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*

APPELLANT'S HEADS OF ARGUMENT

I. INTRODUCTION

1. This is an appeal against the order of the Competition Tribunal (Tribunal) of 1 June 2020 holding that Babelegi Workwear and Industrial Supplies CC (Babelegi) contravened the section 8(1)(a) excessive pricing provision of the Competition Act 89 of 1998, as amended (Competition Act), and imposing upon it an administrative penalty of R76 040.[1]

2. The prohibition of excessive pricing is not without controversy, and most competition regulators have sought to shy away from the regulation of pricing on the basis that this unduly impacts ordinary competitive processes. Notable competition economics commentators demand strict market conditions for the application of excessive pricing provisions, and in South Africa the history of section 8(1)(a) is not a happy one. Prosecution of two apartheid legacy behemoths under the provision failed. This court observed that 'the law and consequently the enforcement of section 8(a) of the [Competition] Act is immensely complex'.[2]

3. Nonetheless, relying on the extraordinary circumstances of Covid-19, the Tribunal held a small firm to be dominant given its asserted 'market power' inferred from (i) the assumptions of the Tribunal on availability of masks and

[1] Notice of Appeal Vol 6 p 615 *ll* 9 – 15.
[2] *Sasol Chemical Industries Limited v Competition Commission* (131CACJun14) [2015] ZACAC 4 (17 June 2015) at para 2.

(ii) Babelegi's ability to charge high prices for dust masks for a period of just over a month from 31 January to 5 March 2020 (Complaint Period), during which it sold 76 boxes of masks to third parties.[3]

4. Because the period of alleged contravention came to an end before the Consumer Protection and National Disaster Management Regulations and Directions[4] (Consumer Protection Regulations) were passed, this referral made under the Regulations on Competition Tribunal Rules for Covid-19 Excessive Pricing Complaint Referrals[5] (Tribunal Covid-19 Rules)[6] was not treated as a case involving contravention of the Consumer Protection Regulations.

5. So it came to be that the first finding of contravention of section 8(1)(a) of the Competition Act post the amendment that took effect on 12 July 2019,[7] was because the owner of a small, unsophisticated business in the industrial area of Rosslyn, Pretoria that hardly anybody had heard about before the referral by the Competition Commission (Commission) referral, had hiked its prices.

6. The Tribunal's findings were based on conjecture and speculation and 'common knowledge', in the absence of evidence that would ordinarily be considered relevant in excessive pricing cases, particularly having regard to the

[3] Tribunal decision para 59 Vol 6 p 572 *ll* 24 – 27. See Applicant's Supplementary Economic Submissions dated 22 April 2020 Table 2 Vol 4 p 353. In total (including internal sales) 496 boxes of masks were sold in the Complaint Period– see FTI Report Table 4 Vol 3 p 296.
[4] Government Notice R 350 in *Government Gazette* No 43116 of 19 March 2020.
[5] Government Notice No R 448 in *Government Gazette* No 43205 of 3 April 2020.
[6] See FA para 71 Vol 1 p 30 *ll* 7 - 10, para 74 Vol 1 p 31 *ll* 4 - 9, para 77 Vol 1 p 32 *ll* 1 - 7, para 79 Vol 1 p 32 *l* 18 – p 33 *l* 2.
[7] Tribunal decision para 40 Vol 6 p 567 *l* 25 – p 568 *l* 2.

relevant factors listed in section 8(3) of the Competition Act. With loose reference to people being confined to their homes (although the national lockdown commenced only 21 days after the end of the Complaint Period) and the desire of 'poor people' to buy masks from the closest retailer to protect themselves (well before mask wearing was compulsory in South Africa, in a case of a firm located in an industrial area far removed from people's homes), the Tribunal justified an adverse finding.

7. Rather than making use of its inquisitorial powers under sections 52(2)(b) and 54 of the Competition Act to accumulate all relevant facts and information, the Tribunal visited upon Babelegi the consequences of the inadequacies of the case's factual underpinnings. It failed to recognize that the absence of relevant evidence was the result of its decision to dispose of the matter urgently, and without the benefit of oral evidence and the ordinary pre-trial procedures (including exchange of discovery).

8. Overall, the Tribunal's decision evidences that it demanded no evidence from the Commission other than the fact of price increases and high margins, whilst it criticized Babelegi for not presenting comprehensive evidence in support of its defence.

9. The Tribunal's penalty calculation, asserted to be based on the traditional six-step methodology devised in *Aveng*[8] followed the steps only up to step four.

[8] *Competition Commission v Aveng (Africa) Ltd* (84/CR/Dec09), decision of 7 May 2012.

