IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CAC CASE NO: 186/CAC/JUN20

CT CASE NO: CR0003Apr20

In the matter between:

BABELEGI WORKWEAR INDUSTRIAL SUPPLIES CC	Appellant / Respondent *a quo*
And	
COMPETITION COMMISSION OF SOUTH AFRICA	Respondent / Complainant *a quo*
HEALTH JUSTICE INITIATIVE	First amicus
OPEN SECRETS NPC	Second amicus
SOUTH AFRICAN HUMAN RIGHTS COMMISSION	Third amicus

APPELLANT'S HEADS OF ARGUMENT IN RESPONSE TO THE SUBMISSIONS OF THE FIRST, SECOND AND THIRD AMICI

I. INTRODUCTION

1. This appeal concerns prices charged by a small business,[1] Babelegi Workwear and Industrial Supplies CC (Babelegi), for 76 boxes of FFP1 dust masks, which are not medical goods, and which it sold to its usual construction, agricultural and wholesaler customers during the period 31 January 2020 to 5 March 2020. The Tribunal found that this conduct was a contravention of section 8(1)(a) of the Competition Act 89 of 1998, as amended (Competition Act).

2. The amici's submissions must be considered within this factual and legal context because the "*determination of excessive prices is complex and often case specific*".[2] Indeed, this Court has previously noted that *"there was no single inflexibly clear threshold which could be applied to determine whether a price was excessive in each and every case."*[3] In addition, the role of an amicus is *"to draw the attention of the court to relevant matters of law and fact"* to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings, without qualifying as a party, an amicus *"has a special duty to the court. That duty is to provide cogent and helpful*

[1] By virtue of Babelegi's turnover in its most recent financial year, it is considered under the Competition Act as a "*small business*" in so far as it is treated as a wholesaler, or a "*medium business*" insofar as it is treated as a manufacturer. As a consequence, Babelegi receives additional protection against unfair pricing of dominant firms under section 8(4) of the Competition Act. This is the category of firm that has been treated as dominant in this matter.

[2] Para 3.3.8 of the Memorandum on the objects of the Competition Amendment Bill, 2018.

[3] *Sasol Chemical Industries Limited v Competition Commission* (131/CAC/Jun14) [2015] ZACAC 4, 2015 (5) SA 471 (CAC) (17 June 2015) at para 163.

submissions that assist the court".[4] The amici's submissions cannot, therefore, ignore the facts of *this* case.

3. The first and second amici (HJI and OS) make broad submissions on the constitutional and human rights framework within which to consider excessive pricing cases arising during a pandemic,[5] and make submissions on how this context is relevant to the interpretation of section 8 of the Competition Act and the administrative penalty.[6]

4. At the outset, we record that we accept at the level of legal principle that the Competition Act must be interpreted within and consistent with the appropriate constitutional framework. Indeed, this is already required by the Competition Act itself.[7]

5. However, where we diverge from the submissions made by HJI and OS, is that this obligation is not limited to compliance and consistency only with the constitutional framework, but rather with the legal and regulatory framework as a whole that regulates a firm's economic activity in South Africa.

6. Several pieces of legislation have been enacted that evince a statutory and policy-based commitment to competitive market-based economic activity by profit-maximising firms. The enforcement of those pieces of legislation will

[4] *In re Certain* Amici Curiae : *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1023 (CC) at 1026.
[5] HJI and OS heads of argument para 4.
[6] HJI and OS heads of argument para 5.
[7] Section 1(2)(a) of the Competition Act.

secure access to goods and services, employment creation and revenue collection for the state, all of which are necessary to realise the constitutional vision for our society. The existence of a pandemic does not materially alter the necessity for, nor the interpretation and application of, this framework. (And, as a fact, the World Health Organisation only declared a pandemic on 11 March 2020, after the end of the Complaint Period).[8]

7. A related preliminary point is to note that "*price gouging*" (temporary unconscionable price increases during an emergency with short-term supply shortages) and "*excessive pricing*" (prices above competitive levels durably sustained due to the significant market power of dominant firms) are distinct economic harms, regulated in distinct ways around the world that reflect the chosen policy priorities of a particular state. These economic concepts are not easily imported and translated in legal prohibitions without due consideration of their policy underpinnings, and should not simply be imposed on a domestic legal and regulatory framework, without careful consideration of whether the existing domestic framework is deficient in some manner that will be cured by grafting on a "*price gouging*" import to South Africa's "*excessive pricing*" regulation under the Competition Act.

[8] https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020.

8. The third amicus (SAHRC) has confined its submissions to the impact of "*price-gouging*" on certain of the rights in the bill of rights and international law, which it says is relevant to the determination of the "*detriment*" leg of the section 8(1)(a) excessive pricing test, and the imposition of appropriate and proportionate administrative penalties.[9] The SAHRC, however, then fails to explain how its broad submissions on these constitutional rights and international law ought to be taken into account in respect of either the "*detriment*" leg or penalties in this appeal by this Court.

9. We make five submissions in response to the submissions of the amici:[10]

9.1. First, we address the irrelevance of the submissions made by the amici. In this regard, the amici have made broad submissions with little regard for the legal and factual issues raised in *this* matter. Their submissions also suffer from a blinkered perspective, ignoring Babelegi's position. They therefore provide little assistance to the Court in its task of determining *this* appeal.

9.2. Second, the amici incorrectly contend for the *infringement* of various constitutional rights. Where there is legislation that gives effect to constitutional rights, that legislation ought to be applied and the courts may not resort to the rights themselves. This is the principle of

[9] SAHRC heads of argument para 5; SAHRC founding affidavit, para 1 p21 and para 64 p24.
[10] Our failure to respond to any of the submissions of the amici should not be construed as an acceptance or concession of their submissions.

subsidiarity. In addition, the competition authorities are not empowered to determine the infringement of constitutional rights.

