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URGENT

Your reference

L Blignaut / A Scallan

Our reference

D Milo/ L Makhubedu /
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Date

13 August 2020

Dear Sirs

Request for consent: Joint admission of Health Justice Initiative and Open Secrets NPC as *amici curiae* in appeal concerning Dis-Chem Pharmacies Limited and the Competition Commission

1. As you are aware we act for the Health Justice Initiative ("**HJI**") and Open Secrets NPC ("**Open Secrets**") (together, "**our clients**").
2. We refer to our letter dated 11 August 2020 in which our clients' requested written consent from the parties to be admitted as *amici curiae* in the above matter ("**our letter**"). We also refer to your response letter dated 12 August 2020 ("**your letter**") wherein you *inter alia*

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requested that our clients provide specificity regarding their interest, intended scope of their participation and the additional evidence and submission that they wish to place before the Competition Appeal Court ("**CAC**" or the "**Court**").

3. Given the limited time available to respond to your letter, it not possible at present to respond to all the matters raised by you, and we reserve our clients' rights to respond at a later stage. Our clients also disagree with certain of the views conveyed in your letter, such as the notion that – insofar as paragraph 4.6 of your letter seeks to suggest this – our clients' intervention is inappropriate because the appeal ostensibly raises what you characterize as "*limited, complex and technical areas of the law*". On the contrary, the significance of the issues in this appeal are central to what the Judge-President of CAC recently described as "*enforcing the vision of the Competition Act 89 of 1998 ('the Act') as formulated and passed by the democratically elected Parliament of this country. A significant part of that vision is to be found in the preamble to the Act*", which unequivocally records "*[t]hat apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anti-competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans.*" The learned Judge President moreover underscored that, under section 2 of the Competition Act, its purposes include (i) providing consumers with competitive prices and product choices; and (ii) promoting employment and advance the social and economic welfare of South Africans (see, para 3 of *Competition Commission v Bank of America Merrill Lynch International Limited*, CAC case no.: 175/CAC/Jul19, judgment delivered on 28 February 2020).
4. We also wish to make it plain that, in accordance with rule 16 of the rules of the Supreme Court of Appeal, our clients intend to file an application to the CAC in which they will seek the court's leave for their admission as *amici curiae*, as well as the additional relief that

was described in our letter of 11 August 2020. That application, the preparation of which is presently underway, will be filed as soon as possible and will address the applicable requirements for our clients' proposed participation in this appeal. Indeed, your letter correctly notes that it is *in that application* where our clients are required to address the matters set out in paragraphs 4.1.1 to 4.1.3 of your letter. The purpose of this letter, therefore, is to furnish the assistance you have requested in your letter to enable you to "*meaningfully engage with Dis- Chem*". We do so, in particular, since your letter accepts at paragraph 4.4 that this appeal raises issues of demonstrable importance. But this letter should not be taken to be exhaustive of the nature and scope of our clients' proposed participation or the further evidence it wishes to place before the Court. In any event, given the time constraints for replying to your letter, it has not been possible for our clients to furnish us with full instructions at this stage.

5. We moreover record that, in a letter received earlier today, the Commission confirmed that it "*[t]he Commission hereby gives its written consent in accordance with Rule 16(1) of the SCA Rules to your clients' request to be admitted as amici curiae in the appeal hearing, to file written submissions and to advance oral argument at the appeal hearing. The Commission also has no objection to your clients' seeking to adduce further evidence.*" For your convenience, a copy of that letter is attached hereto.

