Please take a moment to read the following information in its entirety before scrolling down to the Judgment. Thank you!

In mid-2020, HJI and Open Secrets (OS) were jointly admitted as 'friends of the court' (amici) in the Competition Appeal Court (CAC), in a matter involving an appeal of a decision of the Competition Tribunal involving *Dischem and the Competition Commission.* The case involved Dischem's excessive pricing of face masks (PPE) in the COVID pandemic. HJI and OS were also permitted to adduce expert evidence. Within days, Dischem withdrew its appeal, and agreed to pay a penalty.

Following that, and building on the amici intervention in Dischem, in August 2020, HJI and Open Secrets were jointly admitted as friends of the court also in the CAC, in a similar matter and appeal against a decision of the Competition Tribunal - *Babelegi Workwear Overall Manufacturers & Industrial Supplies CC and the Competition Commission.* Shortly thereafter, the SAHRC was also admitted as a friend of the court (amicus).

The appeal was heard (virtually) by the **CAC** in September 2020 with HJI, OS and the SAHRC appearing before the CAC (Judges Davis, Rogers and Mguni) as friends of the court. HJI and Open Secrets were represented pro bono by Webber Wentzel Attorneys and Advocates P Ngcongo; F Hobden and C Tabata. Counsel for the SAHRC were Advocates B Lekokotla and O Motlhasedi.

On 18 November 2020, judgment was issued by the CAC, and it upheld the finding of excessive pricing. For reasons unknown to HJI and OS and our legal representatives, the judgment omitted to mention that three organisations were admitted as friends of the court, nor was there any direct reference to the submissions and arguments advanced by the amici. The header to the judgment at that time did not reflect the amici parties either.

In January 2021, HJI and OS's legal representatives first wrote to the registrar of the Competition Tribunal about the omission, and since. Eventually, on 17 March 2022, an amended header was issued (the first page of the judgment) - but surprisingly, it does not include the SAHRC. No further header has been issued.

Enquiries about this anomaly should be directed to the Registrar of the Competition Tribunal: Email CAC@comptrib.co.za, Tel +27 (0)12 394 3300

THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CAC CASE NO: 186/CAC/JUN20

In the matter between

BABELEGI WORKWEAR AND INDUSTRIAL SUPPLIES CC Appellant

And

THE COMPETITION COMMISSION OF SOUTH AFRICA Respondent

JUDGMENT: 18 November 2020

DAVIS JP

[1] What is the role of competition law when essential goods such as face masks are sold at a particularly high price in the midst of the Covid 19 pandemic? This question has confronted competition authorities in many jurisdictions. For example, the European Commission, EFTA and the European National Competition Authorities issued a joint statement stressing that it is 'of utmost importance' to ensure that products like facemasks which are 'considered essential to protect the health of consumers' remain available 'at competitive prices. These competition authorities announced that they 'will therefore not hesitate to take action against companies taking advantage of the current situation by … abusing their dominant position.' (Joint statement of the

European Competition Network (ECN) on the application of competition law during the Corona Virus https://ec.europa.eu/competition/ecn/22003_joint-statement_ecn_corona-crisistricis.pdf)

[2] In a number of jurisdictions, price gouging laws were specifically introduced to prevent excessive pricing and profiteering during a state of emergency such as that caused by the Covid 19 pandemic. See, for example, Timothy Snail and Mary Beth Savio "Price Gouging in a Time of Sea Change" CPI Anti-Trust Chronicle September 2020.

[3] In South Africa, on 19 March 2020 the Minister of Trade and Industry on published the Consumer Protection Regulations ('Regulations') following the declaration of a National State of Disaster relating to the Covid 19 outbreak on 15 March 2020.[1]

[4] Of particular relevance is Regulation 4 headed 'Excessive Pricing' which provides thus:

> 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-
>
> 4.2.1 does not correspond to or is not equivalent to the increase in the costs of providing that good or service; or
>
> 4.2.2 increases the 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.

[5] Regulation 5.2, under the heading 'Unconscionable, Unfair, Unreasonable and Unjust Prices', provided as follows:

[1] These regulations appeared in Government Notice 350 GG 43116 under the title 'Consumer and Customer National Disaster Management Regulations' and Directions

5.2 In terms of section 120 (1) (d) of the Consumer Protection Act, during any period of the national disaster, a price increase of a good or service contemplated in Annexure A which-

5.2.1 does not correspond to or is not equivalent to the increase in the costs of providing that good or service; or

5.2.2 increases the 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 unconscionable unfair, unreasonable and unjust and a supplier is prohibited from effecting such a price increase.

[6] For the sake of completion it should be noted that annexure A included a range of emergency products and services as well as medical and hygiene supplies.

[7] The present litigation was triggered by complaints lodged with respondent by customers of appellant concerning prices charged to them for FFP1 masks (face masks) on 20 March 2020, which prices had been quoted to them on 19 March 2020. As a result, respondent requested information from appellant on both 27 and 30 March 2020. Appellant responded thereto on 30 March 2020. After further enquiries were made and an investigation was completed, respondent concluded that appellant's pricing practices during the period 31 January 2020 to 5 March 2020 contravened the Competition Act 89 of 1998 (the Act) read together with the Regulations.

[8] In a letter of 5 April 2020 (incorrectly dated 5 March 2020) addressed to Mr Daniel van Niekerk, the sole member of appellant, respondent contended:

> 'There appears to be no justification for significant price increases effected by Babelegi between 31 January and 5 March 2020 if the supplier's price only increased on 18 March 2020. Babelegi's price increases during this period (i.e. 31 January and 5 March 2020) were therefore unreasonable, unfair and/or unjust. For this reason, it is the Commission's view that Babelegi's conduct in this regard is in contravention of the Competition Act 89 of 1998 and the Consumer Protection Act 68 of 2000, read with the Consumer and Customer and National Disaster Management Regulations and Directions.'

[9] At 20h48 on 9 April 2020, on the eve of Good Friday, respondent launched its application for an order in the following terms:

> 'That the respondent's pricing conduct during the period 31 January 2020 to 5 March 2020, has contravened the provisions of s 8 (1) (a) of the Competition Act;
>
> Interdicting and restraining the respondent from engaging in any further conduct in contravention of s 8(1) (a) of the Competition Act;
>
> Directing the respondent to pay an administrative penalty, in terms of s 58 (1) (a) (iii), equal to 10% (ten percent) of its annual turnover in the Republic and its exports from the Republic during its preceding financial year;
>
> Granting such further order, as the Tribunal determines appropriate, to remedy the respondent's conduct in contravention of s 8(1) (a) of the Competition Act.'

