



competitiontribunal
SOUTH AFRICA

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: CR024May20/SA030May20

In the matter between:

The Competition Commission

Applicant

And

Sicuro Safety CC

First Respondent

Hennox 638 CC t/a Hennox Supplies

Second Respondent

Panel : Mondo Mazwai (Presiding Member)
: Fiona Tregenna (Tribunal Member)
: Halton Cheadle (Tribunal Member)

Heard in chambers on : 21 May 2020

Decided on : 21 May 2020

Settlement Agreement

The Tribunal hereby confirms the settlement agreement as agreed to and proposed by the Competition Commission, Sicuro Safety CC, and Hennox 638 CC t/a Hennox Supplies annexed hereto marked "Annexure A".



**Ms Mondo Mazwai
Presiding Member**

21 May 2020

Date

Concurring: Prof F Tregenna, Mr H Cheadle

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT CASE NO:
CC CASE NO: 2020Apr0046
2020Apr0047

In re:

COMPETITION COMMISSION OF SOUTH AFRICA

Applicant

and

SICURO SAFETY CC

(Reg No. 2008/184726/23)

Respondent

And in re:

COMPETITION COMMISSION OF SOUTH AFRICA

Applicant

and

HENNOX 638 CC t/a HENNOX SUPPLIES

(Reg No. 2005/122042/23)

Respondent

SETTLEMENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND
SICURO SAFETY CC AND HENNOX 638 CC t/a HENNOX SUPPLIES 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, Sicuro Safety CC and Hennox 638 CC t/a Hennox Supplies hereby agree that application be made to the Competition Tribunal for the confirmation of this Settlement Agreement as an order of the Tribunal in terms of sections 58(1)(a)(iii) and 59(1)(a) of the Competition Act 89 of 1998, as amended ("**the Act**"), in respect of an alleged 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*, 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 Settlement Agreement:

- 1.1 "**Act**" means the Competition Act No. 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 "**Complaints**" means the complaints initiated by the Commission on 1 April 2020 against Sicuro and Hennox for alleged contraventions of section 8(1)(a)

of the Act for excessive pricing in respect of the provision of Dust Masks in South Africa and referred to the Tribunal under case numbers CR024May20 and CR025May20 respectively;

- 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 **"Hennox"** means Hennox 638 CC t/a Hennox Supplies, a close corporation duly registered in accordance with the laws of the Republic of South Africa, with registration number 2005/122042/23 and with its registered place of business at Unit B1 Anchor Business Park, 19 Springbok Road, Bartlett, Boksburg;
- 1.7 **"Settlement Agreement"** means this agreement duly signed and concluded between the Commission, Sicuro and Hennox;
- 1.8 **"Sicuro"** means Sicuro Safety CC, a close corporation, duly registered in accordance with the laws of the Republic of South Africa, with registration number 2008/184726/23, and with its registered place of business at Unit A1 Anchor Business Park, 19 Springbok Road, Bartlett, Boksburg;
- 1.9 **"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;
- 1.10 **"Tribunal Directive for Covid-19 Excessive Pricing Complaint Referrals"** means the directive issued by the Tribunal on 6 April 2020; and

- 1.11 **“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.

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 Co-operative Governance and Traditional Affairs (**“COGTA”**) declared a state of national disaster in the Republic of South Africa (hereafter "state of national disaster") 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 state of national 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 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 Annexure A of the Consumer Protection Regulations lists the goods and services that fall to be regulated by 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.
- 2.7 On 3 April 2020, the Tribunal Rules for Covid-19 Excessive Pricing Complaint Referrals were published and thereafter, on 6 April, the Tribunal Directive for Covid-19 Excessive Pricing Complaint Referrals was issued.
- 2.8 On 9 April 2020, President of the Republic of South Africa announced the 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 began receiving several complaints regarding the inflated prices charged for face masks sold by Sicuro's and Hennox's customers. In the course of investigations into the alleged excessive pricing of face masks by the Respondents' customers, the Commission developed the

reasonable suspicion that Sicuro and Hennox were engaging in excessive pricing in the supply and sale of face masks. The Commissioner accordingly, in terms of section 49B(1) of the Act, initiated complaints against both Sicuro and Hennox for alleged excessive pricing of face masks in contravention of section 8(1)(a) of the Act.

