

Open Secrets and Health Justice Initiative joint amici submission in South Africa's first contested excessive pricing case in the Competition Appeal Court (CAC)



BABELEGI WORKWEAR AND INDUSTRIAL SUPPLIES CC V. THE COMPETITION COMMISSION



What is this case about?

This was the first Covid-19 related case of excessive pricing of Personal Protective Equipment (PPE) to be referred to the Competition Tribunal. The Tribunal found Babelegi guilty of excessive pricing on face masks and issued a fine of R76 000. Babelegi is appealing the decision. The Competition Appeal Court will also consider the application of the amended section 8 of the Competition Act for the first time. It does so in an unprecedented context of a worldwide pandemic.

You can read the non-confidential decision of the Competition Tribunal here: www.comptrib.co.za/case-detail/9098



Why did Open Secrets and Health Justice Initiative (hji) seek to be admitted as amici in this case?

This is the first contested excessive pricing case in South Africa, which has been taken on appeal to the CAC. The CAC's decision will have important consequences for how all companies are held accountable for their pricing in this pandemic, and how the public will be protected. We want to assist the CAC, when determining the appeal by Babelegi, so that it has in front of it the relevant factual and legal context. Most importantly, this includes the constitutional obligations of all suppliers of essential prevention and treatment medical supplies.



What is an amicus or joint amici?

An amicus is a 'friend of the court' – a joint amici means more than one organisation is applying together, to be friends of the court in the same matter. In this appeal, Open Secrets (OS) and the Health Justice Initiative (hji) sought permission and were jointly admitted as amici. The South African Human Rights Commission (SAHRC) has also been admitted as a separate amicus in this appeal.

The Constitutional Court in SA has previously stated that:

" Amici curiae have made and continue to make an invaluable contribution to this court's jurisprudence. Most, if not all, constitutional matters present issues, the resolution of which will invariably have an impact beyond the parties directly litigating before the court. Constitutional litigation by its very nature requires the determination of issues squarely in the public interest, and insofar as amici introduce additional, new and relevant perspectives, leading to more nuanced judicial decisions, their participation in litigation is to be welcomed and encouraged."

[1] Koyabe and Others v Minister of Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)



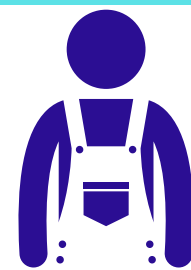
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What were the main findings of the Competition Tribunal against Babelegi?

The Competition Tribunal ruled that Babelegi contravened section 8(1)(a) of the Competition Act by charging excessive prices for face masks that it sold to customers between 31 January 2020 and 5 March 2020, which relates to the sale of face Dust Mask FFP1 Pioneer (FFP1 masks). It ordered the Pretoria-based company to pay an administrative penalty (a fine) of R76 040. It noted Babelegi's successive and significant price increases for face masks before the actual increase in its supplier costs and found that Babelegi could not justify the price increases. The Tribunal noted the impact on the public, saying that: "the exploitation of consumers or customers by charging excessive prices in a time of crisis such as Covid-19, must be considered as both grave and reprehensible conduct."

See more here: <https://www.comptrib.co.za/info-library/case-press-releases/babelegi-guilty-of-excessive-pricing-during-covid-19-crisis-fined-r76k>



Who is Babelegi Workwear and Industrial Supplies CC?

Babelegi operates from premises in Rosslyn, Pretoria. Its principal business is the manufacture, distribution, import and export of overalls and allied products. The alleged excessive pricing conduct relates to Babelegi's sale of FFP1 masks, which is a type of dust mask. Babelegi purchases these masks from suppliers and then on-sells the masks to customers. Babelegi also meets the annual turnover threshold for holding 'market dominance', that is, its annual turnover or assets must be valued at or exceed R5 million.

Our interest in this case goes beyond Babelegi. They are one of many companies that are alleged to have charged excessive prices during the Covid-19 crisis. This case is about setting a precedent and ensuring that private companies will be held to account for any attempts to profit at the expense of people.



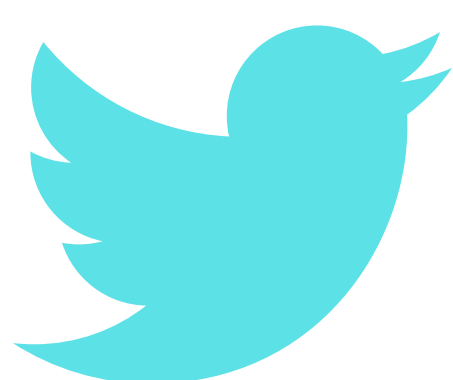
Are Open Secrets and hji seeking to introduce new and further evidence, and why?

Yes. As with a previous similar case of pandemic price gouging by Dis-Chem (who withdrew their appeal) we also filed an urgent application for leave to adduce further evidence. This application will only be considered by the CAC on the day of the hearing of the Appeal (4 September 2020). We have argued that the new evidence should form part of the court record and to help inform the CAC in its deliberations.

#BabelegiAppeal

Which day will the appeal be heard?