9.3. Third, the relevant and existing framework, which includes the Constitution as well as the statutory and regulatory framework that governs healthcare and pricing, is complex and nuanced. The competition authorities should be cautioned against jurisdictional overreach, where the legislature has determined more appropriate means for other regulators (such as the National Consumer Commission (NCC) and various bespoke healthcare regulators) to address issues concerning the pricing of healthcare-related goods and services.

9.4. Fourth, to assist the Court and attempt to distill some utility from the heartfelt and considerable efforts of the amici, we set out in these submissions a possible approach for the Court to adopt in this appeal that takes account of their concerns. In particular, the test for excessive pricing in section 8(1)(a) requires an assessment of "*detriment to consumers or customers*". That provision cannot be rendered meaningless, as has been done by the Commission and Tribunal, through the simple assertion that excessive pricing axiomatically causes detriment to consumers or customers. It is under this leg of the section 8 excessive pricing test that considerations concerning whether a consumer's or customer's constitutional rights are engaged and the impact of conduct

on the realization of their constitutional rights, including the positive and negative obligations on private parties, ought to be assessed.

9.5. Fifth, we consider and respond to the submissions on penalty calculation.

10. We address each of these submissions in turn.

II. RELEVANCE OF THE AMICI'S SUBMISSIONS

II.1 Failure to make submissions relevant to the facts and issues of *this* matter

11. On 5 March 2020, which is the same day that the complaint period *ends*, South Africa announced its first confirmed case of Covid-19.[11] At that time, South Africans were not yet routinely wearing facial coverings.[12] (Even by the time of the hearing on 24 April 2020, the wearing of masks was not compulsory).[13] It is important to recall these facts and not revise them with hindsight.

12. A week later, on 11 March 2020, the WHO declared that Covid-19 is a pandemic.[14] Ten days later, on 15 March 2020, a national state of disaster was declared in South Africa.[15] The Disaster Management Regulations, promulgated pursuant to the declaration of the state of disaster, defines "*COVID-19*" in part with reference to the WHO's declaration that it is a global

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[11] Annexure A Chronology.

[12] Indeed, the Competition Tribunal held an in-person hearing that very day in which no one wore a facial covering nor practiced social distancing. See Annexure B Competition Tribunal Hearing photographs 5 March 2020.

[13] Transcript Record vol 5 p 477 *ll* 1 – 2 reflects Member Daniels saying "*… a suggestion has been made that we are all going to be required to wear face masks"*.

[14] *Competition Commission of South Africa v Dis-Chem Pharmacies Limited* CR008Apr20 (7 July 2020).

[15] FA para 25 Vol 1 p 14 // 2 – 10; AA para 42 Vol 2 p 138 // 15 – 16.

pandemic.[16] On 19 March 2020, the Consumer Protection Regulations were promulgated, prohibiting certain price increases of specified goods.[17] The Department of Health (DoH) first recommended that the public wear masks on 10 April 2020, more than a month after the conduct at issue here ceased.[18]

13. These dates, and particularly the date on which the WHO declared Covid-19 to be a pandemic, are important. This is because HJI, OS and SAHRC, as well as the Commission, seek to hold Babelegi liable for price gouging "*in the context of a pandemic*"[19] that had not yet been declared by the time that the complaint period is over. They seek to have Babelegi's conduct assessed within a pandemic context relating to Covid-19, when Babelegi's conduct wholly pre-dates that context. Their submissions regarding an irrelevant later time period therefore are largely unhelpful to the Court in its assessment of Babelegi's conduct in the context in which it actually occurred.

14. HJI and OS's submissions expressly concern the constitutional and human rights framework in which one must consider excessive pricing cases *"during a*

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[16] Regulation 1 of the Regulations issued in terms of section 27(2) of the Disaster Management Act, 2002, GN 318 of 18 March 2020 *Government Gazette* No. 43107 (Disaster Management Regulations) defines "COVID-19" as meaning "*the Novel Coronavirus (2019-nCov) which is an infectious disease caused by a virus, which emerged during 2019 and was declared a global pandemic by the WHO during the year 2020 that had previously not been scientifically identified in humans*" (underlining added).

[17] FA para 27 Vol 1 p 14 l 20 – p 15 l 8; annexure IL9 Vol 1 pp 53 – 64; AA para 44.1 Vol 2 p 139 ll 2 – 3; Tribunal decision para 11.15 Vol 6 p 561 l 6.

[18] The use of face masks was initially controversial, with WHO initially counselling against the use of widespread face masks as a personal protection device, and then revising its recommendation in April 2020.

[19] HJI and OS repeatedly confine their submissions to the context of a pandemic (see for example their heads of argument para 4 and the references in footnote 19 below); the SAHRC is also concerned with "*price increases to PPE in the context of a pandemic*" (SAHRC founding affidavit para 1 p21 and SAHRC heads of argument paras 6 – 7); the Commission has also focused on price increases *"in an emergency, such as the present crisis"* and the need to adjudicate excessive pricing cases expeditiously *"in the midst of a pandemic"* (Commission heads of argument paras 17 – 18).

pandemic".[20] However, their submissions on this framework have little relevance to the actual facts of this matter on appeal, and therefore are only of academic assistance in establishing possible jurisprudence for future cases where the impugned conduct may actually fall within the period of a pandemic, national state of disaster or health crisis.

