the Act referred a complaint of excessive pricing to the Tribunal against the applicant. As a result of the outbreak of the covid-19 pandemic, the President of the Republic of South Africa declared a National State of Disaster in the country. Pursuant to that the South African Police Services (SAPS) issued requests for quotations (RFQ) to several firms including the applicant for the supply of 3 ply surgical face masks to be provided to its employees. A complaint of excessive pricing of masks arose during the covid-19 pandemic against the applicant which was investigated by the Commission.

[3] In order to prevent the escalation of the disaster and to contain and minimise its effect, the Minister of Co-operative Governance and Traditional Affairs (COGTA) published amended regulations in terms of s 27(2) of the Disaster Management Act 57 of 2002. The regulations made the wearing of masks compulsory especially in public areas. Masks, therefore, were part of the personnel protective equipment (PPE) used for containing and preventing the spread of covid-19 and were identified as essential goods.

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[1] Section 8(1)*(a)* of the Act reads: '(1) It is prohibited for a dominant *firm* to-
(a) charge an excessive price to the detriment of consumers or customers; …'

[4] According to the Commission, when responding to the SAPS' RFQ, the applicant contravened s 8(1)*(a)* of the Act read with Regulation 4 of the Consumer and Customer Protection and National Disaster Management Regulations and Directions(Consumer Protection Regulations)[2] in that it was a dominant firm that had charged excessive prices to the detriment of customers and/or consumers. The Commission received a complaint against several firms that responded to the SAPS' RFQ including the applicant. The applicant supplied the SAPS with 500 000 surgical face masks at a unit price of R32.50 and generated an income of R16 250 000 (Sixteen million two hundred and fifty thousand rand). The applicant, however, denied the allegations of excessive pricing and averred that the SAPS could have rejected or accepted its quotation. It further stated that the supply of masks was a once-off transaction.

[5] On further investigation, the Commission found that the applicant started supplying masks in April 2020 when it responded to the SAPS' RFQ. It procured the 500 000 masks from various entities at an average cost of R17.50 per mask. It, however, charged the SAPS R32.50 per mask, being a mark-up of 87% and a margin of 47% per mask. According to the Commission, the applicant made a profit of R6 586 311 which in its view was excessive. It, therefore, sought an order declaring that the applicant's conduct contravened the provisions of s

[2] Regulation 4 reads: '**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 the 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.'

The Consumer Protection Regulations were published by the Minister of Trade and Industry on 19 March 2020 to protect consumers and customers from excessive, unfair, unreasonable, or unjust pricing of goods and services during the national state of disaster.

8(1)*(a)* of the Act, read with Regulation 4 of the Consumer Protection Regulations. It also sought an order interdicting and restraining the applicant from engaging in any such further conduct and for the applicant to be ordered to pay an administrative penalty in terms of s 58(1)*(a)*(iii) of the Act, which was equal to 10% of its annual turnover during its preceding financial year.

[6] The applicant opposed the application. It contended that it was not an active role player in the supply of PPE equipment and that the transaction complained of was once-off. Therefore, its active participation in that market was limited. Furthermore, that the SAPS had no obligation to accept its quotation, but because the applicant's product was of a better quality than that of its competitors, it accepted its quotation. Since the applicant's business involved mainly waste disposal but is diversified as it also included transportation services as well as plant hire, the price charged was justified in light of its broader business operations and general business needs.

[7] The applicant disputed that it was dominant in the market of supplying PPE's. It stated that it lacked a significant market share which would enable it to qualify under the provisions of ss 7*(a)* or 7*(b)* of the Act. Furthermore, as the applicant's participation in the supply of PPE's was a once-off transaction, it could not exert any market power over any of its competitors or end customers. It denied that it had any power to control prices or exclude competition or customers and suppliers. According to the applicant, the SAPS was a willing buyer and the applicant was a willing seller.