[10] As the complaint period preceded the publication of the Regulations, the notice of motion confined respondent's case to a contravention of s 8 (1) (a) of the Act; that is the section dealing with excessive pricing by a dominant firm as opposed to the bespoke regulations dealing with price gouging. Thus, not only did the present dispute become the first case which dealt with price gouging but it also became the first litigation to be based upon s 8 (1) (a) of the Act, subsequent to the introduction of amendments to the Act which had been passed in terms of the Competition Amendment Act of 2019.

[11] The matter was heard by the Competition Tribunal (Tribunal) as one of urgency on 24 April 2020, pursuant to Covid 19 rules which had been developed by the Tribunal. On 1 June 2020 the Tribunal delivered its order and reasons therefore. It held that the appellant had contravened s 8 (1) (a) of the Act during the complaint period and ordered that it pay an administrative penalty of R 76 040.00 within 15 business days of the date of this order. It is against this order that the appellant has approached this Court on appeal.

The facts giving rise to the litigation

[12] Appellant sells workwear such as overalls and industrial supplies. This includes protection wear including facemasks. During the 12 months up to

March 2020 its sale of face masks contributed a total of 3% to its overall revenue. It does not produce facemasks but purchases these masks from designated suppliers and then sells these products either in bulk to regular customers or to "walk in clients". It generally purchases small quantities in order to supply its customers, as the sale of masks formed a small part of its overall business.

[13] Its financial statements for the year ending 28 February 2019 reflected a total revenue of R 49 292 915 and a profit before taxation of R 1 572 858. Appellant can thus be considered under the Act to be a small business insofar as it is treated as a wholesaler or a medium business if it is to be regarded as a manufacturer.[2]

[14] Prior to 31 January 2020, appellant achieved, on average, a mark-up of 23% on the relevant masks. However, between 31 January 2020 and 5 March 2020, it achieved significantly higher mark-ups. According to a table which is contained in the economic report prepared by Professors Liberty Mncube and Nicola Theron, on behalf of appellant, as at 31 January 2020 its mark-up was 122%, on 4 February 2020 it was 107%, on 10 February 2020 it increased to 754% and on 5 March 2020 to 1120%. Thereafter, its mark-ups reduced to 25%; that is after the termination of the complaint period. Notwithstanding the 25% mark-up after the complaint period, the price for these masks as charged by suppliers to appellant had increased to R440 per box of 20 masks by March 2020 as compared to a price of R 41 per box as at December 2019.

[15] Appellant contended that the cost structure of the relevant masks had changed dramatically over the relevant period as was evident from the dramatic increase in acquisition cost of face masks following the outbreak of the pandemic. An invoice generated on 5 December 2019 from Sicuro Suppliers, one of the firms from which appellant required masks, quoted the cost as at R 41 for a box of 20 masks; that is R 2.05 per mask. Invoices from 18 to 23 March 2020 reflected a quoted price of R 440 for a box of 20 or R 22 per mask, an increase of 973%.

[2] See the definition of small and medium size business in s 1 of the Act read together with Government Notice 987 in Government Gazette 42578 of 12 July 2019

[16] Given that these figures appear in the respondent's supplementary economic submissions of 22 April 2020, it is safe to say that it is common cause that appellant sold 496 boxes of 20 masks per box from 31 January to 5 March conclusive. Of these, 76 boxes were sold to external customers, and the balance to its sister company Babelegi. According to the respondent's supplementary economic submissions:

> 'For the 10 months prior to February 2020, Babelegi earned an average R6,335.60 profit per month on FFP1 mask sales. For March 2020 it earned R 475,381.00 profit from FFP1 mask sales, or 75 times more profit than Babelegi typically earns from these masks in an average month. This is also in the context where Babelegi only sold 3 times more FFP1 masks in March (2867 mask boxes) relative to the average for the 10 months prior to February 2020 (950 mask boxes).'

[17] It was respondent's case that appellant's conduct had to be assessed within the context of the coronavirus pandemic and the surge in demand for face masks. Respondent contended that this context afforded appellant the opportunity to exploit consumers and customers, by charging an excessive price for its face masks. Respondent's case was based on the argument that appellant's pricing conduct was a direct result of the change in market conditions caused by the Covid 19 pandemic and its unprecedented impact on the world in general, including South Africa.

[18] Respondent contended further that price increases which were implemented in an emergency, such as Covid 19 crisis, had a most detrimental impact on poor individuals and families, as well as small businesses, who are already the most vulnerable during such a crisis. These exponential price increases can put basic necessities out of the reach of poor people who desperately need them to protect themselves and their families, and they impose high costs on small businesses seeking to protect their employees.

[19] Turning to the launching of the application on the eve of Good Friday and the subsequent shortened timetable, respondent contended that the expedited investigation, prosecution and adjudication of excessive pricing cases (including the present matter), in the midst of the Covid 19 pandemic,

was necessary to curb anti-competitive behaviour, and thereby protect consumer welfare in such circumstances.

The Tribunal's decision

[20] The Tribunal's decision was based, as noted, upon a case brought in terms of ss 8 (1), (2) and (3) of the Act read together with s 7. Following the 2019 amendments to the Act, the relevant portions of s 8 read thus:

> '8 (1) It is prohibited for a dominant firm to-
>
> (a) charge an excessive price to the detriment of consumers or customers
>
> …
>
> 8 (2) If there is a prima facie case of abuse of dominance because the dominant firm charged an excessive price, the dominant firm must show that the price was reasonable.
>
> 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 the relevant factors, which may include-
>
> (a) the respondent's price costs margin, internal rate of return, return on capital invested or profit history;
>
> (b) the respondent's prices for the goods or services-
>
> (i) in markets in which there are competing products;
>
> (ii) to customers in other geographic markets;
>
> (iii) for similar products in other markets; and
>
> (iv) historically;
>
> (c) relevant comparator firm's prices and level of profits for the goods or services in a competitive market for those goods or services;
>
> (d) the length of time the prices have been charged at the level;
>
> (e) the structural characteristics of the relevant market, including the extent of the respondent's market share, the degree of contestability of the market, barriers to entry and past or current advantage that is not due to the respondent's own commercial efficiency or investment, such as direct or indirect state support for a firm or firms in the market; and