Our clients' interests in the matter

6. By way of overview, our clients are non-profit organisations with a focus on and expertise in healthcare and the role of private firms in the fulfilment and infringement of constitutional rights. In their proposed intervention in this appeal, they intend to provide the CAC with the constitutional and human rights framework within which to consider excessive pricing cases arising during a world health crisis. The constitutional principles will inform the applicants' submissions on two key issues in the appeal:

- 6.1 the determination of dominance for the purpose of excessive pricing regulation; and
- 6.2 the interpretation and application of section 8 of the Competition Act.
7. The first of these issues is a new and unique contribution and perspective that will be brought to this matter by our clients. The constitutional implications of excessive pricing during a pandemic were not raised by either party in the hearing before the Tribunal. The last two of these issues are raised by Dis-Chem in its notice of appeal and are the primary legal disputes between the parties.
8. Our clients will also provide a constitutional analysis of the excessive pricing regulation in South Africa and argue for an interpretation and application of section 8 of the Competition Act and competition law that is consistent with these principles. We submit that this analysis has the potential to assist, and influence, the CAC to adopt a different line of reasoning in determining the outcome of the appeal and materially affect the outcome of the case.
9. Open Secrets works on issues pertaining to economic crimes and their link to human rights violations, with a particular focus on the financial sector in Southern Africa. Open Secrets has developed unique insight into the role of illicit private profiteering in the face of large-scale unemployment, poverty and inequality. It has also conducted research that shows that corporate profiteering in the midst of a pandemic represents a continuation of such practice and is a threat to the values entrenched in the Constitution. Open Secrets submits that its knowledge, and particularly that related to economic crime and malfeasance, will be of assistance to the CAC in crafting an appropriate order in this matter.
10. The HJI seeks to address factors that influence inequity in health during a pandemic, and after, with a focus on race, class and gender discrimination. HJI further seeks to initiate

broad local and global policy reform campaigns to protect classes of people and movements by focusing on the social detriments of ill-health. HJI aims to advance the right to access healthcare, specifically for COVID-19, with a special focus on intellectual property and patent barriers, in order to address the health and other consequences of the pandemic and pending proposed health policy reforms going forward. This matter ties in with the public health and risk mitigation work HJI is pursuing in relation to COVID-19, as well as its socio-economic and health impact on poor and marginalised people in South Africa.

Our clients' contribution

11. Our clients intend to deal with three main issues in the appeal.
 - 11.1 The determination of dominance for the purpose of excessive pricing regulation (this is the second ground of appeal raised by Dis-Chem);
 - 11.2 The interpretation and application of section 8 of the Competition Act (this is the second ground of appeal raised by Dis-Chem); and
 - 11.3 The constitutional and human rights framework and principles for excessive pricing cases in the context of a world health crisis.

Market power in a pandemic

12. Dis-Chem argued before the Tribunal, and raises as a ground of appeal, that it is not a dominant firm, and should therefore not be subject to the excessive pricing provisions of the Competition Act. The Tribunal found that the suppliers and retailers who trade in PPE were able to exercise market power in the sense recognised by the Competition Act, during a health crisis and in the particular economic conditions generated by that crisis. The Tribunal notes that the RBB report did not deal with the notion of market power under

economic conditions associated with COVID-19. (para 95). The Tribunal resorted to reliance on several unpublished media and academic articles in reaching its conclusion on the exercise of market power by Dis-Chem in these circumstances. Dis-Chem takes issue with this approach in its notice of appeal.

13. Our clients wish to provide the CAC with additional research and comparative jurisprudence on the particular kinds of facts and economic conduct that should give rise to the inference of market power by suppliers of PPE etc. within the context of a pandemic.
14. Our clients will also lead evidence about the pricing role of suppliers including of medical supplies, goods, devices and medicines (therapeutics) for the public and private sectors in South Africa, and provide further input on how the current regulatory pricing framework in South Africa relates to these -which also enables firms to exercise market power in the context of a pandemic both locally and abroad. Our clients intend to rely on the evidence of Andy Gray who is a Senior Lecturer in the Division of Pharmacology Discipline of Pharmaceutical Sciences, School of Health Sciences at the University of KwaZulu-Natal.

