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Tribunal finds SAPS hand sanitiser supplier guilty of excessive pricing during Covid-19 pandemic, fines BlueCollar and its partner R3.5m

The Competition Tribunal (“Tribunal”) has found BlueCollar Occupational Health (Pty) Ltd (“BlueCollar”) - acting on behalf of and/or within the ambit of its partnership with Ateltico Investments (Pty) Ltd (“Ateltico”) - guilty of having charged the South African Police Service (“SAPS”) excessive prices for the urgent supply of ten thousand 25L containers of hand sanitiser during the Covid-19 pandemic in 2020.

Hand sanitiser became crucial in mitigating the spread of Covid-19 and this resulted in SAPS needing to urgently procure hand sanitiser at very short notice for its members who were at the forefront of enforcing the lockdown restrictions nationally and to protect the public from the spread of the corona virus.

The Tribunal describes BlueCollar’s conduct as particularly egregious when one considers its social consequences - it exploited a pandemic by charging excessively for hand sanitiser that was crucial for the combatting of the pandemic.

The Tribunal has imposed an administrative penalty of R3 550 000 on BlueCollar and Ateltico, jointly and severally.

A public version of the Tribunal’s reasons will be available once any claimed confidential information in the reasons has been finalised. We provide a summary of the Tribunal’s findings below:

Conduct

BlueCollar supplied hand sanitiser to SAPS during 5-29 April 2020. When supplying the hand sanitiser to SAPS, BlueCollar did so as a so-called trader or reseller. In other words, it bought the sanitiser stock from third party suppliers and supplied it to SAPS (without adding any value to the product itself). BlueCollar’s usual business activities relate to the provision of occupational health services, including to SAPS, and is registered on National Treasury’s Central Supplier Database.

The Tribunal finds that BlueCollar and Ateltico were in a partnership in relation to supplying hand sanitiser to SAPS. BlueCollar acted on behalf of, or within the ambit of, its partnership with Ateltico when it charged SAPS an excessive price; and Ateltico benefitted from the prohibited conduct through its partnership and profit sharing with BlueCollar. Ateltico’s business activities relate to providing investment solutions to customers.

Background

The Competition Commission (“Commission”) received a complaint from SAPS against several firms -including against BlueCollar - that responded to individual SAPS requests for quotation.

The Commission, in its referral of the matter to the Tribunal, alleged that BlueCollar supplied SAPS with ten thousand 25L containers of hand sanitiser at a price of R3 550 (including VAT) per container. The Commission ultimately argued that BlueCollar added a mark-up of 120% per 25L container of hand sanitiser and earned a gross margin of more than 50%.

Excessive price

The Tribunal, in its reasons, explains the various steps involved in an excessive pricing assessment.

On market power or dominance, the Tribunal finds that the market circumstances during the Covid-19 pandemic, conferred market power upon BlueCollar for the urgent supply of hand sanitiser to SAPS.

In terms of the price charged to SAPS, the Tribunal finds that the Commission established a *prima*

the onus, of showing that the price difference (between the actual price charged and a competitive price) was not unreasonable, falls upon BlueCollar. BlueCollar, however, failed to discharge the onus in section 8(2) of the Act to show that its price charged to SAPS for hand sanitiser was reasonable.

Even on a best-case scenario for BlueCollar at cost items should be included under its “costs of sales”, its actual gross margin (BlueCollar’s financial expert) for the supply of the hand sanitiser to SAPS is more than 40% and its mark-up is more than 70%. This is substantially higher than the competitive gross margin for resellers of between 10% to 15% previously determined by the Tribunal in a similar case (*Tsutsumani*).

Furthermore, a comparison of BlueCollar’s price of R3 550 (VAT incl.) to National Treasury’s list price of 15 April 2020 of R1 635.45 (VAT incl.) reveals that BlueCollar’s price is more than double the National Treasury list price.

Having established a *prima facie* excessive price, the onus shifts to BlueCollar but it was not able to provide any cost justifications to show that its price charged to SAPS is reasonable.

In relation to the true relationship between BlueCollar and Ateltico, the Tribunal on the evidence finds that the economically functional relationship between BlueCollar and Ateltico had features that go above and beyond a mere “funder” relationship and the typical features of a loan. In addition, Ateltico did not merely play a passive role in the transaction but participated in and benefitted a 40% share in the profit from the prohibited conduct.

The Tribunal ultimately concludes that the prices charged by BlueCollar to SAPS for hand sanitiser were significantly higher than a competitive price and that the price difference is unreasonable.

The excess profit that was earned by BlueCollar and Ateltico, also referred to as the overcharge to SAPS, even on a best-case scenario for BlueCollar in terms of what cost items to include under its “costs of sales”, amounts to more than R9 million.

Consumer detriment

The Tribunal further finds that BlueCollar (acting on behalf of and/or within the ambit of its partnership with Ateltico) engaged in excessive pricing to the detriment of customers or consumers.

The Tribunal reiterates the importance of context and the fact that SAPS played a crucial role during the pandemic: *“SAPS is the customer detrimentally affected by the excessive price charged. It is also the consumer, as are its employees who are to be provided with hand sanitiser. Importantly, SAPS serves the public of South Africa. Furthermore, government entities, as well as private entities, are recognised as customers in terms of the Competition Act. There can be no doubt that conduct such as excessive pricing impacts negatively on Government’s resources, puts pressure on the fiscus and negatively impacts taxpayers. Moreover, the Covid-19 pandemic created a crisis situation placing consumers in a vulnerable situation, in this case where the product in question was critical to prevent the spread of the corona virus.”*

Administrative penalty

In terms of the Tribunal’s order, BlueCollar and Ateltico are jointly and severally liable to pay an administrative penalty of R3 550 000 within 30 business days of the date of the order, the one paying the other to be absolved.

Although BlueCollar is a first-time offender of the Act, the Tribunal finds that the aggravating factors, specifically the exploitative conduct of BlueCollar, far outweigh any mitigation. BlueCollar’s conduct is particularly egregious when one considers its social consequences.

The Tribunal notes that the Act places a cap on the maximum penalty that may be imposed on a firm, and that in this case the penalty amount is significantly lower than the excess profit (i.e., the overcharge to SAPS) and notes further in its reasons: *“... in terms of section 65(6) of the Competition Act, a person who has suffered loss as a result of a prohibited practice (in this case SAPS), may commence action in a civil court for damages arising out of a prohibited practice.”*