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

[21] Excessive pricing constitutes a contravention of s 8 (1) (a), only if committed by a dominant firm. This requirement became the central dispute before the Tribunal. In order to be considered to be dominant, a firm's annual turnover of assets in the Republic must be valued at or exceed R 5 million. It is common cause that, for the duration of the complaint period, appellant met this threshold. Further in order to be classified as a dominant firm and therefore fall within the scope of s 8, the defendant firm must be shown to meet the requirements for dominance in terms of s 7. According to appellant, its market share for the face mask market was 4.7%, a figure which was not materially contested by respondent. Accordingly, s 7 (c) of the Act became relevant. It provides that a firm is dominant in the market if it has less than 35% of the defined market but has market power. In turn, s 1 of the Act defines market power as 'the power of a firm to control prices or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers'.

[22] Confronted with a firm that had a share of the relevant market of less than 5 %, the Tribunal turned first to the question of market power. It found 'as a matter of economics in a crisis period such as Covid 19 the actual conduct of the firm can be used as a proxy to assess its market power'. Having evaluated the evidence over the complaint period, in particular the fact that appellant was able to sustain mark-ups of between 122% on 31 January to 1120% on 5 March 2020, the Tribunal concluded that appellant 'had the ability to effect material price and mark-up increases suddenly, from 31 January 2020 and successively for the remainder of the Complaint Period, without providing any cost justification for these increases'. Accordingly, the Tribunal found that, 'one can reasonably infer that Babelegi had market power during the Complaint Period since it behaved to an appreciable extent independently of its competitors, customers, or suppliers.'

[23] In evaluating the prices charged by appellant during the complaint period, the Tribunal found that they bore no reasonable relation to the prices charged and mark-ups which were achieved prior to the commencement of the complaint period which served as an appropriate and 'sensible benchmark of what competitive prices and mark–ups would be under conditions of normal and effective competition.' It then held that in light of:

> '… the successive nature of the increase in both price and mark-ups and the significant levels thereof, together with Babelegi's failure to provide any credible justification on the facts for the increased prices charged, as well as the failure of FTI to provide any economic justification for the pricing conduct …'

the respondent had discharged the onus of showing a *prima facie* case of abuse of dominance in terms of s 8 (2) of the Act; hence the onus shifted to appellant to show that the prices it had charged for the face masks during the complaint period were reasonable

[24] Section 8 (3) then required of the Tribunal that it evaluate the evidence of appellant to determine whether the difference between the price charged and the competitive price, as determined, was unreasonable. The Tribunal found that the mark-ups, following upon the prices charged by appellant during the complaint period were, on average, in excess of 500%. These increases were achieved by way of a huge discrepancy between the prices charged and the prices charged prior to the outbreak of the pandemic. The latter was the appropriate benchmark for the determination of a competitive price under conditions of normal and effective competition. The comparison showed clearly that the prices charged during the complaint period were unreasonable. Expressed differently, the prices charged during the complaint period were exploitative. Appellant knew full well that there was a significant increase in the demand for face masks during the period and took advantage of its customers and other consumers during the pandemic.

[25] The Tribunal also held that appellant's prices were to the detriment of the consumers and customers in that appellant's exploitative conduct took egregious advantage of the vulnerability of its customers during the pandemic.

For these reasons, the Tribunal found that the respondent had discharged the overall onus to justify a conclusion that appellant was in violation of s 8 of the Act.

The arguments on appeal with regard to the merits

[26] Ms Engelbrecht, who appeared together with Ms Le Roux, Ms Turner, Ms Avidon, Mr Quinn, Ms Kessery and Mr Phaladi on behalf of appellant, pressed the point that the Tribunal had failed to delineate the relevant market and further had misdirected itself in the manner in which it sought to apply the determination of dominance as provided for in s 7 of the Act. In her view, there was no justification for jettisoning the concept of market definition and its important role in the inquiry simply because the Tribunal was confronted with a case which took place in a time of crisis. As s 8 of the Act was being employed, albeit within the context of a pandemic, the Tribunal was obliged to show fidelity to the text of s 8 (1) read together with s 7 of the Act; that is the breach of s 8 can only take place if the impugned conduct is that of a dominant firm as defined in s 7. In turn this requires a determination of dominance in a particular market in which the alleged abuse has taken place.

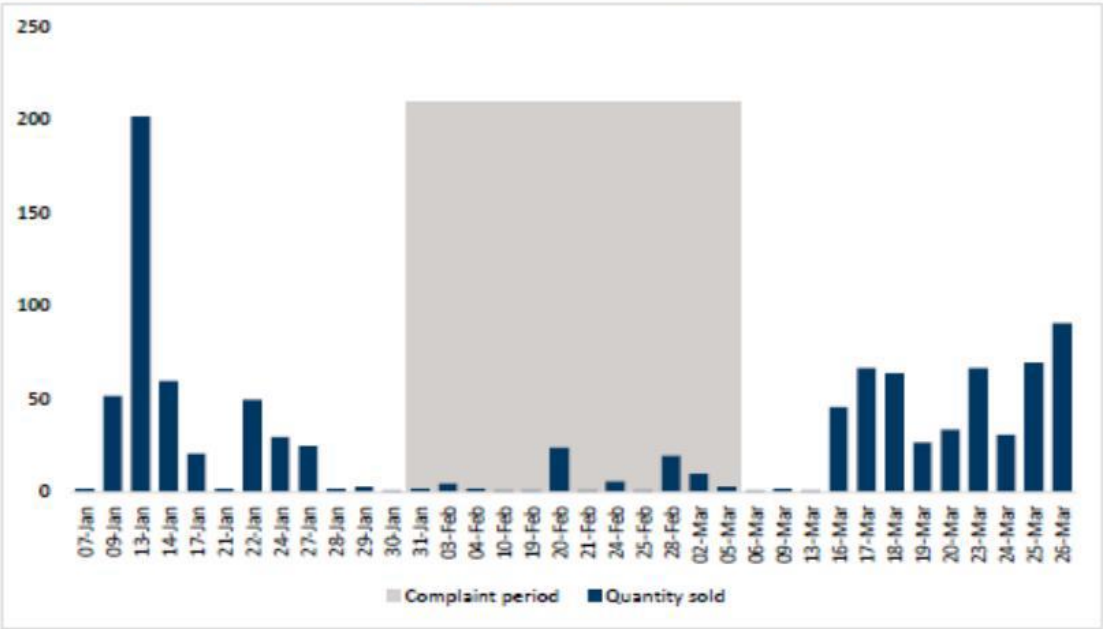
[27] Ms Engelbrecht further submitted that the Tribunal had failed to apply a justifiable approach in seeking to determine dominance. To assess market power, the Tribunal was required to examine the presence of constraints imposed by existing suppliers as well as the position in the market of competitors. In addition, the mandated inquiry requires an examination of the constraints imposed by way of a credible threat of future expansion by competitors, entry into the defined market by potential competitors and constraints imposed by the bargaining strength of customers. In her view, there was a clear failure to examine the available evidence before the Tribunal and then apply it to these particular considerations.