[8] The applicant further contended that its costs included transportation, loading and off-loading of the masks as well as administration costs. All these costs accounted to about 5% of the price quoted. Its price was, therefore, not unreasonable. Further, it stated that no comparative analysis was provided

regarding the behaviour of other firms regarding the same allegations which made it difficult to confirm the allegations. The applicant submitted that as the Commission had failed to substantiate its case the application ought to be dismissed.

[9] In a statement of issues submitted by the parties to the Tribunal, various undisputed facts were stated. These were that the applicant's turnover was in excess of R5 million; that no single supplier had the capacity to satisfy the requirements of the number of masks required by the SAPS and that the applicant knew that its price was higher than the price charged by other suppliers.

[10] The Tribunal found in favour of the Commission and held that the applicant had contravened s 8(1) *(a)* of the Act read with Regulation 4 of the Consumer Protection Regulations during the period of the complaint.[3] It imposed an administrative penalty on the applicant of R3 441 689.10. But it refused to grant the interdict as it did not believe that it was an appropriate remedy in the circumstances of this case. It is this decision that the applicant seeks to have reviewed and set aside. The applicant in its notice of motion also sought an order for condonation for the late filing of its review. This was so because the Tribunal's order was handed down on 28 April 2022 whilst the review was only launched on 21 July 2022.

[11] The applicant stated in its founding affidavit that its review was premised on the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and was in the alternative the principle of legality. It is unclear why the applicant proceeded with a review instead of an appeal. Most of the issues raised by the applicant seem to attack the correctness of the Tribunal's decision. These would more appropriately

[3] *Competition Commission v Tsutsumani Business Enterprises CC* [2022] ZACT 97.

be the subject matter of an appeal. However, since this is a review application, the only question for determination is whether the Tribunal exercised its powers properly.[4] But the choice to proceed by review rather than an appeal is not the only problem facing the applicant. The review has not been brought within the time periods provided in terms of the Rules of this court. This time period (15 days) is far shorter than that provided in terms of PAJA (180 days). For this reason, the applicant has also sought condonation.

[12] It is apposite at this stage to deal with the condonation application. It is trite[5] that an application for condonation is not for the mere asking but that an applicant has various hurdles to go through before the application can be granted. In terms of section 61 of the Act a "person affected by a decision of the Competition Tribunal may …apply to the Competition Appeal Court to review that decision in accordance with the Rules of the Competition Appeal Court …." This makes it clear that the time periods set out in the Rules and not in PAJA, apply for reviews of decisions of the Tribunal.[6] The relevant rule is Rule 23(2)*(b)* which states that any review of a decision of the Tribunal must be brought within 15 business days.

[13] The applicant therefore had up to 19 May 2022 to launch its review application. It was, it is common cause, two months late. Nevertheless, this court retains an inherent power to condone the late filing of a review if it is properly motivated. In *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*[7] the Constitutional Court re-emphasised that a litigant seeking condonation is required to provide a full explanation covering the entire period of the delay and

[4] See: *TWK Agriculture Limited v Competition Commission and Others* [2007] ZACAC 3 para 28.
[5] See: *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-E; *Van Wyk v Unitas Hospital and Another* (*Open Democratic Advice Centre as amicus curiae*) 2008 (2) SA 472 (CC) paras 20-22; *Giwusa and Another v Milco SA (Pty) Ltd and Others* [2022] ZACAC 12 para 6.
[6] The Rules provide for the same time period for bringing an appeal (15 days) as a review, and hence the Rules are intended to be time neutral as to the choice of procedure. An applicant in a review cannot use the fact it is waiting for the record to bring the application, as the rules specifically provide the applicant the right to supplement. (Rule 23(6)).
[7] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) para 52.

that explanation must be reasonable. The applicant has failed to explain the delay and its causes. All it said in its founding affidavit was that:

'[132] We submit an application for condonation *ex abundanti cautella* as we were entitled to. There are also Constitutional considerations brought to bear in this case, as envisaged by section 34 as read with sections 168, 171 and 173 of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution") in that everyone has the right to access the CAC or other forum and as such I am not precluded to call the said provision in aid of my application for condonation.

