

Healthy foods & price-gouging during pandemic?

High ginger, garlic and lemon prices have left a sour taste in mouths of South Africans

By Gina Lodolo and Jemma Muller

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The exorbitant and rapid increase in prices of ginger, garlic and lemon, that which spans up to 300%, has been the source of much public outcry and regulatory concern over the past few months. The question remains whether the price increases by massive retailers can be justified or whether they should be considered as excessive?

The Consumer and Customer Protection and the National Disaster Regulations and Directions (the “**Regulations**”), which came into effect in March 2020, were put in place to consider *inter alia* when a price is excessive. They empower the South African Competition Commission (“**SACC**”) and National Consumer Commission (“**NCC**”) to investigate and prosecute cases of price-gouging. Contraventions may result in penalties of up to ZAR 1 million or 10% of annual turnover. According to the NCC, price gouging is defined as “an unfair or unreasonable price increase that does not correspond to or is not equivalent to the increase in the cost of providing that good or service.”

The NCC has launched an investigation under the Consumer Protection Act into potential contraventions of the COVID-19 Regulations against major retailers such as Woolworths, Pick ‘n Pay, Shoprite, Spar, Food Lovers market, Cambridge Foods and Boxers Superstores. According to the Regulations, and in terms of section 120(1)(d) of the Consumer Protection Act, a price increase of a goods, including *inter alia* “basic food and consumer items”, which does not correspond to the increase in cost of supplying such goods, or increases in the net margin or mark-up on the good(s) which exceeds the average margin or mark-up on the said good in the three month period before 1 March 2020 is “unconscionable, unfair,



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unreasonable and unjust and a supplier is prohibited from effecting such a price increase”.

It has appeared that the trend in the increase of ginger and garlic retail prices is that the allegedly exploitative conduct no longer originates from only one dominant player as such (eg. only Spar) but rather affects shops in the whole of South Africa. The price increases have sparked outrage with consumers who are driving shop-to-shop in an attempt to purchase ginger or garlic at a lower, or somewhat ‘standard’ pre-COVID-19, price.

As stated above, increasing prices will be seen as excessive when the increase is due only to an increase in demand. Retailers have claimed that the increase is not only because of rising demand but also due to an actual decrease in the product supply. It is therefore pertinent to determine the extent to which the supply has been reduced in relation to the increased demand. This would require a proportionality balance, as shops would have to prove to the competition authorities that the increase of pricing is only due to the decrease in supply. Extortionary pricing above and beyond that would demonstrate an increase of pricing due to the increase of demand, and as such would fall foul of the Competition Act and the Regulations cited above.

The rising prices in garlic and ginger have been on the SACC’s radar since July 2020, when it concluded a consent agreement with Food Lovers Holdings whereby the retailer agreed to immediately halt excessively pricing its ginger products at one of its stores. Notwithstanding this fact, the subsequent regulation and enforcement of ginger and garlic prices by the SACC under Regulations has become somewhat tricky due to the fact that the products are not considered to be essential products under the COVID-19 Regulations.

The SACC previously found that the increases in prices were largely attributed to the rise in costs experienced by retailers and they found no evidence of price gouging targeted at taking advantage of the constrained mobility of consumers or shortages during the pandemic. What the SACC found to be concerning, however, were the high pre-disaster margins on products such as ginger and garlic, which have largely been maintained throughout the pandemic by retailers raising their prices for the goods as the costs were increasing. Accordingly, as mentioned above, although the SACC did not find evidence of price gouging, it did find possible contraventions of the Consumer Protection Act and as such, referred the potential contraventions to the NCC to investigate further.

A spokesperson for the SACC, Siyabulela Makunga has stated the following:

“We also appreciate the changes in demand for garlic and ginger, but it is our view the price of ginger and garlic have [sic] increased astronomically at retailers. We don’t think that the increased demand in ginger justified the price of up to R400 a kilogram...”

John Oxenham, an R.S.A. competition lawyer with [Primerio Ltd.](#), notes that “the prosecution of the matter demonstrates the respective authorities’ commitment to priority sectors and an unbridled effort to root out any form of price-gouging.”

To conclude, market power of the implicated retailers has likely been increased due to the reduced availability of substitutes for customers as a majority of retailers have introduced a dramatic price increase. The investigation launched by the NCC is, however, a step in the right direction to protect consumers who have been left with very limited choices in the widespread steep increase in price of ginger and garlic.

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