[28] In particular, Ms Engelbrecht referred to the report of Professors Theron and Mncube on behalf of the appellants which revealed that there were examples of firms switching to entry into the face mask market, including Cape Union Mart's K-Way brand, and First Dissent, which were both traditionally producers of outdoor apparel and accessories. In addition, Polo South Africa,

traditionally a clothing manufacturer, Reliance Clothing in a joint venture with Mike's Sports, and Expand A Sign which traditionally manufactured portable branded gazebos, banners, and inflatables, had all entered the face mask market. Ms Engelbrecht also referred to a report attached to the respondent's founding papers where a single dust mask manufacturer in Centurion Gauteng had produced at least two million masks a month in response to the outbreak of the pandemic.

[29] Apart from the evidence which revealed that appellant held less than 5% of the defined market, an examination of sales to customers other than to its sister company Belegi during the period 1 January to 31 March 2020 reflected a direct relationship between increased prices and a decrease in sales. In support of this submission, Ms Englebrecht referred to the following diagram:

Figure 1: Sales to customers excluding Belegi (Pioneer masks), 1 Jan - 31 March 2020



[30] In summary, a fundamental part of appellant's case on appeal was based on the argument that the Tribunal had failed to distinguish between market power and excessive pricing, and indeed had conflated these two concepts which incorrect move was central to its ultimate finding. In short, the Tribunal had found that the definition of a market 'becomes problematic

and impractical in crisis situations such as Covid 19 for the market in question has been disrupted or distorted by that crisis'. Covid 19 therefore provided conditions for market power to be conferred on firms that otherwise would not have possessed the kind of market power that ordinarily would have been the case, such as appellant. The Tribunal had held that the actual conduct of appellant was a proxy to assess its market power, for it had used appellant's pricing conduct as the means by which to define the market power in the relevant market.

[31] According to appellant, by employing this faulty reasoning, the Tribunal had eschewed adherence to the architecture of the text of the Act in that it had failed to determine whether, as a matter of law, appellant possessed the necessary market power in terms of s 7 read together with s 1 of the Act.

[32] Ms Engelbrecht also submitted that the Tribunal had failed to apply itself to the requirements set out in s 8; in particular the relevant factors provided for in s 8 (3) of the Act. In her view, the 2019 amendment to the Act which introduced the factors as set out in s 8 (3) gave concrete expression to a *dictum* of this Court in *Mittal Steel South Africa Limited and others v Harmony Gold Mining Company Limited and others* [2009] ZACAC 1 at para 43.

[33] In dealing with what was then the crucial concept of the section, the economic value of a good or service, this Court said in *Mittal* that 'the economic value is a notional objective competitive market standard and not one derived from circumstances peculiar to the particular firm. If the price is no higher than the economic value, no contravention of s 8 (a) can arise'.

[34] Although the text of s 8 no longer refers to 'economic value', but rather to a competitive price, Ms Engelbrecht submitted that the same considerations remain. In support thereof, she referred to the decision in *NAPP Pharmaceutical Holdings Limited and others v General Office of Fair Trading* [2002] CAT 1 at para 392:

> 'Measuring whether a price is above the level that would exist in a competitive market is rarely an easy task. The fact that the exercise may be difficult is not, however, a reason for not attempting it. In the present case, the methods used

by the Director are various comparisons of (i) Napp's prices with Napp's costs, (ii) Napp's prices with costs of its next most profitable competitor; (iii) Napp's prices with those of its competitors and (iv) Napp's prices with prices charged by Napp in other markets. Those methods seem to us to be among the approaches that may reasonably be used to establish prices, although there are, no doubt, other methods'.

[35] In essence, appellant's argument in this connection was that, if the Tribunal had examined the evidence presented and in particular developments regarding new entry into the relevant market, it would have concluded that there was a new equilibrium price in the market caused, admittedly, by the effects and consequences of the pandemic. That engagement was necessary in order for the respondent to discharge the onus of proving that even on a prima facie basis appellant had charged a price level above that of the competitive level.

[36] As further support of this submission, Ms Engelbrecht referred to the founding affidavit, being the referral affidavit deposed to by Mr Itumeleng Lesofe, who averred that the relevant economic test for determining whether a price is excessive for the purposes of s 8 (1) (a) was whether the relevant prices had increased materially, relative to that which was previously charged and if so, whether that increase was justified by any cost increases by suppliers further up the value chain. Mr Lesofe went on to claim that a 10% threshold for price increase was 'indicative of an unreasonable difference to the normal competitive price that prevailed historically.'

[37] Ms Engelbrecht contended that in its haste to bring this complex matter before the Tribunal, the founding papers had assumed that reliance on the test set out in Regulations was sufficient. They were clearly not applicable and accordingly the Tribunal had erred in condoning the respondent's failure in this regard and therefore ignoring the case that respondent had brought as defined in its founding papers.

[38] Turning to the reasonableness inquiry, namely whether once it is determined that a price is excessive, the Tribunal is required to consider the reasonableness of the price which has been found to be higher than the

competitive price, Ms Engelbrecht submitted that only a small number of sales during the complaint period triggered margins which were very high, taking into account the historical purchase price of stock in hand . Further the Tribunal had glossed over the argument that the cost of replacement stock was going to be manifestly higher as a result of Covid 19.