In step five, the Tribunal jettisoned the outcome of the calculation rendered by the first four steps in favour of multiplying Babelegi's 'illicit profits' by two and a half, falling just short of imposing the 'treble damages' fine that the Commission had sought, inconsistently with case precedent on penalty calculation.

II. BACKGROUND AND RELEVANT FACTS[9]

10. Babelegi, a close corporation with one member,[10] is generally engaged in the manufacture and supply of overalls and allied products.[11] A small part of its business consists of the re-sale of masks purchased from its suppliers,[12] with the sale of so-called FFP1 masks accounting for 3% of its revenue in the 12 months ending March 2020.[13]

11. By virtue of its turnover in its most recent financial year[14] Babelegi is considered under the Competition Act as a 'small business' insofar as it is treated as a wholesaler, or a 'medium business' insofar as it is treated as a manufacturer.[15]

[9] The facts are largely common cause. For a comprehensive chronology, see Annexure A.
[10] AA para 1 Vol 2 p 121 *ll* 14 – 15; Annexure BB2 Vol 2 p 195.
[11] AA para 38.3 Vol 2 p 136 *ll* 1 – 3; FTI Report para 21 Vol 3 p 284 *ll* 3 – 7.
[12] AA para 38.3 Vol 2 p 136 *ll* 1 – 3. Babelegi does not manufacture masks: FTI Report para 22 Vol 3 p 284 *ll* 9 – 12; Tribunal decision para 5 Vol 6 p 557 *ll* 21 – 28.
[13] FTI Report para 21 Vol 3 p 284 *ll* 3 – 8.
[14] Penalty submissions para 11.1 p 4 Vol 4 p 336 *ll* 11 – 12; see also 2019 Financial Statements Vol 2 p 187.
[15] Competition Act section 1 definition of 'small business' and 'medium business', read with Government Notice 987 in *Government Gazette* 42578 of 12 July 2019 and the Schedule thereto.

12. Historically, and prior to 31 January 2020, Babelegi demanded a 23% mark-up on masks.[16] For about a month, between 31 January 2020 and 5 March 2020, Babelegi imposed significant increases on the mark-up, reverting again to a 25% mark-up from 18 March 2020,[17] albeit that the 'normal' mark-up now resulted in significantly higher prices, given the supply price of R440 per box of masks[18] compared to the December 2019 supply price of R41 per box.[19]

13. On 19 March 2020, the Minister of Trade and Industry (DTI Minister) published the Consumer Protection Regulations further to the declaration of a National State of Disaster relating to the Covid-19 outbreak on 15 March 2020,[20] and under the authority of regulations issued by the Minister of Cooperative Governance and Traditional Affairs (the COGTA Minister) regarding the steps necessary to prevent an escalation of the disaster, in terms of section 27(2) of the Disaster Management Act (Disaster Management Regulations): paragraph 10(6) of the Disaster Management Regulations authorised the DTI Minister to issue 'directions' to protect consumers from excessive, unfair, unreasonable or unjust pricing of goods and services *during the national state of disaster*. [21]

14. Regulation 4 sets out what was to be considered a 'relevant and critical factor for determining whether [a] price is excessive or unfair', namely that a material

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[16] FTI Report Table 3 1st Line Vol 3 p 295.
[17] FTI Report Table 3 Vol 3 p 295.
[18] FA para 41 Vol 1 p 20 *ll* 14 – 19; Annexure IL11 para 2.1.12 Vol 1 p 70 *ll* 12 – 14.
[19] Annexure IL11 para 2.1.2 Vol 1 p 69 *ll* 17 – 20, read with Annexure IL19 Vol 1 p 80. The 'unit price' is reflected as R2,05 per mask, which amounts to R41 per box of 20.
[20] Government Notice No 313 in *Government Gazette* No 43096 of 15 March 2020.
[21] Government Notice No 318 in *Government Gazette* No 43107 of 18 March 2020.

price increase: (i) does not correspond to or is not equivalent to the increase in the cost of providing a good or service; or (ii) increases the net margin or mark-up above the average margin or mark-up in the three-month period prior to 1 March 2020.

