



competitiontribunal
SOUTH AFRICA

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: CO001Apr21

In the matter between:

The Competition Commission

Applicant

And

Mine Africa Safety Solutions (Pty) Ltd

Respondent

Panel : Y Carrim (Presiding Member)
: AW Wessels (Tribunal Member)
: A Ndoni (Tribunal Member)

Heard on : 14 April 2021

Decided on : 14 April 2021

CONSENT AGREEMENT

The Tribunal hereby confirms the consent agreement concluded between the Competition Commission and Mine Africa Safety Solutions (Pty) Ltd, annexed hereto.

**Presiding Member
Ms Yasmin Carrim**

**14 April 2021
Date**

Concurring: Mr Andreas Wessels and Ms Andiswa Ndoni

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT CASE NO:

CC CASE NO: 2020Mar0136

In the matter between:

COMPETITION COMMISSION OF SOUTH AFRICA

Applicant

and

MINE AFRICA SAFETY SOLUTIONS (PTY) LTD

Respondent

**CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND
MINE AFRICA SAFETY SOLUTIONS (PTY) LTD IN RESPECT OF AN ALLEGED
CONTRAVENTION OF SECTION 8(1)(a) OF THE COMPETITION ACT 89 OF
1998, AS AMENDED, READ WITH REGULATION 4 OF THE CONSUMER AND
CUSTOMER PROTECTION AND NATIONAL DISASTER MANAGEMENT
REGULATIONS AND DIRECTIONS PUBLISHED IN GOVERNMENT GAZETTE
NO 43116 ON 19 MARCH 2020**

The Competition Commission and Mine Africa Safety Solutions (Pty) Ltd hereby agree that application be made to the Competition Tribunal for the confirmation of this Consent Agreement as an order of the Tribunal in terms of section 49D of the Competition Act 89 of 1998, as amended ("the Act"), in respect of a contravention of section 8(1)(a) of the Act read together with Regulation 4 of the *Consumer And Customer Protection And National Disaster Management Regulations And Directions*




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published in Government Gazette No 43116 on 19 March 2020, as well as the *Regulations on Competition Tribunal Rules for Covid-19 Excessive Pricing Complaint Referrals* published in Government Gazette No 43205 on 3 April 2020 and the *Tribunal Directive for Covid-19 Excessive Pricing Complaint Referrals* on the terms set out below.

1. DEFINITIONS

The following words shall, unless otherwise stated or inconsistent with the context in which they appear, bear the following meanings in this Consent Agreement:

- 1.1 **“Act”** means the Competition Act 89 of 1998, as amended;
- 1.2 **“Commission”** means the Competition Commission of South Africa, a statutory body, established in terms of section 19 of the Act, with its principal place of business at Building C, Mulayo Building, the dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;
- 1.3 **“Commissioner”** means the Commissioner of the Competition Commission, appointed in terms of section 22 of the Act;
- 1.4 **“Consent Agreement”** means this agreement duly signed and concluded between the Commission and Mine Africa Safety Solutions (Pty) Ltd;


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- 1.5 **“Consumer Protection Regulations”** means the *Consumer and Customer Protection and National Disaster Management Regulations and Directions* published in Government Gazette No 43116 on 19 March 2020;
- 1.6 **“Mine Africa Safety Solutions”** means Mine Africa Safety Solutions (Pty) Ltd, a company duly incorporated in accordance with the laws of the Republic of South Africa with registration number 2003/087280/23. Its principal place of business is located at Unit 2, Meadowbrook Business Estate, Jacaranda Avenue, Olivedale, Randburg;
- 1.7 **“SPCA”** means the Society for the Prevention of Cruelty to Animals;
- 1.8 **“Tribunal”** means the Competition Tribunal of South Africa, a statutory body, established in terms of section 26 of the Act, with its principal place of business at Building C, Mulayo Building, the dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;
- 1.9 **“Tribunal Directive for Covid-19 Excessive Pricing Complaint Referrals”** means the directive issued by the Tribunal on 6 April 2020; and
- 1.10 **“Tribunal Rules for COVID-19 Excessive Pricing Complaint Referrals”** means the Regulations on Competition Tribunal Rules for COVID-19 Excessive Pricing Complaint Referrals published in Government Gazette No 43205 on 3 April 2020.