[39] Appellant's defence was that it increased its prices prior to the cost increase in order to be able to generate sufficient cash flow to enable it to continue its operation when the inevitable price increases from suppliers became effective. Furthermore, appellant operated under conditions that its suppliers only accepted cash on delivery as payment (COD) which required appellant to have sufficient cash on hand to buy new stock. This had a negative impact on the sustainability of appellant's business , since it did not budget for a significant cash flow reserve. Its pricing decisions took account of the need to increase its price in order for it to continue to acquire the necessary stock in the future which was to take place in terms of the radically changed market conditions with which it was now confronted.

[40] Ms Engelbrecht submitted that s 8 (3) (d) was a critical factor in the overall enquiry. This section had been ignored, namely consideration had to be given to the length of time that the prices had been charged at the level complained of during the complaint period. The inclusion of this factor in the 2019 amendment to s 8 had given expression to the concept of durability, namely that a firm could only be found to be in breach of excessive pricing legislation if prices were found to be significantly and persistently above the competitive level as a result of its market power. As the complaint period spanned little more than a month, there was insufficient evidence of the existence of durability which was required, if an excessive pricing case was to be successfully prosecuted by respondent. Underlying the requirement of durability is the economic premise that excessive pricing by a non-dominant firm will quickly be neutralised by increased production by rivals or new entry into the relevant market.

Evaluation

[41] The doctrine of excessive pricing is extremely challenging for competition authorities, in that it requires of them, to a considerable extent, to act in the manner of a price regulator. In order to determine whether a price is excessive, a yardstick has to be established in order to establish a competitive price with which to assess whether the impugned price is excessive as compared to the yardstick price. This challenge has proved to consistently be problematic and not only in South Africa. See the perceptive remarks by David Lewis Thieves at the Dinner Table (2012) at 173ff.

[42] Nonetheless, context always matters in legal disputes. The outbreak of a novel virus such as Covid 19 has effected a disastrous impact on the health, economic and social fabric of societies throughout the world and in particular on the normal functioning of markets. It is a legitimate, indeed a commendable exercise of the authority for government in general and competition authorities in particular to be concerned about price gouging as firms seek to prey on desperate consumers in a time of disaster.

[43] These observations do not detract from the complexity of the task confronting this court, particularly in the present case where at the relevant time, government had not introduced bespoke price gouging regulations. As a result, the present case has to be determined through the prism of an excessive pricing provision would was not intended for use in the specific and unique conditions of a Covid 19 pandemic. The present case is mercifully somewhat more confined than might otherwise confront a competition authority in dealing with an excessive pricing case.

[44] Some critical facts are common cause. The appellant charged significantly increased prices for FFP1 masks through a series of price increases amounting to a total of 888% from R50.60 per box of 20 excluding VAT on 9 December 2019 to R500 per box on 5 March 2020. Appellant's margin increased from 23% to 1119% over the complaint period. These price increases took place when there was no increase in appellant's costs of procuring the face masks over the complaint period, even though a future

increase in procurement costs was anticipated. In other words, appellant sold stock acquired at pre Covid cost prices at significantly increased prices.

[45] Doubtless a new equilibrium in the market had been achieved as a result of an increased demand and the changing conditions of supply. But this case turns essentially on the question of distribution as opposed to allocation. It does not appear that an argument based on a different and much higher equilibrium price is of assistance in resolving this dispute nor , as I shall indicate , was any assistance provided by the parties in this regard.

[46] The critical issues which arise and require determination in order to dispose of this appeal are the circumstances brought about by the Covid 19 pandemic which appeared to confer market power on appellant as contemplated in s 7 of the Act. In turn, it is necessary to determine whether, for the purposes of this case, appellant was a dominant firm with market power. Furthermore the question then arises as to whether in the context of appellant's conduct and explanation , the increased prices were reasonable. Further, given the argument raised by appellant, consideration must be given to whether the requirement of detriment to consumers has been met in this case. If all of these questions are determined in favour of respondent, then only is this court required to deal with whether the penalty imposed on appellant was appropriate in the circumstances.

Dominance

[47] Both the Tribunal in its reasons and respondent in its argument before this Court relied on an opinion piece written by Professor Massimo Motta (Daily Maverick 22 April 2020) dealing with the question of dominance in the content of a pandemic. Professor Motta writes thus:

> 'Excessive price actions may appear as an odd instrument: They require the finding of dominance, and firms that may be accused of price gouging might not necessarily be dominant in ordinary times. However, they may well be in out exceptional times.
>
> Consider markets for food and groceries. Normally, they are defined geographically in a broad way, because consumers can move and shop

around. But during a period of confinement, people are obliged to buy their shopping next door, thus becoming captive of local shops.

Even if they have very little market share in a "normal times" market, these shops may be dominant during the crisis. Note that in such cases insufficient supply is not the problem: Some firms may simply take advantage of consumers' impossibility to shop around. (And here, one cannot argue that price regulations are inefficient: There is no lack of supply.)

In cases of excess demand, even a small firm may have considerable market power. Under normal demand conditions, if any firm tried to set a high price, its rivals would use their spare capacity to undercut it and sell more. But, if at that high price each firm's demand is higher than its capacity, there would be no incentive to cut prices. When firms already sell at capacity, by lowering their price they would sell the same amount, but make less profit. In other words, when demand is much higher than capacity, even "small" firms may be endowed with significant market power, that is, they may be dominant.'

[48] This view finds support in a contribution by Jorge Ramos (Firm Dominance in EU Competition Law: The Competitive Process and the Origins of Market Power (2020) at Chapter 7, where Ramos discusses the concept of the "lucky monopolist". The lucky monopolist is not a dominant firm whose power comes from the state or from natural efficiencies, from unparalleled investment efforts or superior management ability nor as a result of anti-competitive conduct. Its dominant position comes from what Ramos refers to as luck, being events that fall outside of the knowledge of the economic actor or its ability to determine the timing thereof. They do not require the firm to incur any cost in order to secure its market position in that the relevant factors are exogenous to the cost functions of the firm but are significantly meaningful to propel a firm to a position of dominance among existing firms. Ramos provides the following example:

'Suppose a snow avalanche has collapsed roads and other transport ways so that the inhabitants of a village can only do their groceries in one supermarket. At some early point in time snow ploughs will remove the snow or the sun will melt it away. The villagers will in a short time be able to do their groceries in other groceries stores. The lucky monopolist can thus be a short-lived phenomenon or an entrenched outcome that is not dependent on superior

efficiencies to maintain its randomly acquired position of market power.' (at 229)

[49] The lucky monopolist might not be a single firm in the relevant market. Given prevailing exogenous factors, multiple firms can be found to be dominant during the crisis, as the European Commission found in *ABG Oil Companies* IV/28:241, 77/327/EEC (decision of the European Commission 19 April 1977). Although the European Court of Justice overturned this decision, it did so on unrelated grounds. The finding of the Commission was that customers can be completely dependent on a firm for the supply of scarce products during a crisis. In such a case, more than one supplier can be in a dominant position in respect of its normal customers.