Section 8 test

15. Our clients will support the test and approach adopted by the Tribunal in the interpretation and application of section 8 of the Competition Act.
16. In particular, the Tribunal's findings in respect of the relevant economic tests, the need to have regard to the economic conditions that existed at the time, and the comparison of a firm's own pricing before and after an identified occurrence is permissible under certain economic conditions. (para 52 - 53)
17. Our clients will focus their submissions on:

- 17.1 the question of what ‘justifications’ from firms for price increases should be accepted in the context of a pandemic (as part of the first leg of the test applied by the Tribunal); and
- 17.2 the question of what magnitude of price differences are reasonable / acceptable in the context of a pandemic (as part of the second leg of the test applied by the Tribunal).
18. In addressing these issues, our clients will refer to evidence dealing with the impact of the pandemic on poor sectors of society, those in ‘essential services’ and the role of suppliers of medical equipment. Our client will advance legal argument on the role of section 8 of the Constitution in interpreting and applying section 8 of the Competition Act.

Constitutional framework for excessive pricing cases in a pandemic

19. Our clients will advance submissions on the constitutional and human rights obligations of suppliers of PPE and medical supplies in the context of a pandemic. They will address the Court on the manner in which excessive pricing by private firms during a health crisis implicates the rights to access to healthcare, equality and dignity, as well as South Africa’s broader human rights obligations. Our clients intend to make submissions on the constitutional obligations of suppliers of PPE under section 8 of the Constitution, and the way in which these obligations should be incorporated into the pricing jurisprudence adopted by the CAC.
20. These issues were not raised by either of the parties, or the Tribunal, in the initial determination of the matter. HIJ and Open Secrets are well-placed to provide the CAC with this background and framework to inform its jurisprudence.
21. In support of these legal submissions, our clients wish to provide the Court with additional evidence on the impact of the current pandemic on the access to healthcare, and the

manner in which it exacerbates social and economic inequality. Our clients intend to rely on the evidence of Dr Tracey Naledi and Ihsaan Bassier.

21.1 Dr Tracy Naledi is the Deputy Dean of Health Services at the University of Cape Town's Health Sciences Faculty Dean; and

21.2 Ihsaan Bassier is a PHD Candidate in Economics at the University of Massachusetts, Amherst.

22. Our clients will not:

22.1 deal with the retrospective application of the regulations to Dischem's conduct but will assume, for purposes of argument, that section 8 applies to the present matter, but that the economic test in regulation 4 is relevant;

22.2 engage specifically with Dis-Chem's factual case about whether its price increase was reasonable. Rather its submissions will focus on the relevant factors and principles when assessing price increases in a health crisis; and

22.3 engage specifically with Dis-Chem's factual case about the reasons for its increases. Rather its submissions will focus on whether those are relevant factors and/or should carry any weight.

23. Our clients' rights are reserved.

Yours faithfully

WEBBER WENTZEL

Dario Milo

Partner

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Our ref: B Majenge / 2020Apr0035

Your Ref: D Milo 3042837

13 August 2020

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Dear Dario

Request for consent: Joint admission of Health Justice Initiative and Open Secrets NPC as *amici curiae* in appeal concerning Dis-Chem Pharmacies Limited and the Competition Commission, Case Number: 187/CAC/Jul20

1. We refer to the above matter and your letter dated 11 August 2020, the contents of which have been noted.
2. In your letter under reply, your clients have:

- 2.1. requested written consent from the parties to be admitted as *amici curiae* in the appeal before the CAC in accordance with Rule 16 of the SCA Rules read with Rule 28 of the SCA Rules ostensibly in order to enable them to file written submissions and to advance oral argument at the appeal hearing; and
 - 2.2. advised the parties of their intention to seek leave to adduce further evidence (including expert evidence).
3. The Commission hereby gives its written consent in accordance with Rule 16(1) of the SCA Rules to your clients' request to be admitted as *amici curiae* in the appeal hearing, to file written submissions and to advance oral argument at the appeal hearing. The Commission also has no objection to your clients' seeking to adduce further evidence.

We trust that you will find the above in order.

Kind regards



Bakhe Majenge
Chief Legal Counsel
Competition Commission SA