[133] According to the CAC Rules, we were supposed to file our review application within 15 days of the Tribunal ruling. We submit the delay be condoned as there is no prejudice to the parties. Also if one is to use the PAJA route or legality principle, then there is no delay at all.'

It is evident from the above that there has been no explanation at all about the delay by the applicant.

[14] The unexplained delay of almost two months is unreasonable in the circumstances and ought not to be condoned. This is especially so in light of the fact that the application by the Commission was initially launched on an urgent basis but because of the applicant's failure to adhere to the timelines set by the Tribunal to hear the matter, the matter lost its urgency. Its review ought to have been brought within 15 business days of the Tribunal's decision and it was not.

[15] The applicant has also failed to deal with the other considerations for an application for condonation including but not limited to the interests of justice, the prospects of success and any prejudice that the party may suffer.[8] The applicant has not explained why it is in the interests of justice to condone its late filing of the review application. It has not explained what prejudice it will suffer if its delay is not condoned save for illustrating the effects of paying a penalty. More was required of the applicant. The Commission has gone to great lengths

[8] *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC) para 3.

in explaining the prejudice it will suffer should condonation be granted which also includes costs of litigation.

[16] The applicant has also failed to deal with the prospects of success of its review application. In this regard, we agree with the Commission's contention that the applicant's prospects of success are non-existent. We will deal with this aspect simultaneously with the merits of the review. The first is whether the Tribunal erred in finding that it was a dominant firm. It is trite that in order to find that a firm is dominant two jurisdictional grounds must be satisfied. First, in terms of section 6 of the Act, the firm's turnover must exceed a threshold of annual turnover or asset size determined by the Minister.[9] Second, assuming it does, then the firm is only dominant if it qualifies in terms of the market share or market power criteria set out in section 7.[10]

[17] There is no dispute that the applicant's turnover exceeded R5 million during its preceding financial year. This was part of the agreed facts. But what the applicant argues is that this turnover in the preceding financial year (March

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[9] See s 6(1) of the Act which reads: **'Restrictive application of Part**
(1) The *Minister*, in consultation with the Competition Commission, must determine-
(a) a threshold of annual turnover, or assets, in the Republic, either in general or in relation to specific industries, below which this Part does not apply to a *firm*; and
(b) a method for the calculation of annual turnover or assets to be applied in relation to that threshold.
(2) The *Minister* may make a new determination in terms of subsection (1) in consultation with the Competition Commission.
(3) Before making a determination contemplated in this section, the *Minister*, in consultation with the Competition Commission, must publish in the *Gazette* a notice-
(a) setting out the proposed threshold and method of calculation for purposes of this section; and
(b) inviting written submissions on that proposal.
(4) Within six months after publishing a notice in terms of subsection (3), the *Minister*, in consultation with the Competition Commission, must publish in the *Gazette* a notice-
(a) setting out the threshold and method of calculation for purposes of this section; and
(b) the effective date of that threshold

[10] Section 7 of the Act reads: '**Dominant firms**
A *firm* is dominant in a market if-
(a) it has at least 45% of that market;
(b) it has at least 35%, but less than 45%, of that market, unless it can show that it does not have *market power*; or
(c) it has less than 35% of that market, but has *market power*.'

2019 to February 2020), was not in respect of the sale of masks, but other sales, and hence section 6 of the Act did not apply. Put differently the applicant argues that when section 6 refers to a turnover threshold it means turnover in the affected product market not any turnover. In this respect, it alleges the Tribunal erred. But this argument wrongly conflates the requirements of sections 6 and 7. There is nothing in the language of section 6, or the regulations made pursuant thereto that says the relevant turnover is the turnover in the market affected by the transgression. Nor is there any purpose served by this interpretation. Section 6 serves as a screening mechanism to exclude from the application of the dominance provisions, firms whose size in terms of assets or turnover makes them economically trivial. This is intended to be an easily applied form of screening that can be ascertained from the firm's financials and does not require a detailed market definition enquiry.