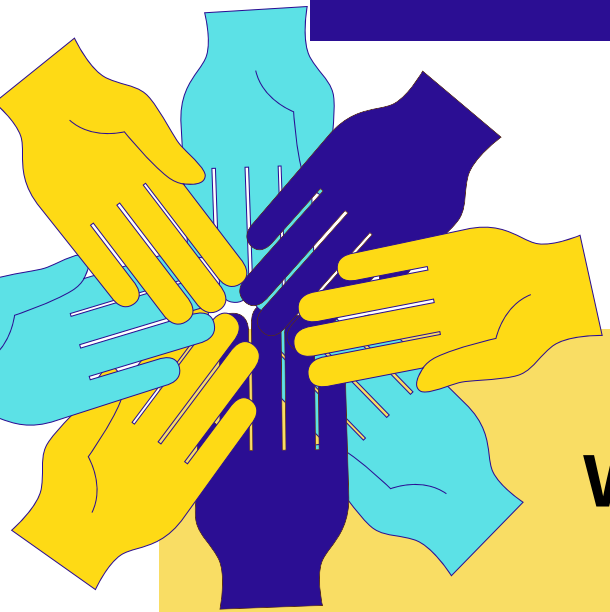
4 September 2020, 09h30. Due to logistical considerations, the e-hearing has been limited by the CAC to the parties to the case. You can follow #BabelegiAppeal on Twitter for the latest updates



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Why has Open Secrets and hji sought to introduce further evidence?

This is a matter involving constitutional issues. As the Constitutional Court has previously pointed out, constitutional matters present issues that have an impact beyond the parties directly litigating before the Court. We have argued that our evidence provides the factual foundation and context for our legal submissions. The evidence of our 4 expert witnesses support our case that an exceptional, and human-rights based, approach to excessive pricing jurisprudence is warranted in the context of a pandemic.

Also:

The evidence does not raise new factual disputes and does not address the particular facts of Babelegi's conduct.

- The evidence is materially relevant to the outcome of the appeal because it is not only the economic impact of the pandemic that is relevant to the current matter and the legal issues at hand.
- The full context of Covid-19 must include a consideration of how the pandemic exacerbates the strains and challenges of the South African healthcare system, how socio-economic factors determine access to healthcare and PPE, the inability of the current pricing framework to regulate price gouging, and the broader social consequences and the human rights implications of the pandemic.
- Evidence of this nature has not been adduced by either party and is not part of the record.
- The Competition Commission does make submissions on the broader impact of the pandemic, and notes that the livelihoods and incomes of millions of South Africans have been impacted by the national state of disaster and that this requires the rights and interests of consumers to be protected to the greatest degree possible. We build on this evidence, for our constitutional arguments.
- Globally, several countries are adopting laws and policies to address pandemic price gouging including in the USA, Colombia and countries in the EU. We want to share these developments with the CAC too.



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Whose expert evidence does Open Secrets and hji wish to bring to the CAC?

We have applied to introduce the evidence of four experts:

1. **Dr Tracey Naledi** - a public health physician, and the Deputy Dean: Health Services at the School of Public Health, University of Cape Town (UCT). Dr Naledi was previously the Chief Director: Health Programmes in the Western Cape Department of Health.
2. **Andy Gray** - a pharmacist and Senior Lecturer in the Division of Pharmacology, Discipline of Pharmaceutical Sciences at the School of Health Sciences at the University of Kwazulu-Natal in South Africa.
3. **Ihsaan Bassier** - an academic, and phd candidate in Economics at the University of Massachusetts, with a research focus on labour and the political Economy of development and the need for state intervention to provide social assistance in the time of a pandemic.
4. **Professor David Bilchitz** – a Professor of Fundamental Rights and Constitutional Law at the University of Johannesburg and Director of the South African Institute For Advanced Constitutional, Public Human Rights and International Law (SAIFAC) since 2009.

Can I access the Open Secrets and hji joint Heads of Argument?

Yes, we believe in the principles of open justice to encourage public participation. Our heads of argument which have been prepared by our pro bono legal team at: Open Secrets, hji, Webber Wentzel and legal counsel (Adv Phumlani Ngcongco, Adv Frances Hobden and Adv Cingashe Tabata) can be downloaded here: <https://www.opensecrets.org.za/cac-excessive-pricing/>

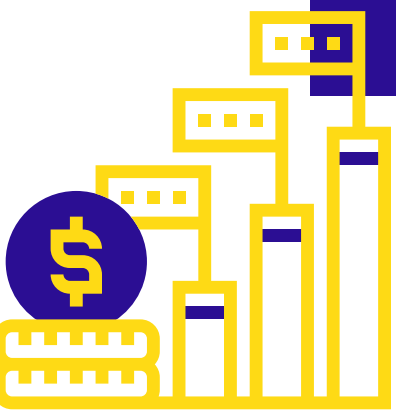


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The Health Justice Initiative (hji) is a dedicated public health and law initiative, founded in 2020 by a human rights lawyer and social justice activist, and established specifically to address the intersection between racial and gender inequality with a focus on the COVID-19 pandemic.



Open Secrets is a non-profit organisation which exposes and builds accountability for private sector economic crimes and related human rights abuses in Southern Africa through investigative research, advocacy, and the law.