[50] The recourse to this literature indicates that in a crisis situation, such as that induced by the Covid 19 pandemic, one needs to use a somewhat different conceptual framework from what ordinarily would be employed in an excessive pricing case. It is correct that, if the market is defined as that of the supply of face masks throughout the country , appellant enjoyed less than 5% share of the national market. It might well be, as suggested in the economic report on behalf of the appellant, that the relevant geographical market may be larger than Pretoria where appellant's premises are located and be at least as large as an inland South African market. Recall however that the test for dominance for a firm that has less than 35% share of the defined market is that it has market power; that is 'the power to control prices or to exclude competition or to behave in an appreciable extent independently of its competitors, customers or suppliers'. Within the context of this case, this definition requires evaluation in terms of the cost, prices and mark-ups prior to or during and after the complaint period which are set out in the following table:

	Cost box	**Cost/ Mask**	**Selling/ box**	**Selling/ mask**	**Profit (R)**	**GP%**	**Mark-up**
09 Dec	41	2.05	50.6	2.53	9.6	18.97	23%

31 Jan	41	2.05	91	4.55	50	54.94	122%
4 Feb	41	2.05	85	4.25	44	51.76	107%
10 Feb	41	2.05	350	17.5	309	88.28	753%
05 Mar	41	2.05	500	25	459	91.80	1120%
18 Mar	440	22	550	27.5	110	20.00	25%
26 Mar	440	22	550	27.5	110	20.00	25%

[51] During the complaint period, appellant faced no increase in costs in that it sold its existing stock of masks, all of which had been acquired at pre- Covid 19 prices. Accordingly, it might be asked: what other explanation is available for its ability to increase the prices of FFP1 mask by 888% over the relevant period other than that it could act with appreciable independence of its competitors, customers or suppliers? In short, for the relevant period, it had the power to control its prices and not be concerned that a countervailing power of a competitor would cause it to reduce its prices during that particular period. In this sense it must be viewed, as Ramos has described, as a lucky monopolist. No other plausible explanation is available for the massive increases which appellant was able to sustain throughout the complaint period.

[52] The only counter to this submission is that the market power requirement, even if analysed through the prism of economic behaviour such as that sustained by appellant during the complaint period, must imply a degree of durability. Section 8(3) refers to a number of factors that should be taken into account to determine whether the difference between the price charged and the competitive prices are unreasonable and this includes the length of time the prices had been charged at that level. In other words, durability matters. There is a danger that a host of firms who are able to exercise some degree of independent pricing without regard to a change in costs, no matter how transitory the increase, could fall foul of the excessive pricing provisions contained in s 8 (1) of the Act. That is why durability matters

in that markets will inevitably catch up with this opportunistic behaviour and then discipline a firm that seeks to extract monopoly rents in this manner.

[53] Hence the critical question is: how long a view must this court take of conduct which clearly is reflective of independence from customers and competitors? The question thus is not whether the market will inevitably work but when will it work sufficiently to impose discipline on a rent seeker?

[54] In its submissions, appellant relied on O'Donoghue and Padilla The Law and Economics of Article 102 TFEU (2nd ed) at 129, to show that the Tribunal's approach ran the risk of employing circular reasoning. A firm may be found to be dominant due to its conduct and dominance and 'the special responsibility' can in turn lead to conduct itself being catalogued as anti-competitive without any evidence of its actual abusive character. Furthermore in exploitative abuses, if it must be shown that excessive prices persist for long periods and the market resists change, then dominance is a likely explanation for the prices being charged. In determining if a firm is earning an economic profit, one must account properly for other factors, such as the economic risk to generate income. The appellant contends, on the strength of these considerations ,that there was neither abuse not dominance on its part.

[55] However, in law, as I have already indicated, the context of the dispute matters. In this case, the context is a market where market conditions have been altered by an unprecedented pandemic. It may well be that, had the appellant charged high prices for a few days, or indeed a week, that may have been insufficient to sustain the arguments raised by respondent in this case. That it could only sustain its high prices for a few days may have reflected a measure of market correction to the benefit of consumers. But in this case ,while appellant had supplies of masks which it had acquired at a pre Covid price, it continued to extract the maximum benefit. In the complaint period, it acted as a monopolist, no matter that other firms may have done the same. It extracted a surplus that could only be achieved by virtue of the independence it enjoyed as a result of being "lucky". It had a stock of face masks acquired at what was a competitive price; that is acquired under pre Covid 19 market conditions. Thanks only to the outbreak of the pandemic, it possessed market

power which allowed it for at least six weeks to mimic the conduct of a monopolist.

[56] It is true that in its haste to bring this matter to the Tribunal, respondent produced no evidence as to the behaviour of other firms and its pricing practices, particularly those, whom it was suggested, were located within a 20 kilometre radius of the premises of appellant. But an excessively zealous and unreflective approach by respondent to the importance of this kind of litigation is itself not a defence. In addition , the reformulated s8(2) read together with s8(3) of the Act imposes an evidential burden on the appellant , once dominance is established , to rebut the prima facie case against it .More about this question when s8(3) is analysed. In respect of the evidence on the record in respect of dominance, it revealed that throughout the complaint period appellant acted as if it was a monopolist, extracting the maximum price that it possibly was able to obtain from those who purchased a product which was necessary to assist in slowing the spread of the virus. The actions of appellant took place in circumstances where it is possible to take judicial notice of the anxieties of prospective purchasers as the wave of Covid 19 pandemic finally broke onto South African shores.