[18] Section 7 on the other hand requires consideration of the effect of the firm on the market in which the alleged abuse takes place. Here the enquiry may be detailed and complex. The Tribunal correctly kept these enquires separate. With regard to the turnover, there can be no dispute that the applicant met the s 6 threshold as its turnover was above R5 million. To that extent, the Tribunal did not exercise its powers improperly.

[19] The next leg of the enquiry is to consider whether during the period in question the applicant had market power and was therefore a dominant firm for purposes of s 7*(c)* of the Act. The Tribunal held as follows in this regard:

'[71] Tsutsumani's argument that it cannot be found to be dominant or to have market power since 18 suppliers responded to the RFQ cannot hold. This is because in *Babelegi*, the CAC stated: "The lucky monopolist might not be a single firm in the relevant market. Given prevailing exogenous factors, multiple firms can be found to be dominant during the crisis…". The finding of the Commission was that customers can be completely dependent on a firm for

the supply of scarce products during a crisis. In such a case, more than one supplier can be in a dominant position in respect of its normal customers.' (Footnote omitted.)

[20] That the Tribunal took into account the factual constraints facing SAPS is evident from the following conclusion it drew from the facts:

"We find that the reason SAPS purchased masks from Tsutsumani at high prices is because it had no other choice given the crisis context, amplified by the large volumes of masks required as well as the utmost urgency in order for SAPS staff to safely fulfil their duties during the state of disaster."

We are bound by *Babelegi Workwear and Industrial Supplies CC v Competition Commission* [11] unless we are convinced that it was incorrectly decided and it has also not been demonstrated to us that it was wrongly decided. Therefore, we agree with the Tribunal's finding that the applicant had the market power, in the supply of masks in that period and was dominant in terms of s 7 of the Act. This ground of review must fail.

[21] We turn now to the Tribunal's analyses of the abuse; whether the applicant charged excessive prices for the masks. As already stated, it was common cause that the applicant quoted R32.50 for the masks which it had procured from the various suppliers at the rate of R17.50 and R17.00 respectively. The applicant's argument in this regard was that no investigation was conducted to prove that its pricing was excessive. In any event, the SAPS, according to the applicant, was at liberty to accept or reject its quotation. Furthermore, as the applicant was not in the business of supplying masks, the Commission would have been unable to assess its margin or mark-ups for those goods for three months prior to the period 1 March 2020.

[22] The Commission's argument was that the applicant's mark-up was 87%. According to the Commission, the SAPS accepted the applicant's offer because

[11] *Babelegi Workwear and Industrial Supplies CC v Competition Commission* 2021 (6) SA 446 (CAC).

it had no choice. It was a price taker and obliged to accept the price from any firm which could secure the supply. It had no bargaining power as the demand exceeded supply.

[23] Section 8(1)*(a)* of the Act provides that it is prohibited for a dominant firm to charge an excessive price to the detriment of consumers or customers. Section 8(3) provides the test for excessive pricing and states: 'Any person determining whether a price is an excessive price must determine if that price is higher than a competitive price and whether such difference is unreasonable, determined by taking into account all relevant factors…'.

One of these factors is listed in sub-paragraph 8(3)(f) as: "any regulations made by the Minister, in terms of section 78 regarding the calculation and determination of an excessive price." Acting in terms of this power, the Minister made the Consumer Protection Regulations.

[24] Regulation 4.2 of the Consumer Protection Regulations provides that:

'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 the 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.' The Consumer Protection Regulations listed masks under the category of medical and hygiene supplies and as being those products that deserve special regulatory protection, given their critical value in fighting the spread of covid-19.