II.2 Failure to adopt a non-partisan approach

15. The amici, first, largely disavow assisting on the interpretation of section 8 and then premise their voluminous submissions on an assumption that there has been an infringement of rights to life, equality, dignity, health care and bodily integrity of unidentified individuals during a pandemic where that has not been, and cannot be, established in this case. At best, the amici draw attention to the possibility that these rights may be infringed in future cases. But that prediction without proof is of no assistance to the Court in determining this

[20] Almost every paragraph of the HJI and OS heads of argument locate the relevance of their submissions to the period *"during a world health crisis"* (para 4); in a *"global pandemic and public health crisis"* (para 4.1); *"in the context of a pandemic"* (para 4.2); *"during a pandemic"* (para 4.3); *"during times of crisis and disaster"* (para 7); *"price gouging during the Covid-19 pandemic"* (para 10); *"in the context of Covid-19 emergency"* (para 15); *"during the Covid-19 pandemic"* (para 16); *"during a pandemic"* (para 17); *"Traders of PPE who excessively increase their prices during a time of pandemic impair and diminish South Africans' rights to life, dignity, security of the person, access to healthcare and equality. Profiteering during a pandemic will directly and indirectly jeopardise the rights of many individuals in South Africa*" (para 32, underlining added); *"in a time of crisis and desperate need"* (para 37); *"occurred in the context of an impending national lockdown and advice to wear face-masks"* (para 39.2); *"during worldwide pandemic and health crisis"* (para 39.3); *"managing the pandemic"* (para 40.1); *"including South Africa's public health response to the pandemic"* (para 40.2); *"health outcomes during a pandemic"* (para 40.3); *"during this period"* (para 40.4); *"consequences of the pandemic"* (para 40.4.1); *"work at the 'frontline' of the pandemic"* (para 40.4.2); *"in a pandemic"* (para 40.5); *"in times of crisis"* (para 42); *"during a pandemic"* (para 44.2); *"during a pandemic"* (para 57); *"the circumstances of the Covid-19 crisis"* (para 62); *"in times of crisis such as Covid-19"* (para 69); *"for times of crisis"* (para 74); *"during times of crisis"* (para 85); *"in times of a health crisis"* (para 88); *"amidst the Covid-19 health crisis"* (para 91); *"recognise the constitutional implications of excessive pricing in the context of a pandemic"* (para 93).

appeal. An appreciation for the issues actually at stake in this specialist appeal would have enabled the amici to tailor submissions to assist the Court. Instead, the parties and the Court are given only broad, bald and bold submissions that are, at worst, irrelevant and partisan, and, at best, unhelpful to the determination of this appeal. This is not the contribution of true friends of the Court.

16. An amicus must make submissions *"that will be useful to the court"* and that are:

"directed at assisting the court to arrive at a proper and just outcome in the matter in which the friend of the court does not have a direct or substantial interest as a party or litigant. This does not mean an amicus *may not urge upon a court to reach a particular outcome. However, it may do so only in the course of assisting a court to arrive at a just outcome and not to serve or bolster a sectarian or partisan interest against any of the parties in litigation."*

17. The SAHRC has completely failed to adopt a non-partisan approach. Indeed, the SAHRC openly states that its CEO *"consented to the intervention of the SAHRC in the present litigation based on the need for the SAHRC to collaborate with the Commission in this matter*".[21] It is patently inappropriate for a party to purport to intervene in proceedings as an amicus, in circumstances where its sole purpose is to collaborate with and assist one of the parties.

[21] SAHRC's founding affidavit, paras 10 – 18 and in particular paras 14 – 15, 23.

18. Furthermore, it is somewhat disquieting that in the SAHRC's own internal memorandum attached to its founding affidavit, it notes that it "*may not have anything specific to add to the constitutional violations specifically related to Babelegi and Dis-Chem"*.[22] The internal memorandum also records:

"5.5 While the actions of Babelegi and Dis-Chem, may not have affected a wide-reach of the South African population, there are many more companies who are using the pandemic to exploit people's need for essential goods and services, for services. Babelegi and Dis-Chem are representative of an economic practice that violates basic human rights and which needs to be addressed.

…

5.8 We would advise that the Commission take advantage of this platform to highlight the constitutional violations that are consequent of price gouging or excessive pricing, by intervening as an amicus curiae."[23]

19. It is clear from the above that the SAHRC is seeking a campaign platform through these proceedings for broader issues that are irrelevant to the parties in this matter, and is doing so in a partisan manner by "*collaborating*" with the Commission.

20. The only place in the memorandum where the SAHRC identifies an intention to assist the Court is when it states:

"9.1. By participating in this litigation, the [Human Rights] Commission will have an opportunity <u>to share pro human rights jurisprudence within the Competition arena</u> and will be seen to be taking a stand to protect and promote the rights of the most vulnerable in society during the Covid-19 pandemic.

9.2. It expands the Commission's Business and Human Rights footprint.

[22] Annexure FA8 to the SAHRC's founding affidavit, para 5.6.

[23] Annexure FA8 to the SAHRC's founding affidavit, paras 5.5 and 5.8.

9.3. There is very little to no information on other countries raising the human rights violations related to excessive pricing during Covid-19, making it a novel move by the [Human Rights] Commission.

9.4. Establishing good working relationship with the Competition Commission."[24]

"13.1. By participating in the matter as an amicus curiae, the Commission will contribute to the jurisprudential development of common law."[25]

21. We submit that, in light of the above, the SAHRC's submissions should be viewed with circumspection at best.

22. In addition, we note that all three of the amici focus only on the constitutional rights of consumers and assume that they are harmed. They do not consider the rights of Babelegi to predictable forward-looking regulation and procedural fairness that underpin the rule of law at all in their analysis of the relevant constitutional rights, again indicating a partisan approach to this matter.