[57] During the complaint period, customers could notionally have shopped around (the national lockdown had not yet been imposed). Customers did not, however, do so, instead buying from appellant at grossly inflated prices. Why? One possibility is that other suppliers did not have masks available, in which case appellant's temporary market power would be obvious. If other suppliers did have masks available and were charging significantly lower prices than appellant, one might have expected customers to go there rather than to buy from appellant. The only explanation for the customers nevertheless buying from appellant at high prices is that the pandemic was causing them to believe that if they did not buy promptly they would be left without masks altogether. Lacking information about the status of other suppliers, and not wishing to delay in order to find out, they took what they could get from appellant. Notionally other suppliers could have exploited the same state of affairs. Either way, it was a state of affairs which conferred market power on appellant over

those who sought supply from it. Significantly, appellant never claimed that its pricing policy followed that of its competitors. It eschewed any reliance on such evidence to the extent that it might have been available to it. While Ms Engelbrecht referred to a new equilibrium price in her argument before this Court, there was no evidence provided to justify her submission. To the contrary, appellant's entire case was based on seeking to justify its unilateral conduct, on the basis of anticipated increases in its acquisition costs of face masks. I shall return to the issue of this evidence and the absence of evidence concerning competitors pricing in relation to the 'reasonableness' enquiry. But on the evidence read as a whole as it relates to the determination of dominance, appellant's ability to price in the manner it did was reflective of its market power albeit that this was sourced in the unprecedented market conditions created by Covid-19.

[58] Once dominance is established, the gateway is open for respondent to bring its case under s 8 (1). In the enquiry that follows, it must be established by respondent that the price charged was excessive. (See s 8 (2)) In the present case, the evidence which is relevant to this enquiry is the following: Appellant's price for the face masks prior to the commencement of the Covid 19 pandemic, was vastly lower than the prices that were charged during the complaint period. Secondly, there were a number of price hikes implemented by appellant over the complaint period subsequent to the onset of the pandemic which itself caused customers and consumers to pay significantly and increasingly more for their masks. The significant increases in the mark ups during the complaint period together with the absence of any price increases for the sales stock during the period is telling. Furthermore, as indicated earlier, appellant had an ability to price higher without any constraint imposed upon it by either its consumers or customers, not as a result of any new investment or commercial efficiency produced but simply because the onset of the pandemic created entirely different conditions for the market in which appellant was located. Hence *prima facie*, the prices charged were excessive in terms of s 8 (2) of the Act. This conclusion shifts the evidential ball into appellant's court.

[59] Section 8 (3) of the Act now comes into play. It enjoins this Court to determine whether the price charged is unreasonable. Here the appellant must provide a justification for its prices. The section is hardly drafted with the precision that should be demanded of national legislation. Section 8 (3) covers both the s 8 (2) enquiry and the case that a defendant firm must produce to show that, notwithstanding the *prima facie* finding, the price it charged is reasonable. Both the determination of whether the price is excessive and the question of reasonableness are to be determined, inter alia, by the factors set out in s 8 (3). In the present case the price charged was manifestly far higher than the yardstick price, that is the price charged in a relatively competitive pre Covid 19 market.

[60] Why then did appellant contend that the price it charged was not unreasonable? As observed earlier, appellant did not seek to justify its decision to increase prices on the basis of a new competitive equilibrium. It produced no evidence to illustrate that its prices were conditioned by that of its competitors. The only plausible explanation proffered by appellant was that it anticipated an increase in the price of acquiring further masks, once its existing stock had been exhausted. There was some evidence, particularly from one of its suppliers, being Dromex, which said on 31 January 2020 that future pricing would be effected by rand / dollar exchange rate and again on 2 March 2020 when it said 'there is a possibility of an amended pricelist in the coming weeks'.

[61] In his answering affidavit of 12 April 2020 Mr van Niekerk claimed the following:

> 'The price increases were imposed in circumstances where Babelegi's supplier had made it clear that that there would be a significant increase in price. Bababelegi was forewarned that it would incur significant additional costs to replenish the stock sold in the period between 31 January and 5 March 2020. This occurred in fact when the price for a box of masks escalated to R440 from R41 on 18 March 2020.'

[62] The problem is that no evidence was produced to show that costs were expected to rise by an amount which was anywhere close to the 888% increase extracted during the complaint period. Indeed its return on capital

thanks to the high prices had clearly increased exponentially . In any event , the evidence produced by appellant cannot sustain the argument that it based its price increases before, during and after the complaint period on clearly justifiable and anticipated price increases, which correlated with its own increases.

[63] In arriving at this conclusion this Court, albeit in the context of the pre 2019 s 8(1), said the following in *Sasol Chemical Industries Ltd v Competition Commission* 2015 (5) SA 471 (CAC) at para 102:

> 'Where the actual price is shown … to exceed the normal price for roughly similar products to a degree which is, on the fact of it, utterly exorbitant, then the need to quantity economic value more precisely before concluding that the actual price bears no reasonable relation to it may fall away. In this way a prima facie case would have been made out, leaving it to the respondent firm to adduce evidence to the contrary if it is to avoid the case against it becoming conclusive.'

[64] In summary, the evidence appellant adduced is unconvincing. When on 2 March 2020, Dromex stated that 'there is a possibility of an amended pricelist in the coming weeks' it did not suggest an exponential increase. As a matter of fact, appellant's costs for face masks only increased on 18 March 2020.

[65] The only clear indication was that prices would be affected by fluctuations in the Rand/Dollar exchange rate. But there is no correlation whatsoever between the contents of the supplier notices and the extent and timing of appellant's frequent price increases during the complaint period. In addition appellant's anticipatory cost argument does not explain the numerous, increasingly large, price increases it pushed through during the course of the complaint period. If appellant had increased its price because of anticipated cost increases, it would have most likely effected a single price increase in line with the expected increase in costs of the face masks particularly in that the complaint period was for approximately only 6 weeks. This is a manifestly inadequate explanation to rebut the *prima facie* case as required of appellant in terms of s 8 (2) of the Act

Detriment to consumers

[66] Section 8 (1) (a) curiously contains the additional requirement in respect of an excessive price, which has already been found to unreasonable, namely that it must be charged to the detriment of consumers or customers. This court in *Mittal, supra* at para 55 emphasised that this phrase should be treated as a subordinate description of an excessive price rather than as a qualification of its likely effects. Regrettably the drafters of the 2019 amendments did not seem to take account of this concern.

