



# BOWMANS

THE VALUE OF KNOWING

## COVID-19 AND COMPETITION LAW

May 2020



# THE LAW THAT STARTED IT ALL:

## DISASTER MANAGEMENT ACT, 53 OF 2005 (DMA)



15 March 2020

In terms of Section 3 of the DMA, the Minister of Cooperative Governance and Traditional Affairs, declared a **STATE OF DISASTER**.



18 March 2020

The first regulations, in terms of section 27(2) were released to prevent an escalation of the disaster.



27 March 2020

The nation begins its 21 day lock-down.

# COMMISSION'S PROCEDURAL APPROACH TO COVID-19

(1)



## Statement of 24 March 2020

- Significantly **SCALE DOWN** operations.
- **PRIORITISE** COVID-19 complaints and the enforcement of the regulations under the DMA.
- **DISCOURAGE**
  - **filing of complaints** unrelated to COVID-19; and
  - **filing of mergers** except if it involves failing firms and firms in distress.
- In a press release dated 31 March 2020, the Commission said had received **559 complaints**.

# TRIBUNAL

## PROCEDURAL APPROACH TO COVID-19

(2)



Direction of 26 March 2020

### MERGERS

- Unopposed extension applications for large mergers to be granted in chambers.
- **Phase 1:**
  - Heard by Panel via teleconference;
  - parties not required to dial-in;
  - requests for information would be submitted to the Commission and merging parties electronically; and
  - parties notified of decision in the stipulated time periods.
- **Phase 2:**
  - Parties may be required to make themselves available for a hearing via teleconference.
- **Phase 3:**
  - Won't be set down during the lockdown period.

### COMPLAINTS

- Referrals already enrolled, will be postponed *sine die*.
- Pre-hearing and interlocutory hearings will be postponed *sine die*.
- No new matters will be set down.
- Priority will be given to complaint referrals emanating from Covid-19 and will be heard by arrangement.

**CONSENT ORDERS** - Won't be set-down.

**INTERIM RELIEF AND URGENT APPLICATIONS**- Will be heard by arrangement.

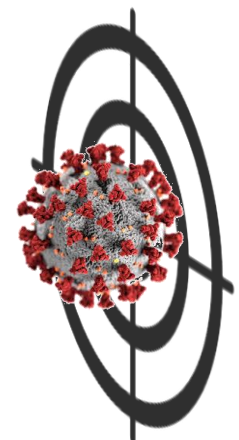


# REINFORCEMENTS: REGULATIONS AGAINST EXCESSIVE PRICING

(1)

19 March 2020

- Minister Ebrahim Patel imposes Regulations to **LIMIT UNJUSTIFIED PRICE HIKES** and **PRODUCT STOCKPILING** in order to protect consumers.
- **DURATION:** the Regulations apply during the period of the declared National Disaster.
- The Regulations refer to the Competition Act and the Consumer Protection Act.



# DEBATE ABOUT SOURCE OF THESE PROVISIONS

## Competition Act

Section 78 read with section 8(3)(f):

*“78. Regulations.-The Minister, by notice in the Gazette, may make regulations that are required to give effect to the purposes of this Act.”*

*“8(3) 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, which may include-*

*(f) any regulations made by the Minister, in terms of section 78 regarding the calculation and determination of an excessive price.”*

## Consumer protection Act, 68 of 2008 (CPA)

Section 120 of the Consumer Protection Act read with section 40 (unconscionable conduct) and section 48 (unfair, unreasonable or unjust contract terms):

*“120. (1) The Minister may—*

*(d) make regulations relating to unfair, unreasonable or unjust contract terms”*

# EXCESSIVE PRICING

(3)

- Applies to a 'material price increase' by a **DOMINANT SUPPLIER** which
  - A. does **NOT CORRESPOND** or is not equivalent to an increase in the cost of providing the product or service,
  - OR**
  - B. increases the net margin or mark-up on the product or service **ABOVE THE AVERAGE MARGIN OR MARK-UP** in the three month period prior to 1 March 2020.
- Will **PRIMA FACIE** be considered to be excessive or unfair and is a **RELEVANT AND CRITICAL FACTOR** in determining whether the price is **EXCESSIVE** or **UNFAIR**.