23. In seeking a novel interpretation of section 8(1)(a) that relies directly and solely on the infringement of constitutional rights held by unidentified groups, the amici ignore the principle that the law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly.[26] This is a foundational value of our constitutional democracy, and is founded on the rule of law.[27] A person should

[24] Annexure FA8 to the SAHRC's founding affidavit, paras 9.1 – 9.4 (underlining in original).
[25] Annexure FA8 to the SAHRC's founding affidavit, para 13.1 (underlining in original).
[26] *Affordable Medicines Trust and Others v Minister of Health of RSA and Another* 2005 (6) BCLR 529 (CC) at para 108.
[27] *Affordable Medicines Trust and Others v Minister of Health of RSA and Another* 2005 (6) BCLR 529 (CC) at para 108.

be able to conform his/her conduct to the law,[28] which must be stated in a clear and accessible manner.[29]

24. In *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distribution (Pty) Ltd*,[30] Langa DP noted that the legislature *"is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them."* Government sought to do precisely this when it promulgated the Consumer Protection Regulations. Those Regulations do not apply retrospectively,[31] and the amici cannot trample on Babelegi's rights by seeking to give section 8(1)(a) a meaning that is so heavily based on the premise that certain rights have been infringed, where there is no evidence to that effect, that it is bears little relation to the provision itself.

II.3 Application to admit new evidence

25. Babelegi does not formally oppose HJI and OS's application to admit new evidence, however, we submit that for the reasons provided above, that evidence is irrelevant to *this* matter. Babelegi is in the Court's hands as to whether the evidence is admitted.

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[28] *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC) at para 102.
[29] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (8) BCLR 837, at para 47.
[30] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC), at para 24.
[31] In *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* 2007 (3) SA 210 (CC) at para 26, Mokgoro J held that the principle that legislation will affect only future matters and not take away existing rights, is founded on the rule of law.

III. INCORRECT RELIANCE ON THE INFRINGEMENT OF RIGHTS, AND THE PRINCIPLE OF SUBSIDIARITY

26. The amici submit that *"[p]rice gouging during the Covid-19 pandemic is not only a breach of the provisions of the Competition Act, but exploitative conduct that infringes, and threatens to infringe, constitutional rights"*.[32]

27. The amici place substantial weight on a claimed *infringement* of constitutional rights as a result of Babelegi's pricing conduct.[33] They contend that:

27.1. With regard to market power and dominance, the traditional notions of market power are *"not sufficient in circumstances where the pricing conduct of corporate entities infringes constitutional rights"*.[34]

27.2. With regard to the factors under section 8(3) of the Competition Act, the *"potential of the price increase to infringe constitutional rights must be included in the section 8(3) assessment"*.[35]

27.3. With regard to the reasonableness requirement, the *"question of the justification [of] reasonableness of the price difference must be considered in light of private companies' negative obligation not to infringe rights."* And that *"[i]n South Africa, a relatively modest increase in price may place certain items out of reach for a large portion of the population. Once a*

[32] HJI and OS heads of argument para 10.
[33] HJI and OS heads of argument paras 10, 32, 67, 76, 81, 92.
[34] HJI and OS heads of argument para 67.
[35] HJI and OS heads of argument para 76.

court concludes that the conduct has the potential to limit constitutional rights, a strict threshold on the actual difference should be adopted". [36]

28. All of the above submissions made by the amici require a finding that constitutional rights have been *infringed*.

29. We submit that the invocation of the infringement of constitutional rights is misplaced, for two reasons. First, it is not the constitutional right itself that must be considered, but rather the provisions of the relevant legislation which must be interpreted in a manner consistent with the Constitution.[37]

30. This is the principle of subsidiarity, given expression by the Constitutional Court when it has held that:

"*a litigant cannot directly invoke the Constitution to extract a right he or she seeks to enforce without first relying on, or attacking the constitutionality of, legislation enacted to give effect to that right. … Once legislation to fulfil a constitutional right exists, the Constitutional embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role.*"[38]

31. There are various reasons for the importance of the principle of subsidiarity, including that:

[36] HJI and OS heads of argument paras 81 – 82.
[37] Section 1(2)(a) of the Competition Act.
[38] *My Vote Counts NPC v Speaker of the National Assembly and Others* [2015] ZACC 31 at para 53 (minority decision, summarising the case law on the principle of subsidiarity. The majority concur with the minority judgment's exposition of the history behind the principle of constitutional subsidiarity – see para 121).

"[t]he Constitution's delegation of tasks to the legislature must be respected, and comity between the arms of government requires respect for cooperative partnership between the various institutions and arms tasked with fulfilling constitutional rights. As this Court has said, 'the courts and legislature act in partnership to give life to constitutional rights'. The respective duties of the various partners and their associates must be valued and respected if the partnership is to thrive."[39]

32. The second reason why direct reliance on the *infringement* of constitutional rights is inappropriate is because neither the Commission nor the Tribunal are empowered (nor permitted) to investigate, refer and/or determine whether constitutional rights have been infringed. Both the Commission and Tribunal are creatures of statute, and such an inquiry would be *ultra vires* the powers given to them under the Competition Act. These bodies may only determine whether section 8 of the Competition Act has been contravened.

IV. CONSTITUTIONAL, STATUTORY AND REGULATORY FRAMEWORK

IV.1 The framework reflects legislative policy decisions

33. In construing the section 8(1)(a) excessive pricing provision of the Competition Act, the competition authorities including this Court must be:

"guided by the interpretive injunction contained in section 1(2)(a) of the [Competition] Act. That provision echoes section 39(2) of the Constitution which requires 'every court, tribunal or forum' to interpret any legislation, including the Competition Act, to 'promote the spirit, purport and objects of the Bill of Rights'.

[39] *My Vote Counts NPC v Speaker of the National Assembly and Others* [2015] ZACC 31 at para 62.