15. Customers of Babelegi, probably unaware of the significant increase in supply prices it was facing by that time,[22] lodged complaints with the Commission concerning prices charged to them on 18 March 2020 (R400 per box)[23] and quoted to them on 19 March 2020 (R550 per box).[24] The Commission sought information from Babelegi,[25] who responded promptly.[26] Babelegi provided information concerning its price increases from 31 January 2020, explaining that these had been motivated by supplier communications about increasing prices.[27]

16. The Commission, ostensibly relying on the information initially sought by it to determine the comparator price prior to 1 March 2020, as contemplated by Regulation 4, came to the conclusion that Babelegi's pricing practices in the period 31 January 2020 and 5 March 2020 contravened the Competition Act, read with the Consumer Protection Regulations.[28] Babelegi objected to an

[22] Described above.
[23] Annexure IL7 Vol 1 p 48, read with Annexure IL8 p 49. Notably, the price charged on 18 March 2020 is lower than the price paid by Babelegi in acquiring masks on the same day.
[24] See Annexure IL4 Vol 1 p 45, read with Annexure IL5 Vol 1 p 46.
[25] FA para 36 Vol 1 p 18 // 11 – 14; annexure IL9 Vol 1 pp 50 – 52; FA para 37 Vol 1 p 18 // 15 – 17; annexure IL10 Vol 1 pp 66 – 68.
[26] FA para 38 Vol 1 p 18 / 18 – p 19 / 15; annexure IL11 Vol 1 pp 69 – 72.
[27] Annexure IL11 paras 2.1.2 – 2.1.17 Vol 1 p 69 / 17 - p 70 / 26.
[28] Annexure IL23 para 3 Vol 1 p 85 // 1 – 5.

adverse finding, asserting that it is not a dominant firm for purposes of section 8(1)(a) and that the Consumer Protection Regulations were in any event not in effect in the Complaint Period.[29]

17. Without warning or further engagement, at almost nine in the evening on 9 April 2020 (the eve of Good Friday), the Commission referred a complaint against Babelegi, alleging that it had, in the Complaint Period, increased the selling prices of certain dust masks when it did not face increased supply costs to justify the increases.[30]

18. Presumably since the Complaint Period preceded publication of the Consumer Protection Regulations,[31] the Commission's notice of motion confined the case to one of contravention of section 8(1)(a) of the Competition Act.[32] This case thus became the first section 8(1)(a) case to be prosecuted by the Commission and heard by the Tribunal since the coming into effect of the 2019 amendments to the Competition Act.

19. Despite the Commission's recognition that the pricing complained of occurred in the period preceding publication of the Consumer Protection Regulations, it advanced the case that the 'economic test for excessive pricing in the context of a [Public Health Emergency of International Concern] or similar extra-ordinary event, is the same before, during and after the Consumer Protection

[29] Annexure IL24 Vol 1 pp 86 – 88.
[30] FA paras 45 – 46 Vol 1 p 22 *ll* 3 – 10; Tribunal decision para 1 Vol 6 p 556 *ll* 13 - 18.
[31] As had been pointed out to the Commission in Babelegi's correspondence of 3 April 2020.
[32] NoM prayers 3 – 4 Vol 1 p 2 *ll* 10 – 15.

Regulations'.[33] And even though the Commission purported to only rely on the economic test in the Consumer Protection Regulations, it nonetheless sought leave for the hearing to be conducted in terms of the Tribunal Covid-19 Rules on an urgent basis and on the papers alone.[34] This, in the face of its recognition that 'Had Babelegi simply breached the Act's excessive pricing provisions in a manner unrelated to the pandemic, this application would have been dealt with in the ordinary course'.[35]

20. Notwithstanding Babelegi's objections on the papers, the Tribunal (without hearing argument) directed that the matter be disposed of on an urgent basis.[36] Ordinary procedures were jettisoned and the matter was considered without any discovery process, exchange of witness statements or calling of witnesses. The Tribunal simply heard submissions from counsel and the economists involved in the matter.

21. In its decision handed down six weeks later, the Tribunal would explain that it invoked its powers under section 27, read with Rule 15 of the Rules for the Conduct of Proceedings in the Competition Tribunal (Tribunal Rules) to do so, on the basis that 'alleged excessive pricing within the context of the exceptional Covid-19 circumstances is a matter of significant public interest and requires determination by the Tribunal. The interests of consumers must

[33] FA para 47 Vol 1 p 22 *ll*
[34] NoM prayer 2 Vol 1 p 2 *ll* 1 – 9.
[35] RA para 34 Vol 2 p 214 *ll* 4 – 6.
[36] Tribunal Directive Vol 2 pp 255 – 257.

be protected during this extraordinary crisis where markets may be distorted. Furthermore, businesses in South Africa will benefit from quickly knowing the decisions of the Tribunal in matters relating to excessive pricing in the context of Covid-19'.[37] However, it asserted that, since the Complaint Period preceded the publication of the Consumer Protection Regulations, 'we shall have no regard to the Consumer Protection Regulations for the assessment of the merits of the case'.[38]