What do the Regulations apply to:

- critical **medical** equipment;
- a wide range of **basic consumer goods**; and
- the Minister can **add to this list** by notice in the Gazette,

# REINFORCEMENTS: CONSUMER PROTECTION ACT

(4)

## UNCONSCIONABLE, UNFAIR, UNREASONABLE AND UNJUST PRICES

- Suppliers may **not** engage in:
  - **unconscionable** conduct in terms of section 40 of the CPA; or
  - **unfair, unreasonable or unjust prices** in terms of section 41 of the CPA.
- A price increase by a supplier which does **not correspond** with the **cost** of the product or is increased above the average mark-up **IS** unconscionable, unfair, unreasonable and unjust prices and a supplier is **prohibited** from effecting such a price increase.
- If necessary, the Minister can **set maximum prices** on **private medical goods** and services relating to the testing, prevention and treatment of Covid-19 during the national disaster.



# STOCKPILING

(5)

- Suppliers are required to ensure that the **BASIC GOODS** are:
  - **equitably distributed** to consumers or customers; and
  - that they maintain **adequate stocks**.
- Adopts a **partnership** model that requires retailers and wholesalers to take prudent and responsible steps such as limiting the number of items that a customer may purchase.
- But **still** also **allows the Minister** to take **firmer measures** if they become necessary, including setting limits on the numbers of basic goods a consumer can purchase.



# PENALTIES

(5)

- **Dominant Firms** found to have excessively priced will be liable for penalties imposed on it as provided for in the **Competition Act**.

Note: The more recent Tribunal Regulations allow for a **pricing order**.

- A person found guilty of contravening the Regulations, subject to the Competition Act and the CPA can have one or more of the following penalties imposed:
  - A fine of **R 1 000 000**; or
  - A fine of up to **10% of a firm's turnover**; and
  - **Imprisonment** for a period not exceeding 12 months.

# REGULATION ON TRIBUNAL RULES FOR COVID-19

## RE: EXCESSIVE PRICING

(6)

3 April 2020

### PENALTY

- The Tribunal may impose a **pricing order** on a respondent found to have contravened section 8(1)(a) (subject to an appeal on an urgent basis to the CAC- provided that the pricing order will remain unless overturned).
- This would not preclude the party concluding a consent order.

### EXPEDIATED PROCEEDINGS

- Respondents wishing to oppose a complaint must serve an answering affidavit within **72 hours**.
  - If an answer is not received, the referral may be heard on an **unopposed basis**.
- A reply must be served within **24 hours**.
- Hearings would be by way of audio or video proceedings.

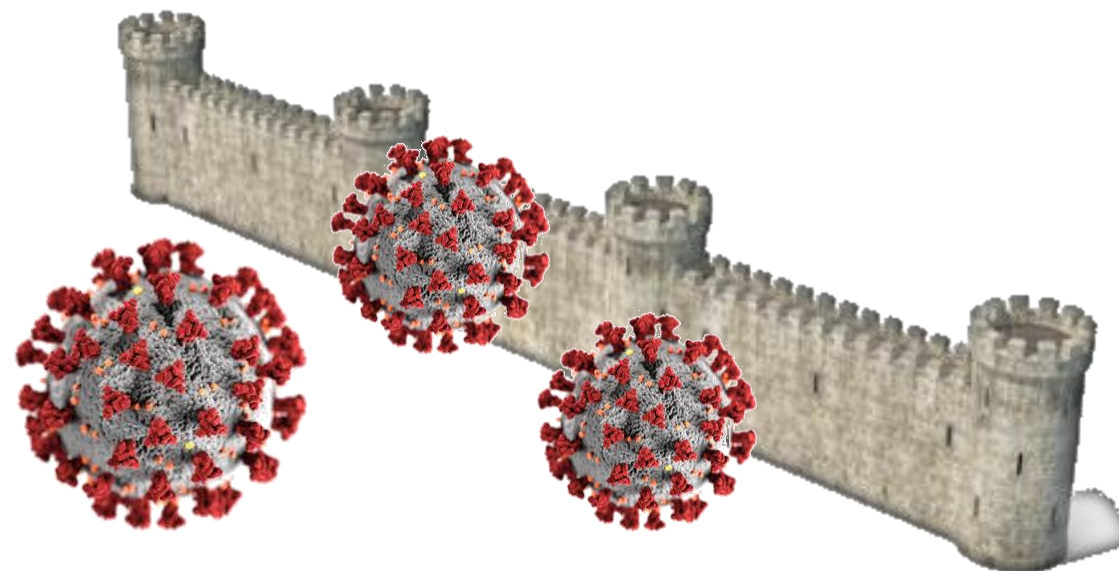
# HELPING TO PROTECT AGAINST THE VIRUS

## BLOCK EXEMPTIONS

“...In normal times, without a common enemy, coordination leads to, inefficiency and higher prices.”