- 3.2 Facial 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 Settlement 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, Sicuro's and Hennox's ability to raise prices is 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 Sicuro's and Hennox's alleged conduct and, *inter alia*, found the following:

3.6.1 Sicuro and Hennox are based at Anchor Business Park, 19 Springbok Road, Bartlett, Boksburg and operate as "sister" firms;

3.6.2 Sicuro and Hennox do not manufacture face masks;

3.6.3 Sicuro and Hennox operate as resellers of face masks (including FFP1, FFP2 and FFP3 masks) and a variety of products. Hennox imports face masks from China and Sicuro "purchases" face masks from Hennox and then on-sells the face masks to its customers (some of whom then act as resellers themselves);

3.6.4 Sicuro and Hennox operate in the market for the provision of personal protective equipment (which includes facial masks); and

3.6.5 Sicuro and Hennox have market power in the market for the supply of FFP1 facial masks during the national disaster, given the current pandemic and state of national disaster.

3.7 In respect of Sicuro, the Commission found, *inter alia*, that:

3.7.1 Sicuro increased its prices for FFP1 masks by 969.07% between the price charged in December 2019 (R2,16) to the price charged from 17 March 2020 (R23,06);

3.7.2 Sicuro's costs only increased from 17 March 2020; and

- 3.7.3 Sicuro's average gross profit margins for FFP1 facial masks on 19 March 2020 was ■% and on 23 March 2020, Sicuro's average gross profit margin was ■%.
- 3.8 In respect of Hennox, the Commission found, *inter alia*, that:
- 3.8.1 the prices charged by Hennox for FFP1 masks cumulatively increased by 956% between the price charged in December 2019 (R2,23) to the price charged in March 2020 (R23,57);
- 3.8.2 Hennox's costs only increased from 2 March 2020; and
- 3.8.3 Hennox's average gross profit margins for FFP1 facial masks on 10 February 2020 was ■% and on 19 March 2020, Hennox's average gross profit margin was ■%.
- 3.9 The Commission ultimately found that Sicuro's conduct of excessively escalating its margins for FFP1 face masks in March 2020 without a corresponding increase in its costs is a contravention of section 8(1)(a) of the Act read together with Regulation 4 of the *Consumer Protection Regulations*.
- 3.10 The Commission also found that Hennox's conduct of excessively escalating its margins for FFP1 face masks in February and March 2020 without a corresponding increase in its costs is a contravention of section 8(1)(a) of the Act read together with Regulation 4 of the *Consumer Protection Regulations*.

4 ADMISSION

- 4.1 Sicuro admits that it increased its gross profit margins for FPP1 face masks during March 2020 in contravention of section 8(1)(a) of the Act read together with Regulation 4 of the *Consumer Protection Regulations*.
- 4.2 Hennox admits that it increased its gross profit margins for FPP1 face masks during March 2020 in contravention of section 8(1)(a) of the Act read together with Regulation 4 of the *Consumer Protection Regulations*.