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2. BACKGROUND AND CONTEXT

- 2.1 On 15 March 2020, given the magnitude and severity of the COVID-19 outbreak which had been declared a global pandemic by the World Health Organisation (“WHO”) and classified as a national disaster by the Head of the National Disaster Management Centre, the Minister of Cooperative Governance and Traditional Affairs (“COGTA”) declared a National State of Disaster in the Republic of South Africa which declaration was published in Government Notice No. 313 of Government Gazette No. 430096.
- 2.2 On 18 March 2020 the Minister of COGTA issued regulations (“**Disaster Management Regulations**”) published in Government Notice No. 318 of Government Gazette no. 43107, regarding the steps necessary to prevent an escalation of the disaster or to alleviate, contain and minimize the effects of the disaster. These regulations were made in terms of section 27(2) of the Disaster Management Act, 2002 (Act No. 57 of 2002) (“**Disaster Management Act**”). Paragraph 10(6) of the Disaster Management Regulations (“**Disaster Management Regulations**”) authorised the Minister of Trade and Industry to, *inter alia*, issue directions to protect consumers from excessive, unfair, unreasonable or unjust pricing of goods and services during the national state of disaster.
- 2.3 On 19 March 2020, the Minister of Trade and Industry published the Consumer Protection Regulations. The purpose of the Consumer Protection Regulations is to promote concerted conduct to prevent an escalation of the national disaster


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and to alleviate, contain and minimise the effects of the national disaster and to protect consumers and customers from unconscionable, unfair, unreasonable, unjust or improper commercial practices during the national disaster.

2.4 In relation to excessive pricing, the Consumer Protection Regulations states the following:

"4. 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 –

4.1.1. does not correspond to or is not equivalent to the increase in the cost of providing that good or service; or

4.1.2. increases in 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."

2.5 Annexures A and B list the goods and services that fall to be regulated by the Consumer Protection Regulations. Annexure A lists the goods and services that fall to be regulated by Regulation 4 of the Consumer Protection Regulations.

2.6 On 23 March 2020, the President of the Republic of South Africa announced the enforcement of a nationwide lockdown for 21 days with effect from midnight on Thursday, 26 March 2020.



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2.7 On 3 April 2020, the Tribunal Rules for Covid-19 Excessive Pricing Complaint Referrals were published and thereafter, on 6 April 2020, the Tribunal Directive for Covid-19 Excessive Pricing Complaint Referrals was issued.

2.8 On 9 April 2020, the President of the Republic of South Africa announced an extension of the enforced nationwide lockdown by a further two weeks, until the end of April 2020. This lockdown has since been further extended and remains ongoing.

3. THE COMMISSION'S INVESTIGATIONS AND FINDINGS

Investigation

3.1 In March 2020, the Commission received information in terms of section 49B(2)(a) of the Competition Act, against Mine Africa Safety Solutions in relation to the inflated prices it was charging for FFP1 and FFP2 face masks for the period March and April 2020.

3.2 Masks fall under the category of 'medical and hygiene supplies' in Annexure A as well as item 1.3 of Annexure B of the Consumer Protection Regulations. Regulation 4 of the Consumer Protection Regulations is therefore applicable to the conduct described in this Consent Agreement.

3.3 In terms of Section 7(c) of the Act, market power can also be inferred from the economic behaviour of the firm. In this case, the mere ability to raise prices is



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indicative of market power as it demonstrates a lack of constraints such that there is an ability to control prices and/or behave independently of competitors and customers.

- 3.4 States of disaster often provide the conditions for temporary market power to be held by market participants that may not otherwise have market power outside of the disaster period. The removal of constraints may occur for several reasons, many of which are conceptually related to a narrowing of the geographic market for products as a result of disruptions to the normal functioning of markets. Due to the national lockdown, the scope of the geographic market is narrow as citizens' movements are heavily restricted.
- 3.5 In a state of national disaster, an established test within the assessment of excessive pricing under the Act is determining whether price increases have a corresponding cost justification. This is because an excessive profit margin is detectable if the ordinary prices are increased materially absent cost increases.

Findings

- 3.6 The Commission conducted an investigation into Mine Africa Safety Solutions' alleged conduct and found the following:
- 3.6.1 Mine Africa Safety Solutions is an online supplier of safety products including, *inter alia*, face masks, clothing, gumboots, head and hand protection gear. Mine Africa Safety Solutions sells its products to the


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following customer categories: wholesalers, distributors, retailers, and end users.