[67] It must then follow, as Ms Le Roux who argued this part of the case on behalf of appellant, correctly noted, that the legislature must be taken to have appreciated that, in some circumstances, a price would be excessive but will not necessarily inure to the detriment of the consumers. But, in this case, the excessive prices were charged at a time of crisis when the employment of a mask by every person in the country was seen as being essential to the protection of the health, safety and welfare of others and therefore as critical to the reduction of the danger posed by Covid 19. The high prices of such a necessity unquestionably acted to the detriment of consumers in the country.

[68] Competition law in South Africa has a more ambitious animating framework than that which has dominated the US antitrust law and even that of the European Union. It is designed to ensure that markets work fairly and do not add to the economic disadvantage of millions of presently disadvantaged South Africans. The manner in which I have sought to apply s 8 (1) gives expression to this objective which finds clear support in the Preamble and s 2 of the Act.

[69] That now leaves for consideration the question of an administrative penalty.

The Penalty

[70] In terms of s 59 (1) of the Act, the Tribunal may impose a penalty for a prohibited practice in terms of s 8 (1) (a). Such administrative penalty may not exceed 10% of the respondent's firm's annual turnover in the Republic during its preceding financial year.

[71] In determining the appropriate penalty the Tribunal is required to consider the factors listed in s 59 (3) of the Act. As this Court noted in *Isipani Construction (pity) Ltd v Competition Commission* [2017] ZACAC (3) at para 78, the determination of an appropriate administrative penalty can be likened to a decision to sentence in a criminal matter, in that it is case specific and by its inherent nature lacks the precision of a scientific determination.

[72] In *South Pipeline Contractors and another v Competition Commission* [2011] ZACAC 6 at para 9, this Court observed that an administrative penalty should promote the important objective of deterrence and 'should be proportional in severity to the degree of blame of the offending party, the nature of the offence and the effect on the South African economy in general and consumers in particular.'

[73] In its determination to impose a penalty of R 76 040 on appellant, the Tribunal found that appellant's defence that its prices during the complaint period were aligned to that of its competitors did not pass muster. Furthermore, the contravention took place in the midst of an unprecedented health crisis from which appellant sought to profit. This in view of the Tribunal constituted a grossly aggravating factor. The Tribunal then went on to find that the administrative penalty should exceed the excess profits made by appellant during the complaint period, namely a fine in excess of R 37 817 (respondent's calculation) or R 30 416 (appellant's calculation).

[74] Section 59 (3) provides that when determining the appropriate penalty the Competition Tribunal must consider the following factors:

(a) the nature, duration, gravity and extent of the contravention;

(b) any loss or damage suffered as a result of the contravention;

(c) the behaviour of the respondent;

(d) the market circumstances in which the contravention took place;

(e) the level of profit derived from the contravention;

(f) the degree to which the respondent has cooperated with the Competition Commission and the Competition Tribunal; and

(g) whether the respondent has previously been found in contravention of this Act.

[75] There can be little doubt that competition law should prevent firms from taking unfair advantage of market conditions in the wake of Covid 19 to increase prices, particularly in respect of products considered essential to the protection of the health of the consumers in the situation such as face masks and sanitisers. So much is clear from the judgment on the merits as set out above.

[76] It would clearly have been preferable for this case to have been determined by way of recourse to specific price gouging regulations of a kind which were promulgated by the Minister but given the complaint period were inapplicable in this case. Price gouging laws prevent firms in general from profiteering from situation necessity. Section 8 (1) (a) prohibits dominant firms from imposing excessive prices because they are able to employ their dominance and unfairly capture rents. Expressed differently they are able to mimic the conduct of a monopolist.

[77] That should not be read to imply that s 8 (1) (a) should not be imposed to prevent exploitative abuses. But it is regrettable that the very first case which was mounted by the respondent concerned a firm, being appellant, which, in the ordinary course, would be regarded as a small or, at worst, a medium size firm of a kind which should be promoted as is clear from the broad objectives of the Act. (see s 2 thereof)

[78] A further critical factor is that, absent the 400 boxes that appellant sold to its sister company, only 76 boxes of 20 masks per box were affected by the excessive price during the complaint period. Furthermore the National

Consumer Tribunal found its sister company, Belegi Workwear, guilty of contravening Regulation 350 of the Consumer Protection Regulations by inflating its prices of face masks and ordered it to pay an administrative fine of R 100 000. In short, only 76 boxes were 'at regulatory play' in the light of this finding. Furthermore some of the increases were effectively *de minimis;* for example the 1120% mark-up on 5 March concerned but 3 boxes of mask masks. The diagram that appears at para 30 of this judgment further reveals minimal sales during the complaint period.

[79] Viewed in this way, this case, the first brought under the amended s 8 (1) of the Act, stands to be classified as one of a *de minimis* breach of s 8(1) by a small firm which sold very few masks at an excessive price. This Court, however, must apply the law as set out in s 8 (1) to the facts of the case in a manner which shows fidelity to the Act. It is however regrettable that, in the absence of price gouging legislation which should have been applicable at the time of the complaint period, the Tribunal and this Court were required to engage with important, yet complex new provisions for the first time in a case brought with unseemly haste at the expense of precision. While the manner in which this Court has approached the interpretation of this provision has obvious precedential value and importance, it is regrettable that the first case in which this complex section was called into aid involved a small firm which sold but 76 boxes of masks during the Complaint Period.

[80] When the *de minimis* character of the offence is compared to the costs incurred by appellant in defending itself against the full force of the litigation by the respondent, the minimal harm caused as a result of the small amount of sales and the short duration of the Complaint Period, justice, in my view, would best be served by a decision not to impose a penalty on appellant, a small firm, the actions of which during the Complaint Period have already caused it significant harm.

[81] In the light of this decision, it would also not be appropriate to make a costs order which is adverse to appellant.

[82] In the result, the following order is made.

1. The appeal against the finding that appellant contravened s 8 (1) of the Competition Act 89 of 1998 as amended is dismissed.

2. The order that appellant is to pay an administrative penalty of R 76 040 is set aside.

3. There is no order as to costs.

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DAVIS J

ROGERS and MNGUNI JJA concurred