One of the objects of the Bill of Rights is to guarantee to everyone the right of access to healthcare services and to impose constitutional obligations on the State 'to take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of [the right in the Bill of Rights]."[40]

34. This imperative was recognised in the Health Market Inquiry (HMI) which was mandated to consider the state of competition in the private healthcare sector.[41]

35. The HMI recognised that the task of the competition authorities is to construe the relevant provisions of the Competition Act *"in a manner that will promote competition in the private healthcare markets while ensuring that the fundamental right of access to healthcare services, which is guaranteed by the Constitution, is not impeded.*"[42]

36. In addition to the interpretive injunction, the purpose of the Competition Act is to promote and maintain competition in South Africa in order, amongst other things, to provide consumers with competitive prices and product choices.[43]

37. The HMI noted that it is this balance, between promoting competition, not impeding Constitutional rights, and facilitating the achievement of the purpose of the Competition Act in section 2(b), which the competition authorities must seek to achieve.[44]

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[40] Health Market Inquiry Final findings and recommendations report, September 2019 para 6.
[41] Health Market Inquiry Final findings and recommendations report, September 2019 para 1.
[42] Health Market Inquiry Final findings and recommendations report, September 2019 para 7.
[43] Section 2(b) of the Competition Act.
[44] Health Market Inquiry Final findings and recommendations report, September 2019 para 7.

38. However, it is not only the Constitution and the Competition Act that one must have regard to when considering the relevant legislative framework. The legislative and regulatory framework concerning the broader healthcare market, in which the amici contend includes "*PPE and medical supplies*", is complex and nuanced.

39. The HMI found that:

"The private health sector is subject to a myriad of statutes, regulations and by-laws which together constitute the regulatory framework for the provision of healthcare services. There are 107 statutes that are administered by the National Department of Health (DoH)."[45] While the national DoH bears primary responsibility for enacting framework legislation, *"all three spheres of government are, subject to the Constitution, responsible for administration of these legislative measures. In administering this regulatory framework, the state is assisted by a number of regulatory bodies."*[46]

40. Importantly, the HMI recognised that the *"regulators have a significant role to play in the implementation of the regulatory framework"*, and concluded that it was *"important to understand the role and mandate of these regulators, and to assess their effectiveness in order to make appropriate recommendations."*[47]

41. The recognition of the broad regulatory framework is important. There are numerous policy decisions underlying the roles that the different legislation and regulators play.

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[45] Health Market Inquiry Final findings and recommendations report, September 2019 para 27.
[46] Health Market Inquiry Final findings and recommendations report, September 2019 para 29.
[47] Health Market Inquiry Final findings and recommendations report, September 2019 para 30.

42. Indeed, it is not only the regulatory framework for healthcare that is relevant. The *pricing* of goods and services itself concerns economic policy. The Competition Act is not the only statute that is concerned with regulating pricing. HJI and OS note Government's policy choice to regulate the Single Exit Price (SEP) for medicines in the private sector and the phased introduction of price regulation of medical devices and in vitro diagnostic devices, as well as the policy decision not to regulate PPE.[48] These are important legislative choices and decisions in what will be regulated. They implicate the policy-laden and polycentric decision-making of the executive function.

43. The pricing of goods also is regulated by the Consumer Protection Act, 68 of 2008 (CPA), which prohibits a supplier from offering to supply, supplying, or entering into an agreement to supply, any goods or services at a price that is "*unfair, unreasonable or unjust*".[49] Unlike under the Competition Act, the regulation of this pricing conduct by these broad standards is not limited to dominant firms. HJI and OS appear to overlook the CPA and role of the National Consumer Tribunal.

44. The NCC did in fact institute proceedings against Babelegi's sister company, Belegi Workwear and Industrial Supplies (Pty) Ltd (Belegi), for contravening section 48(1)(a)(i) of the CPA and regulation 5 of the Consumer Protection

[48] HJI and OS heads of argument paras 45 – 46.
[49] Section 48(1)(a)(i) of the CPA.

Regulations in respect of its sale of FFP2 masks. That complaint was heard on 10 June 2020, and decided on 12 June 2020. The NCC's complaint in terms of section 48(1)(a)(i) was dismissed, as the NCC's pleadings were based on general arguments and were devoid of facts.[50] The NCC's complaint concerning regulation 5 was upheld. That complaint was based on conduct which does not form the subject of this complaint referral.

45. It is evident from the above that the SAHRC's submission that *"the provisions of the Competition Act and/or the emergency regulations currently in place are the sole means by which to regulate pricing and pricing conduct for the items listed above"*[51] is plainly wrong, and evidences a blinkered approach to the regulation of pricing conduct in the healthcare market.

46. We submit that price regulation is not without consequence and raises polycentric issues that are best placed for government and not the courts to address.

47. In Italy, for example, the government took steps to clamp down on "*price gouging*" in respect of masks in the context of Covid-19, which included announcing that masks must be sold at a fixed price of 50 European cents plus tax, but the result was a shortage of masks. It has been reported that *"[m]any factories and producers during lockdown started making masks, which was*

[50] *NCC v Babelegi Workwear and Industrial Supplies (Pty) Ltd* NCT/160912/2020/73(2) (12 June 2020), para 33.
[51] SAHRC's heads of argument para 46.4.

better than being idle and served a social purpose. These companies' efforts to refocus their productive power were halted with the stroke of a pen."[52]

48. In contrast, prices for hand sanitizers were not regulated, and the article notes:

"When Covid-19 exploded in Milan, hand sanitizer disappeared from shelves within days. Prices soared. On Feb. 26, a 250-millilitre bottle of hand sanitizer was going for €2,500 on eBay. Companies saw an opportunity. Pharmacists and distilleries started making sanitizer, and bottles reappeared on shelves at elevated prices. Now an 80-milliliter bottle sells on the internet for around €4, a few cents more than before the pandemic. Letting markets set prices produced some dramatic effects in the short run. It also guaranteed a quick return to normal."

49. It is also instructive to consider how the Federal Trade Commission (FTC) in the United States has approached "*price gouging*".

