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Excessive pricing in State procurement of PPE

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The COVID-19 national state of disaster declared in terms of the Disaster Management Act No. 57 of 2002 has increased the risks for firms charging excessive prices for their goods or services. Such behavior is termed "price gouging" and is common worldwide in times of crisis. The Competition Commission of South Africa has taken a firm stance against such conduct and has gone to great lengths to detect and address it. To date the Commission has fined 34 retailers for charging excessive prices. These retailers range from small pharmacies and hardware stores to large retailers like Dis-Chem and Food Lover's market. Products that were subject to investigation included hand sanitizers, face masks and even raw ginger. However, the Commission has not yet brought an excessive pricing case regarding personal protective equipment procured by the state during the COVID-19 national state of disaster.

It is no secret that there have been allegations that firms have charged the South African government excessive prices for PPE and other medical supplies. Several media outlets have reported margins of up to 800% earned by vendors on PPE supplied to the state.

The Competition Act aims to protect consumers and customers from anticompetitive behavior. It also aims to ensure that consumers and customers, including the state, are not exploited by dominant firms charging high prices. In addition, the Consumer and Customer Protection and National Disaster Management Regulations and Directions, 2020 ("**Consumer Protection Regulations**") were promulgated to curb price gouging during the national state of disaster. In terms of the Consumer Protection Regulations a price is excessive or unfair where for example, the increase of the price does not correspond to or is not equivalent to the increase in cost; and or the net margin or mark-up on that good or service is higher than the average margin or mark-up for that good or service in the three month prior to 1 March 2020.

The Commission has relied on these provisions to act against retailers who increased their gross profits on PPE and basic food and consumer items or services during the national state of disaster. For example, SMEs such as Steelmate and Umhlanga Medisport Pharmacy have been investigated for excessive pricing because their gross profits ranged from 43% to 256.56% respectively, whilst the Commission considered a gross profit margin of 20% as reasonable in both cases.

In the normal course it is not likely that a SME can be a dominant firm. In these COVID-19 related excessive pricing cases, the competition authorities have established dominance because market power can be inferred from the economic behavior of a firm during the national state of disaster. The market conditions during the pandemic are also different for urgent public procurement of PPE as the safeguards of the Public Finance Management Act No. 29 of 1999 may not be strictly applied. It is not inconceivable that PPE suppliers could have easily profiteered in these circumstances.

Historically, no excessive price increase has been too small for the Commission to pursue. Given the current competition legal framework and reports of fantastic bounty enjoyed by unscrupulous vendors, there is good reason why the Commission, an effective institution, should investigate vendors who supplied PPE and other essential goods to the state at excessive prices. It has been reported that the State has awarded contracts for PPE to various SMEs ranging from R1.9 million to R116.9 million during the COVID-19 pandemic. The media reports create the impression that these firms used the market conditions brought about by the national state of disaster to take advantage of the State.

The Competition Act empowers the Commission to initiate and investigate a complaint against an alleged abuse of dominance by excessive pricing even in the context of state procurement. This position is supported by the effect that the national disaster has had on market conditions where price gouging in the private sector even on a limited scale has raised the ire of the authorities. The information published by several media outlets regarding allegations of excessive pricing in state procurement should prompt the Commission to investigate

whether there has been a contravention of the Competition Act. Firms who exploit the State with regard to prices charged during the pandemic could be taken to task under the Competition Act. The Commission is the one public institution that has had an effective track record when other public institutions, such as the NPA, have had some challenges. The Commission has proven its mettle in many smaller excessive pricing matters cases it is hoped that it will use its powers to stamp out the reportedly significant exploitation of the state and its people.



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