III. THE TRIBUNAL DECISION

III.1 Introduction

22. It was common cause before the Tribunal that the essential elements of contravention of section 8(1)(a) of the Competition Act are: (i) dominance; (ii) charging of an excessive price within the meaning of the statute; and (iii) detriment to consumers.[39]

III.2 The framework for assessment

23. Noting the content of sections 8(1)(a), 8(2) and 8(3) of the Competition Act,[40] the Tribunal observed that the definition of 'excessive price' had been replaced by a 'broader, more discretionary approach provided for in section 8(3)', and

[37] Tribunal decision para 26 Vol 6 p 564 / 26 – p 565 / 7.
[38] Tribunal decision para 37 Vol 6 p 567 // 13 – 16.
[39] Tribunal decision para 48 Vol 6 p 570 / 28 – p 571 / 2.
[40] Tribunal decision para 41 Vol 6 p 568 // 3 - 26

that section 8(2) provides for a reverse onus if there is a *prima facie* case of an excessive price.[41]

24. The Tribunal, correctly, explained that section 8(3) 'demands': (i) determination of whether the price charged is higher than a competitive price; and (ii) whether such difference is unreasonable.[42]

25. According to the Tribunal, the question whether a price charged is higher than the competitive price is answered by establishing 'whether the price exceeds what the firm would have obtained in the counterfactual world of normal and sufficient competition'.[43] That question, in turn, must be answered by taking into account all relevant factors, including those set out in the non-exhaustive list provided in section 8(3).[44]

26. In the Tribunal's assessment, it is entrusted with a discretion to decide, on a case-by-case basis, which factors are relevant and what weight to attach to each of them.[45]

27. The Tribunal disavowed any reliance on the Consumer Protection Regulations in its assessment of the merits of the case,[46] asserting that it considered the complaint under section 8(1)(a) of the Competition Act.[47]

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[41] Tribunal decision para 43 Vol 6 p 569 // 5 – 9.
[42] Tribunal decision para 45 Vol 6 p 569 // 22 – 24.
[43] Tribunal decision para 45 Vol 6 p 569 // 24 – 27.
[44] Tribunal decision para 46 – 46.1 Vol 6 p 569 // 1 – 5.
[45] Tribunal decision para 46.2 – 47 Vol 6 p 570 // 7 – 27.
[46] Tribunal decision para 37 Vol 6 p 567 // 13 – 16. See also Tribunal decision para 60 Vol 6 p 573 // 6 – 7.
[47] Tribunal decision para 39 Vol 6 p 567 / 23.

III.3 Dominance

28. For purposes of assessing dominance, the Tribunal noted that sections 7(a) and 7(b), which express dominance by reference to a firm holding a particular share of a market, found no application since the Commission's case was that the 'Covid-19 circumstances' conferred market power on Babelegi during the Complaint Period.[48] The Tribunal understood that the 'central question that we have to answer in relation to dominance, is if Babelegi can be considered dominant in terms of section 7(c) of the Act i.e. if it has market power'.[49]

29. The Tribunal correctly recorded the definition of 'market power', namely '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'.[50]

30. When it came to the Tribunal's evaluation of *dominance*, it agreed with the Commission that the 'context' of Covid-19 was the 'prism through which Babelegi's *pricing conduct* must be assessed'.[51] Also under the heading of dominance, the Tribunal held that 'an excessive pricing assessment must be done with due regard to the context',[52] and explained that 'we shall consider the economic test for excessive pricing when markets have been disrupted, for

[48] Tribunal decision para 53 Vol 6 p 571 // 20 – 26.
[49] Tribunal decision para 64 Vol 6 p 574 // 10 – 12.
[50] Tribunal decision para 54 Vol 6 p 571 / 27 – p 572 / 2.
[51] Tribunal decision para 67 Vol 6 p 574 // 3 – 4. Emphasis supplied.
[52] Tribunal decision para 68 Vol 6 p 575 // 3 – 4.

example by a crisis such as Covid-19'.[53] That led it to a consideration of 'price gouging', described by it as price hikes during a crisis or disaster.[54]

31. The conclusion reached was that:

'In crisis situations such as the Covid-19 health crisis, there are *typically* abnormal disruptions to certain markets, such as a disruption to the supply of, or a spike in demand for, certain products utilised by consumers in an attempt to cope with, or as a response to, the challenges of that crisis. These disruptions, from an economic perspective, remove the ordinary competitive constraints faced by firms. This *may* confer upon the firms, for example retailers or distributors holdings stock, or local producers of relevant items, market power which enables them to increase prices without constraint until normal competitive conditions or supply channels resume.'[55]