[25] The applicant in the statement of issues submitted to the Tribunal conceded that it was aware that its price was higher than that charged by other suppliers to

government. Furthermore, the Commission presented the evidence of the Treasury's pricelist for masks at the relevant time. To the benefit of the applicant, the Tribunal also took certain costs into account even though in its view they were not substantiated by the applicant. It, however, still found that the price was excessive, comparatively speaking. It found that:

'[83] There is no conceivable explanation which might account for Tsutsumani's pricing other than the existence of market power on the part of Tsutsumani in the context of the Covid-19 health crisis that disrupted the demand and supply of masks. In the relevant period, Tsutsumani had the power to act independently of its competitors on the supply side and independently from SAPS as a customer on the demand side.'

[26] The Tribunal further found that the mark-up and margin earned by the applicant were accordingly significantly higher than a competitive benchmark of 10-15% margin for resellers and thereby met the first part of the test for an excessive price under s 8(3) of the Act. The applicant could not rebut this finding before us. The next leg of the test as provided for in s 8(3) of the Act was to determine whether the price was unreasonable. The applicant had to justify its price. However, the applicant failed to substantiate the costs it claimed justified its pricing. The Tribunal thoroughly examined all the costs it deemed were relevant to the applicant's pricing. One of the costs it excluded were the applicant's historical tax costs which the latter alleged amounted to R208 million. The Tribunal explained why it did so:

"We note that tax is not an expense that is to be included when assessing excessive pricing by comparing the price charged to appropriate benchmarks. It is the profit before tax that is relevant to the determination of this issue." We were not referred to any authority that suggested this approach was incorrect.

[27] The applicant contended that the detriment of its pricing could not be felt where there was only 'one consumer and buyer' being the SAPS. The Tribunal rejected this argument. In coming to this conclusion, the Tribunal placed reliance

on what this court held in *Babelegi*,[12] which we respectfully agree with and that is: 'in a crisis situation, such as that induced by the Covid-19 pandemic, one needs to use a somewhat different conceptual framework from what ordinarily would be employed in an excessive-pricing case'. In this regard, that different framework has been provided for in the Consumer Protection Regulations. The other difference is that the applicant's excessive pricing was not only detrimental to the customer, being the SAPS, since the effects of excessive pricing would have affected the country as a whole as the masks were used to curb the spread of covid-19. The applicant's argument in this regard cannot be sustained.

[28] For all these reasons therefore, we are of the view that the applicant has no prospects of success in the review and this is another reason why its condonation application should not succeed. Perhaps for completeness, we should deal with the issue of the penalty imposed on the applicant. The Tribunal imposed the administrative penalty in terms of s 59(1) of the Act which empowers it to do so. The penalty imposed was 10% of the applicant's turnover which is the maximum permissible in terms of s 59(2) for a first-time contravention. Nevertheless the Tribunal justified doing so because:

"This figure is significantly lower than the excess profit which Tsutsumani derived from the sale of the masks to SAPS, even if certain costs are included in favour of Tsutsumani."

[29] In terms of section 59(3)(e), one of the factors the Tribunal must consider is the level of profit derived from the contravention. The Tribunal's approach was that even the maximum penalty would not lead to a disgorgement of the excess profit derived from the contravention. As we have previously held in *Stanley's Removals,* absent a misdirection or fundamental error in methodology, this Court has a narrow power to interfere with a penalty imposed by the Tribunal.[13] In our

[12] Ibid para 49.
[13] *Competition Commission v Stanley's Removals CC,* Case No. 149/CAC/Jan17, paragraph 30.

view, there was nothing improper with the Tribunal's exercise of its power. The review application must fail.

[30] Accordingly, I make the following order:

'The review application is dismissed with costs'.

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Poyo Dlwati AJA

Manoim JP

pp.

Masipa AJA

APPEARANCES

Counsel for Applicant	: Adv MacGregor Kufa, Assisted by Adv Philip Sila
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Counsel for Respondent	: Adv Shannon Quinn
Instructed by	: Bopape Attorneys
Date of Hearing	: 08 June 2023
Date of Judgment	: 13 October 2023