3.6.2 Since the outbreak of Covid-19, Mine Africa Safety Solutions has significantly increased prices of FFP1 and FFP2 face masks in respect of sales to end users and retailers.


3.6.3 Mine Africa Safety Solutions did not sell FFP1 and FFP2 masks to retailers and end-users before February 2020. It started selling FFP1 and FFP2 face masks to retailers during March 2020 and to end-users during February 2020.

3.6.4 During February and March 2020, Mine Africa Safety Solutions applied the following gross profit margins on the sales of FFP1 and FFP2 face masks to retailers and end-user:

3.6.4.1 For FFP1 masks, a gross profit margin of 52.57% on sales to retailers in March, and a gross profit margin of 82.70% in February, and 64.98% in March on sales to end-users;

3.6.4.2 For FFP2 masks, a gross profit margin of 53.42% in March on sales to retailers, and a gross profit margin of 69.45% in February and 61.38% in March to end-users; and

3.6.5 Mine Africa Safety Solutions has market power in the market for the sale of FFP1 and FFP2 face masks given the current pandemic and state of national disaster.



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Determination of excessive price

3.7 The tables below reflect the Commission's determination of the excessive prices charged by Mine Africa Safety Solutions:

Table 1: Invoice prices of the FFP1 Face Masks per customer category

Customer Category	End users	
Date	February 2020	March 2020
Volume weighted average cost price / Unit	R2.05	R9.47
Volume weighted average selling price / Unit	R11.85	R27.10
Mark-up (%)	478.04%	185.56%
Gross Profit (%)	82.70%	64.98%
Quantity sold	20	4 460
Customer Category	Retailers	
Date	February 2020	March 2020
Volume weighted average cost price / Unit		R9.49
Volume weighted average selling price / Unit		R20.01
Mark-up (%)		110.85%
Gross Profit (%)		52.57%
Quantity sold		21 100


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Excess profit amounts as calculated for FFP1 sales to retailers and end-users

	Would be selling price at 30% benchmark profit margin	Overcharge per unit (Rands)	Total overcharge amount (Rands)
Sales to Retailers	R14.01	R6.00	R126,663.30
	Would be selling price at 30% benchmark profit margin	Overcharge per unit Rands)	Total overcharge amount (Rands)
Sales to End-users	R18.97	R9.50	R42,370.00
Total excess profits in respect of FFP1 Masks sales to Retailers and end-users			R169 033.30

Table 2: Invoice prices of the FFP2 Face Masks per customer category

Customer Category	End users	
Date	February 2020	March 2020
Volume weighted average cost price / Unit	R6.95	R12.85
Volume weighted average selling price / Unit	R22.75	R33.28
Mark-up (%)	227.34%	158.98%
Gross Profit (%)	69.45%	61.38%
Quantity sold	80	2 568
Customer Category	Retailers	
Date	February 2020	March 2020
Volume weighted average cost price / Unit		R12.85
Volume weighted average selling price / Unit		R27.59
Mark-up (%)		114.71%
Gross Profit (%)		53.42%
Quantity sold		5 800

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Excess profit amounts as calculated for FFP2 sales to retailers and end-users

Sales to Retailers	Would be selling price at 30% benchmark profit margin	Overcharge per unit (Rands)	Total overcharge amount (Rands)
	R19.31	R6.46	R37,485.40
Sales to End-users	Would be selling price at 30% benchmark profit margin	Overcharge per unit (Rands)	Total overcharge amount (Rands)
	R23.30	R10.45	R26,825.33
Total excess profits in respect of FFP2 Masks sales to Retailers and end-users			R64 310.73

3.8 In assessing the reasonableness of the margins realized by Mine Africa Safety Solutions, the Commission had regard to its gross profit historic margins for the sale of masks. The above table shows that the gross profit margins realized by Mine Africa Safety Solutions were significantly higher than the industry benchmark of 20-25% previously relied on by the Commission. Thus, given the high gross profit margins realized, the gross profit margins realized by Mine Africa Safety Solutions do not appear to correspond with the increase in cost, and is unreasonably high. This conduct accordingly constitutes a contravention of section 8(1)(a) of the Act read together with Regulation 4 of the *Consumer Protection Regulations*.