5 ADMINISTRATIVE PENALTY

- 5.1 Having regard to the admissions above, Sicuro and Hennox are liable to pay an administrative penalty, the one paying and the other to be absolved, in terms of section 58(1)(a)(iii) read with sections 59(1)(a) and 59(3) of the Act in the amount of R1 500 000,00 (one million five hundred thousand Rand), jointly and severally, the one paying the other to be absolved.
- 5.2 Sicuro and Hennox will pay the above administrative penalty within 7 (seven) days from the date of confirmation of this Settlement Agreement as an order by the Tribunal.
- 5.3 Sicuro and Hennox shall remit the payment of the administrative penalty into the following bank account:

Name of account holder:

COMPETITION COMMISSION

Bank name: ABSA BUSINESS BANK
Account number: 4087641778
Branch code: 632005
Reference: Sicuro/Hennox/2020Apr0046/7

5.4 The Commission confirms that the above settlement agreement does not exceed the statutory limit of 10% of Sicuro's and Hennox's annual turnover in the Republic and their exports from the Republic respectively, during the firms' preceding financial year, as provided for in section 59(2) of the Act read with regulation 7.2.2 of the *Consumer Protection Regulations*.

5.5 The Commission will pay the settlement amount into the National Revenue Fund in terms of section 59(4) of the Act.

6 CONTRIBUTION TO THE SOLIDARITY FUND

6.1 Sicuro and Hennox undertake to, jointly and severally, the one paying the other to be absolved, pay a contribution in the amount of R200 000,00 (two hundred thousand Rand) to the Solidarity Fund.

6.2 Sicuro and Hennox will pay the amount set out above to the Solidarity Fund withing 7 (seven) days from the date of confirmation of this Settlement Agreement as an order by the Tribunal.

6.3 The contribution must be paid into the Solidarity Fund's bank account which is as follows:

Name of account holder:	SOLIDARITY FUND
Bank name:	STANDARD BANK
Account number:	023 070 021
Branch code:	051001
SWIFT code:	SBZAZAJJ
Payment reference:	Compcom 2020Apr0046/Sicuro Compcom 2020Apr0047/Hennox

7 AGREEMENT REGARDING FUTURE CONDUCT

7.1 Sicuro and Hennox agree to:

- 7.1.1 immediately desist from the excessive pricing conduct described above;
- 7.1.2 reduce their gross profit margin on FFP1 face masks to a maximum of ■%, with immediate effect, for the duration of the state of the national disaster;
- 7.1.3 ensure that their gross profit margin for FFP2 and FFP3 facial masks will not exceed ■% for the duration of the state of the national disaster;
- 7.1.4 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. The competition law compliance programme will be developed in conjunction with a staff member of the Commission. In particular, such compliance programme will include a mechanism for the monitoring and detection of any contravention of the Act;

7.1.5 to submit a copy of a compliance programme to the Commission within 60 business days of the date of confirmation of the Settlement Agreement as an order by the Tribunal or such longer period as may be agreed with the Commission depending on the duration of any lockdown imposed in terms of the legislation and directions referred to in paragraphs 2.1 and 2.2 above; and

7.1.6 to circulate a statement summarising the content of this Settlement Agreement to all management and operational staff employed at Sicuro and Hennox within 14 calendar days from the date of confirmation of this Settlement Agreement by the Tribunal and notifying the Commission by submitting an affidavit under oath by the CEOs of Sicuro and Hennox confirming compliance with this undertaking.

8 FULL AND FINAL SETTLEMENT

8.1 This Settlement 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 Sicuro Safety CC and Hennox 638 CC t/a Hennox

Supplies relating to the alleged contraventions 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 are the subject of all the Commission's investigations under Commission Case Nos. 2020Apr0046 and 2020Apr0047.

8.2 For the sake of clarity, this Settlement Agreement envisages that any and all investigations by the Competition Commission into the affairs of Sicuro Safety CC and Hennox 638 CC t/a Hennox Supplies up to and including 15 May 2020 and in respect of FFP1, FFP2 and FFP3 masks, is hereby concluded.

Signed at CAPE TOWN on this the 15th day of May 2020.



Mervyn Doringo (duly authorised)

Sicuro Safety CC & Hennox 638 CC t/a Hennox Supplies

Signed at PRETORIA on this the 15TH day of May 2020.



Tembinkosi Bonakele

The Commissioner, Competition Commission of South Africa