49.1. In the week following Hurricane Katrina, gasoline prices in the United States rose significantly.[53] This led to allegations of price gouging and Congress directed the FTC to investigate whether these developments resulted from market manipulation or price gouging practices in the sale of gasoline. The FTC duly carried out its investigation and released its report titled '*Investigation of Gasoline Price Manipulation and post-Katrina Gasoline Price Increases*'.

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[52] Alberto Mingardi, *Italy's Covid Price-Control Fiasco*, 19 May 2020, available at https://www.cato.org/publications/commentary/italys-covid-price-control-fiasco.

[53] Report titled 'Investigation of Gasoline Price Manipulation and post-Katrina Gasoline Price Increases' (The FTC Report), p(vi), available at:https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commissioninvestigation-gasoline-price-manipulation-and-post-katrina-gasolineprice/060518publicgasolinepricesinvestigationreportfinal.pdf.

49.2. Part III of the FTC report is headed '*Policy Implications and Recommendations*', and Section B thereof is titled '*Federal Price Gouging Legislation*'. The section commences with the FTC explaining (i) that it is preferable to allow the market to self-correct, and (ii) how legislative intervention often results in harm to consumers:

"Consumers understandably are upset when they face dramatic price increases within very short periods of time, especially during a disaster. In a period of shortage, however…higher prices create incentives for suppliers to send more product into the market…".[54]

"If pricing signals are not present or are distorted by legislative or regulatory command, markets may not function efficiently and consumers may be worse off. Accordingly, our competition-based economy generally … relies on market forces – rather than government intervention – to determine the prices a seller can seek."[55]

49.3. The ultimate conclusion of the FTC is that it *"cannot say that federal price gouging legislation would produce a net benefit for consumers"* but that *"if congress nevertheless proceeds with passing federal price gouging legislation…any price gouging legislation should:*

"define the offense clearly. A primary goal of a statute should be for business to know what is prohibited. An ambiguous standard would only confuse consumers and businesses and would make enforcement difficult and arbitrary."[56]

[54] The FTC Report, p196.
[55] The FTC Report, p196.
[56] The FTC Report, p196.

> *"A price gouging bill also should account for increased costs, including anticipated costs, that businesses face in the marketplace. Enterprises that do not recover their costs cannot long remain in business, and exiting businesses would only exacerbate the supply problem. Furthermore, cost increases should not be limited to historic costs, because such a limitation could make retailers unable to purchase new product at the higher wholesale prices."*[57]
>
> *"The statute also should provide for consideration of local, national, and international market conditions that may be a factor in the tight supply situation. International conditions that increase the price of crude oil naturally will have a downstream effect on retail gasoline prices. Local businesses should not be penalized for factors beyond their control."*[58]
>
> *"Finally, any price gouging statute should attempt to account for the market-clearing price. Holding prices too low for too long in the face of temporary supply problems risks distorting the price signal that ultimately will ameliorate the problem. If supply responses and the market-clearing price are not considered, wholesalers and retailers will run out of gasoline and consumers will be worse off."*[59]

50. "*Excessive prices*" are not universally prohibited, and different jurisdictions have adopted different approaches. Whish & Bailey note that US antitrust law does not prohibit excessively high prices, while in systems such as the EU, including that of the UK, excessively high prices are considered to be abusive and therefore unlawful.[60] As HJI and OS note in the appendix to their heads of

[57] The FTC Report, p196.
[58] The FTC Report, p197.
[59] The FTC Report, p197.
[60] Whish and Bailey, *Competition Law* 9th ed, p735.

argument, the US also does not have a federal law that prohibits "*price gouging*"[61] although steps have been taken by certain States in the US to address "*price gouging*" conduct.[62]

51. The OECD has issued a paper on '*Exploitative pricing in the time of COVID-19*', which focuses on *"how crises can lead to sudden price increases, and on the role that competition and public authorities will be expected to play in addressing them.*"[63]

52. Recognising the multiple mechanisms through which price increases during a crisis can be managed, the OECD notes that:

> *"Some competition agencies are empowered to act directly against exploitative pricing abuses under competition law. However, bringing excessive pricing cases is challenging even in normal times. Before bringing such cases, competition authorities should consider whether antitrust enforcement against high prices is needed, proportionate and effective. Agencies should also take into account whether alternatives such as consumer protection, price gouging rules or even price regulation are preferable. Some competition authorities may have competence over these matters, while many do not. However, all competition authorities have the ability to pursue advocacy in favour of measures that protect consumers, while also ensuring that incentives remain in place for products to come into the market where and when needed."*

53. Under South African law, the legislature has expressly prohibited the charging of an excessive price if it contravenes the relevant provisions of section 8 of the Competition Act. The concept of an "*excessive price*" is therefore both a

[61] HJI and OS heads of argument, appendix para 4.
[62] HJI and OS heads of argument, appendix para 1.1
[63] OECD: Exploitative pricing in the time of Covid19 published on 26 May 2020.

legal concept expressly referred to in section 8(1)(a), and an economic concept.

54. The concept of "*price gouging*", in contrast, finds no explicit recognition in the Competition Act or any other statute of which we are aware. To the extent that "*price gouging*" as an economic concept can be considered a species of "*excessive pricing*", the onus was on the Commission to show that such conduct falls within the confines of section 8(1)(a) of the Competition Act read with section 8(2) and 8(3).

