

For immediate release

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Babelegi loses its Appeal in the Competition Appeal Court in a matter involving the excessive pricing of face masks during Covid- 19

The **Health Justice Initiative (hji) and Open Secrets** welcome the news from the Competition Appeal Court (CAC), in a judgement dated 18 November 2020, that the appeal by BABELEGI WORKWEAR AND INDUSTRIAL SUPPLIES CC ("Babelegi") against a decision of the Competition Commission and a finding of excessive pricing by the Competition Tribunal dated 1 June 2020, has been **dismissed**. Alongside the South African Human Rights Commission (SAHRC), the Health Justice Initiative (hji) and Open Secrets were jointly admitted as amici (friends of the court) in August 2020 in this case.

Our legal submissions and our fact sheet in the Babelegi appeal can be accessed here: <https://www.opensecrets.org.za/cac-excessive-pricing/>

Background:

On 1 June 2020, the Competition Tribunal of South Africa found Babelegi guilty of charging excessive and exploitative prices for masks to the detriment of consumers during the first few months of 2020. Babelegi was given an administrative fine. Babelegi appealed the finding of the Competition Tribunal.

Appeal:

The appeal was dismissed by the Competition Appeal Court on 18 November 2020. The Competition Appeal Court upheld the finding of excessive and exploitative pricing in a pandemic and found that:

'The evidence on record 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. 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.'

We are also particularly encouraged that the Competition Appeal Court found that:

'... context always matters in legal disputes. The outbreak of a novel virus such as Covid 19 has had 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.'

And:

'In this case, the context is a market where market conditions have been altered by an unprecedented pandemic. ... while appellant had supplies of masks which it had acquired at a pre Covid price, it extracted 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.'

The basis of our joint admission as *friends* of the court in this case and in the earlier appeal by another company, Dis-Chem (subsequently withdrawn) was to argue that it is essential that evidenced-based and constitutionally-aligned jurisprudence be developed regulating issues such as potential profiteering, gouging and anti-competitive behaviour in the context of a pandemic - and that the current global pandemic and public health crisis disproportionately affects poor and

vulnerable members of our society. We strongly believe that especially in a time of a pandemic, there can be no price-gouging or profiteering by private businesses and companies, nor the state, and that appropriate penalties and other measures must apply.

Rather surprisingly the Competition Appeal Court did not mention in its judgement that there were two successful applications by 1. Health Justice Initiative (hji) and Open Secrets (jointly) and 2. the SAHRC, to be admitted to the case as friends of the court, and in the case of the Health Justice Initiative (hji) and Open Secrets, to adduce expert evidence, nor mention of our written and oral arguments. We are nonetheless happy about the outcome of the case and to have been afforded an opportunity to present expert evidence regarding the impact of excessive pricing during a pandemic, for the court's consideration.

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