“At a time of crisis such as in war or with a pandemic, where there is a **common enemy to fight for the nation's survival**, and so a sense of national purpose, **coordination is both efficient** and carries **little or no downside...**”

Rod Sims- Chair of ACCC



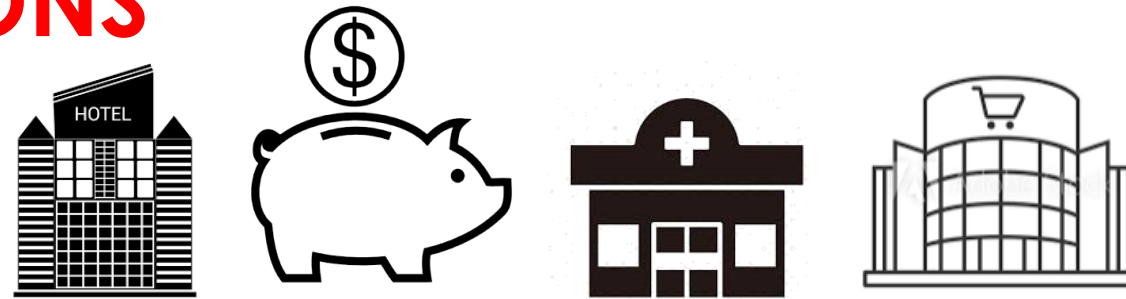
# COLLABORATION TO DEAL WITH THE VIRUS:

## BLOCK EXEMPTIONS





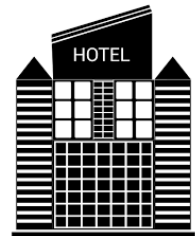
# PROTECTING AGAINST THE VIRUS: BLOCK EXEMPTIONS



- **Certain agreements** and practices in these industries are exempted from the application of section 4 and 5 of the Competition Act.
- The exemptions are **only applicable** if undertaken in coordination with the relevant Minister for the **“sole purpose”** of **responding to the COVID-19 epidemic**.
- The exemptions **exclude communication in respect of prices unless specifically authorised**.
- The purpose of the exemptions is to prevent an escalation of the national disaster and to facilitate coordination for the benefit or protection of consumers.

# PROTECTING AGAINST THE VIRUS:

## BLOCK EXEMPTIONS



**Healthcare:** includes hospitals allocating patients efficiently and **medical suppliers co-ordinating on availability of supplies and on procurement.**



**Banks** may coordinate to ensure that **essential payment systems continue** to operate and debtors are managed and there is **extension of credit.**



**Hotels:** Allows for hospitals and others to collectively **identify and provide appropriate facilities for persons placed under quarantine.** The category of agreements relate to the identification and provision of facilities and cost reduction.



**Retail:** This exemption pertains to payment holidays, limitations on evictions and the suspension or adjustment of lease agreement clauses.

# LEGITIMATE JOINT VENTURES BETWEEN COMPETITORS?

- **Exemptions for healthcare product suppliers are narrow and onerous – need Ministerial involvement (and in the case of pricing, require permission from the Minister)**
- **BUT: there is some potential protection for efficiency-enhancing engagements between competitors in response to COVID-19:**
  - **Section 3: Competition Act does not apply to “concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose”**
  - **ANSAC: legitimate JV’s may fall outside of the section 4(1)(b) prohibition IF the conduct can be “characterised” as non-collusive**

# THE USUAL PROHIBITIONS ON COMPETITORS STILL APPLY!

- BUT: the usual restrictions on **agreements or understandings competitors on prices, markets or tenders** will generally still apply
- Caution needs to be applied to any kind of **information exchange**: competitors cannot discuss competitively sensitive information
  - Make sure you follow the CC Guidelines !
  - AVOID TALKING ABOUT: how to deal with suppliers or customers, boycotts or consistent approaches to pricing or payment terms.
  - **This conduct remains illegal and might still attract a huge fine, even for a first time offence.**

# ABUSES OF DOMINANCE

- **Given the current crisis, CC likely to act swiftly to address any other kinds of abuses by:**
  - **Dominant suppliers**
  - **Dominant buyers**

**[some new provisions in the Act can potentially be applied]**
- **No special COVID regulations but the normal restrictions on firms with MARKET POWER will apply**





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## THANK YOU

THESE SLIDES ARE FOR DISCUSSION PURPOSES ONLY AND DO NOT CONSTITUTE LEGAL ADVICE. IF YOU HAVE ANY PARTICULAR QUESTIONS, YOU SHOULD CONTACT YOUR LEGAL ADVISOR.