55. This is because regardless of whether conduct is economically classified as "*price gouging*" or "*excessive pricing*", only conduct which falls within the legal parameters of the test provided for in section 8 will contravene section 8. In other words, high prices (regardless of economic classification or *nomenclature*) which do not meet the requirements of section 8, are not prohibited. This is because it is "*pre-eminently the function of the legislature to determine what conduct should be criminalized and punished*".[64]

56. This emphasizes the importance of deferring to the legislative priorities set out in legislation. Here, Parliament decided to adopt both the Competition Act which prohibits excessive pricing by dominant firms, and the Consumer Protection Act, which prohibits unfair, unreasonable or unjust pricing by any

[64] *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another* (70/CAC/Apr07) [2009] ZACAC 1 (29 May 2009) para 30 (footnotes omitted).

firm. These decisions must signal a policy choice to keep the former limited to cognisable harms to competition through a specific, ascertainable and well-known form of economic conduct (a price durably and unreasonably in excess of a competitive price) charged by a particular kind of market participant (one dominant in a defined market).

IV.2 Risk of jurisdictional overreach

57. The failure to take into account other mechanisms for regulating the price of goods, and relying solely on the Competition Act, creates a risk of the competition authorities' jurisdictional overreach, as legislation such as the CPA may be better suited to addressing pricing in non-ordinary market situations.

58. The risk of jurisdictional overreach is apparent from the summary of consent orders, which is attached as "Appendix A". It appears from these consent orders that the Commission has assumed the role of a price regulator in recent months, with numerous consent orders recording that the Commission has determined that a gross profit margin of 20% to 25% is generally regarded as fair and reasonable for the sale of the products forming the subject of those consent orders. Whilst such a finding may fall within the scope of section 48(1)(a)(i) of the CPA, there is simply no basis for this type of price regulation under section 8 of the Competition Act. It simply appears to be arbitrary, and *ultra vires*, price regulation.

59. We also note from the summary of consent orders that:

59.1. Of the 32 consent orders confirmed by the Tribunal, 10 have involved firms that only entered the market in March 2020.

59.2. The revenue derived by these new entrants for the alleged excessive pricing ranged from R16,890 to R199,500, and the profits derived ranged from R500 to R65,028.

59.3. The remaining firms that entered into the consent agreements were already present in the market and were found to have priced excessively because the price for the goods was above the 20% to 25% threshold that the Commission has determined was reasonable.

59.4. With one exception,[65] the penalties imposed ranged between R3,875 and R287,276.

60. The number of new entrants caught in these consent orders suggests that there are low barriers to entry and that higher prices quickly stimulated new entry which in turn make masks more widely available. The low profits and penalties suggest that the Commission is zealously pursuing complaints against small, non-dominant, firms, and firms that are new entrants into the various markets.

61. The number of *"small business[es]"* and *"medium business[es]*" that have consequently been caught by the Tribunal's interpretation of section 7 and

[65] Matus was an outlier that was ordered to pay a R5,949,542 to the Solidarity Fund.

8(1)(a) is contrary to the very protection afforded to some of these businesses in section 8(4).[66]

62. The consent orders do show high prices being charged by firms, but it also shows that the higher prices have stimulated entry, investment, competition and secured supply. It is not apparent from the consent orders whether the impugned conduct in facts falls foul of section 8(1)(a) of the Competition Act. Indeed, we note that in many of the consent orders, the respondent firm appears to have entered into the consent order simply to avoid the costs of litigation and have routinely denied any wrongdoing.

63. The provisions in section 8 of the Competition Act, which prohibit excessive pricing, cannot be considered in a void. There is a broader constitutional, statutory and regulatory framework that regulates pricing within the broader healthcare market, which reflects policy choices by the government that cannot be ignored by the amici or this Court.

V. SECTION 8(1)(a) TEST, DETRIMENT, AND CONSTITUTIONAL RIGHTS

64. Eleanor Fox notes that *"nations that use competition law for equality ends confront a distinct challenge. The law is most likely to be successful in meeting its goals to the extent that: (1) the legal rules and frameworks for analysis are clear; (2) the derogations from market-based rules are clear; and (3) decision-*

[66] "Small business" and "medium-sized business" are defined with reference to their turnover and number of full time employees as per the table set out in the schedule to GN 987 of 12 July 2019: Notice in terms of section 1 of the Act *Government Gazette* No. 42578.

making is transparent and agency and court discretion is limited. The South African competition law substantially fulfills these requirements, or can easily be brought within their purview".[67]

65. We submit that these three points raised by Fox are pertinent to this matter.

66. HJI and OS submit that the Constitutional and human rights framework, during a pandemic, is the relevant context to each step of the test for a contravention of section 8(1)(a) of the Competition Act. The SAHRC does not address the test for abuse of dominance, but submits that certain constitutional rights and South Africa's international law obligations must be viewed against section 8 and in particular, *"the undeniable 'detriment' caused to consumers"*.[68]

67. We have set out above why it is not appropriate for the competition authorities to consider whether there has been an *infringement* of constitutional rights.

68. We submit that the correct approach under the leg of the excessive pricing test that requires an assessment of detriment to consumers and customers, is whether a constitutional right has been *"engaged".* We make this submission for two reasons.

69. First, the question of whether a constitutional right is engaged requires only that the constitutional issue be raised, and not that a finding of infringement is made.

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[67] Eleanor Fox, "Equality, Discrimination, and Competition Law: Lessons from and for South Africa and Indonesia", Harvard Law Journal, Spring 2000, 41 Harv. Int'l L.J. 579, 594.
[68] SAHRC founding affidavit para 64 p24; SAHRC's heads of argument para 5.

70. Second, it gives meaning to the question of what constitutes "*detriment to consumers or customers*". There is a presumption against tautology/superfluity, which requires provisions of a statute to be given effect. In *Wellworts Bazaars Ltd*,[69] Davis AJA quoted approvingly the following passage:

"It is… a good general rule in jurisprudence that one who reads a legal document, whether public or private, should not be prompt to ascribe…to its language tautology or superfluity, and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use."