3.9 The Commission however notes that, contrary to the large retailers relied upon in calculating the industry benchmark of 20-25%, Mine Africa Safety Solutions scale is lower than the bigger players operating in the South African retail market. Given the difference in scale, a slightly higher gross margin (30% in this case) may be justified in settlement with Mine Africa Safety Solutions.


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4. ADMISSION

Mine Africa Safety Solutions does not admit that the above conduct constitutes excessive pricing in terms of section 8(1)(a) of the Act read together with Regulation 4 of the Consumer Protection Regulations. After engaging with the Commission, Mine Africa Safety Solutions nevertheless agrees to resolve the complaint on the terms set out below.

5. FULL AND FINAL SETTLEMENT

This Consent Agreement, upon confirmation as an order by the Tribunal, is entered into in full and final settlement and concludes all proceedings between the Commission and Mine Africa Safety Solutions relating to any alleged contravention of section 8(1)(a) the Act read together with Regulation 4 of the Consumer and Customer Protection and National Disaster Management Regulations and Directions published in Government Gazette No 43116 on 19 March 2020 that is the subject of the Commission's investigation under Commission's Case No 2020Mar01364.

6. AGREEMENT REGARDING FUTURE CONDUCT

Mine Africa Safety Solutions agrees to:

- 6.1. immediately desist from the excessive pricing conduct described above;
- 6.2. reduce its gross profit margin on face masks to a maximum of 30% with immediate effect and for the duration of the state of the national disaster;



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6.3. donate essential goods to Empilweni - New Life Community Project (013-499 NPO) situated at 152 Nkanyamba Street, Mqantsa Section, Tembisa, 1632 totalling a cost price value of **R116 672.02** (One hundred and sixteen thousand, six hundred and seventy-two Rand and two cents) within 7 (seven) calendar days of signature by both Parties; and

6.4. pay a cash contribution in the amount of **R116 672.02** to the Solidarity Fund within Seven calendar days from the date of confirmation of this Consent Agreement as an order by the Tribunal. The contribution must be paid into the Solidarity Fund's bank account which is as follows:

NAME: Solidarity Fund

BANK: Standard Bank

ACCOUNT NUMBER: 023 070 021

ACCOUNT TYPE: Current account

BRANCH CODE: 051001

SWIFT CODE: SBZAJJ

PAYMENT REF: 2020Mar0136/ Mine Africa Safety Solutions

6.5. submit an affidavit under oath by the owner or director of Mine Africa Safety Solutions testifying that the abovementioned undertakings have been adhered to within 7 (seven) calendar days of confirmation of the Consent Agreement as an order by the Tribunal;

6.6. submit an affidavit under oath by a duly authorised representative of Mine Africa Safety Solutions within 7 (seven) calendar days of abovementioned



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undertakings testifying that the abovementioned payment to the solidarity fund and donation has been made together with proof of payment, donation and acceptance of donation which must be emailed to collections@compcom.co.za with subject line heading “*Consent Agreement between Competition Commission of South Africa and Mine Africa Safety Solutions - 2020Mar0136*”;

- 6.7. to circulate a statement summarising the content of this Consent Agreement to all management and operational staff employed at Mine Africa Safety Solutions within 7 (seven) calendar days from the date of confirmation of this Consent Agreement by the Tribunal and notifying the Commission, by submitting an affidavit under oath by the owner of Mine Africa Safety Solutions, confirming compliance with this undertaking;
- 6.8. develop, implement and monitor a competition law compliance programme incorporating corporate governance designed to ensure that its employees, management, directors and agents do not engage in future contraventions of the Act. In particular, such compliance programme will include a mechanism for the monitoring and detection of any contravention of the Act; and
- 6.9. to submit a copy of a compliance programme to the Commission within 60 business days of the date of confirmation of this Consent Agreement as an order by the Tribunal.



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Signed at _____ on this the 19 day of March 2021.



Duly authorised signatory

Mine Africa Safety Solutions (Pty) Ltd

Name in full: ANGELIQUE VAN DYK

Authority: General Manager

Signed at _____ on this the _____ day of _____ 2021.



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The Commissioner, Competition Commission of South Africa