71. The phrase "*to the detriment of consumers or customers*" was not only retained in the recent amendments to the Competition Act, but the words "*or customers*" was added. The phrase must therefore be given meaning. It cannot be rendered meaningless by an interpretation that "*[i]f an excessive price is found to have been charged, and an excessive profit earned … this must be at the expense of consumers or customers in the economy.*"[70] If this test were correct, then it would be sufficient to engage in the enquiry in section 8(3), and there would be no need to engage in a separate assessment of "*detriment to consumers or customers*" under section 8(1)(a), as the answer would follow automatically from the section 8(3) assessment. In other words, the assessment under section 8(3) would provide the answer as to whether

[69] *Wellworths Bazaars Ltd v Chandlers Ltd* [1947] 2 All SA 233, 1947 (2) SA 37 (A).
[70] Decision para 167 Vol 6 p 602 // 10 – 13.

there was "*detriment to consumers or customers*", rendering those words superfluous.

72. By requiring a showing of detriment to consumers or customers, the legislature clearly appreciated that in some circumstances, a price will be "*excessive*" but will not have harmed consumers. This may occur, for example, where the otherwise excessive price concerns luxury goods.

73. It also may occur where the high price subsists for a short period of time and stimulates entry, expanding supply to meet demand. In this latter instance, the US Supreme Court said that:

"*The opportunity to charge monopoly prices – at least for a short period – is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth*".[71]

74. Placing the analysis of whether the goods or services engage constitutional rights under the leg of the enquiry that concerns "*detriment to consumers or customers*" ensures that those words are given meaning, and provides a clear framework for using competition law to enhance the fulfilment of constitutional rights.

75. The SAHRC supports the submission that constitutional rights and international legal obligations ought to be considered under the "*detriment*" analysis,[72]

[71] *Verizon Communications Inc v Law Offices of Curtis Trinko* 540 US 398 (2004) referred to in Whish and Bailey, *Competition Law* 9th ed, p736.
[72] SAHRC founding affidavit para 64 p24; SAHRC's heads of argument, para 5.

although they do not state how their submissions on rights impact on the "*detriment*" analysis.

76. It ought to satisfy the amici that the rights and interests of identified consumers or customers are considered in future cases to determine whether they have suffered any detriment as a result of being charged an excessive price, where the excessiveness of that price has been established through consideration of each of the elements of the section 8 test.

VI. PENALTY

77. HJI and OS support *"stringent penalties for corporate infringements of constitutional rights"*.[73] SAHRC also supports the imposition of appropriate sanctions to *"deter anti-competitive practices"*.[74]

78. As stated above, the competition authorities are not empowered to determine whether there is an infringement of constitutional rights.

79. The competition authorities are constrained by the provisions of section 59(3) when determining an appropriate penalty. The six-step methodology for calculating an administrative penalty, set out in *Competition Commission v Aveng*,[75] sufficiently makes provisions for all relevant factors to be balanced in determining an appropriate penalty. That framework already takes into

[73] HJI and OS heads of argument para 92.
[74] SAHRC founding affidavit para 1 p21, para 76 p26.
[75] *The Competition Commission v Aveng (Africa) Limited t/a Steeledale and Others* (84/CR/Dec09); *Competition Commission v Isipani Construction (Pty) Ltd and Another* (CR128Nov14) [2016] ZACT 88 (18 July 2016) [15].

account the nature of the contravention and the market circumstances in which the contravention took place, which may take into account any rights which are engaged.

80. We submit then when considering if Babelegi's conduct engages constitutional rights and international law, as submitted by the amici, this Court must also consider the nature of the goods in question. In particular, this matter is concerned with the sale of FFP1 dust masks, which have not been shown to offer any protection against the virus.[76]

81. Even if a broad market definition is adopted, and it is found that FFP1 dust masks are substitutable for medical masks from a demand perspective, it remains a relevant consideration under the "*detriment*" leg of the analysis what type of masks Babelegi in fact sold and to whom.

82. The extent to which the right to healthcare is engaged here is tenuous in circumstances where Babelegi did not sell goods that would ordinarily be classified as medical PPE, and where the sales occurred prior to the declaration of a pandemic and prior to either the WHO or Government recommending the use of masks.

83. It is equally relevant under this leg of the analysis to consider who exactly Babelegi's customers were. It cannot be assumed, for example, that the rights of children are engaged, when on the facts Babelegi did not sell masks that

[76] FTI Consulting Report para 46 Vol 3 p290 // 4-6.

could be used by children. The SAHRC quite astonishingly makes the following bald and unsubstantiated submission concerning elderly persons:

"It is on this basis that we ask that this Court considers the rights of older persons who may have suffered from the conduct of Babelegi, who admitted to have increased its mark-up in excessive of 500% during the complaint period."[77]

84. In fact, Babelegi sold to its regular customers, who generally used the masks in construction and agriculture for example,[78] as well as to walk-in customers who were opportunistically seeking to buy masks to sell at increased market prices or to export to China.[79] To the extent that further information was required in order to fully assess this leg of the test, the Tribunal ought to have invoked its inquisitorial powers and requested further information.[80]

85. As a result, the amici's submissions regarding the determination of the appropriate administrative penalty in this case do not require this Court to revise the existing and fitting framework established in the caselaw.

VII. CONCLUSION

86. For the reasons set out above, the amici have provided little actual assistance with either evidence or argument to the Court in its determination of this appeal.

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[77] SAHRC's heads of argument para 63.
[78] FTI Consulting Report para 47 Vol 3 p290 // 14 - 16.
[79] FTI Consulting Report para 96 Vol 3 p301 // 24 - 26.
[80] *Industrial Development Corporation of South Africa Ltd v Anglo-American Holdings Ltd* 45/LM/Jun02 and 46/LM/Jun02 (23 October 2002), paras 57 – 64.

87. The appeal ought to be upheld, with costs, including the costs of three counsel.

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