32. Moreover, so held the Tribunal, 'in the context of Covid-19, firms *may* be able to exercise market power due to the disruption to normal market conditions and the inability of consumers to defer consumption'.[56]

33. In an apparent attempt to counter Babelegi's arguments that: (i) market power is the ability to raise prices consistently and profitably over competitive levels;[57] and that (ii) market power must be understood to mean substantial market power that is durable,[58] the Tribunal noted that section 7 'does not put

[53] Tribunal decision para 70 Vol 6 p 575 // 14- 15.
[54] Tribunal decision paras 71 – 72 Vol 6 p 575 // 16 – 21.
[55] Tribunal decision para 73 Vol 6 p 575 // 22 – 29. Emphasis supplied.
[56] Tribunal decision para 75 // 10 – 15. The theme was developed in Tribunal decision paras 76 – 79 Vol 6 p 576 / 16 – p 578 / 2.
[57] Tribunal decision para 61 Vol 6 p 573 // 7 – 17.
[58] Tribunal decision para 62 Vol 6 p 573 / 16 – p 574 / 2

any time frame or limit on dominance'.[59] It held that the 'contention that market power must be sustained for a significant period of time … is again based on an assumption of normal well-functioning markets and ignores the current context'.[60] In the Tribunal's view, the 'correct approach in both law and economics is to consider the context including market circumstances in order to determine market power and dominance'.[61]

34. The Tribunal declined to define a market, distinguishing between the sub-provisions of section 7 on an understanding that it 'defines dominance on the basis of either certain market share thresholds in a market or in terms of market power'.[62] On its understanding, market definition is not required to assess market power,[63] even though section 7 expressly defines dominance by reference to 'a market'.[64]

35. Indeed, the Tribunal held that there is 'no compelling reason to engage in market delineation if other means exist to determine market power', relying on 'developments in the literature and competition economics practice' that 'offer means for measuring market power directly, dispensing with the need for market delineation'.[65] (The case cited in support of this conclusion, *Arriva*

[59] Tribunal decision para 52 Vol 6 p 571 / 17.
[60] Tribunal decision para 80 Vol 6 p 578 // 8 – 10.
[61] Tribunal decision para 82 Vo 6 p 578 // 23 – 24.
[62] Tribunal decision para 52 Vol 6 p 571 // 17 – 19.
[63] Tribunal decision para 83 Vol 6 p 578 / 27 – p 579 / 2.
[64] Competition Act section 7: 'A firm is dominant in a market …'.
[65] Tribunal decision para 85 Vol 6 p 579 // 14 – 17.

The Shires Ltd vs London Luton Airport Operations Limited,[66] in fact concludes with the court finding no abuse, even 'on the assumption' that the respondent were dominant,[67] and the learned judge recording that the 'judgment necessarily leaves a number of issues unresolved', including 'whether Luton operations are in fact dominant'. In accordance with the judgment, that question 'will need to be addressed at a later date', because the court had not heard argument on that question.[68] The reason the court had not heard argument was because there had been agreement between the parties that the trial would proceed on the assumption that the respondent held a dominant position because they had a 100% share in the relevant market.[69])

36. In addition, the Tribunal viewed market delineation as 'problematic and impractical in crisis situations such as Covid-19 if the market in question has been disrupted or distorted by that crisis',[70] and therefore held that 'a firm's own conduct is therefore the best available proxy for market power if the market is distorted by the crisis'.[71] (In doing so it ignored the explanation of the OFT[72] (now CMA) that '…without any coherent framework in which to conduct the analysis, there is a real danger that the analysis could degenerate

[66] [2014] EWHC 64 (Ch). See Tribunal decision fn 64 Vol 6 p 579 *ll* 29 – 31.
[67] *Arriva The Shires* at para 166(i).
[68] *Arriva The Shires* at para 167.
[69] *Arriva The Shires* at para 6(i).
[70] Tribunal decision para 86 Vol 6 p 579 *ll* 16 – 18.
[71] Tribunal decision para 86 Vol 6 p 579 *ll* 20 – 22.
[72] OFT (July 2001). The role of market definition in monopoly and dominance inquiries. Economic Discussion paper 2, Prepared for the OFT by NERA.

to the level of *"I know abuse when I see it' in which there are no identifiable benchmarks against which to discriminate between 'competitive behaviour' and 'anticompetitive behaviour"'.*). The conclusion reached by the Tribunal is that 'the circumstances of the Covid-19 crisis can provide the conditions for market power to be conferred to firms that may not otherwise have market power under normal competitive conditions'.[73]

37. Finding that section 7 does not exclude a finding of market power under conditions of crisis, the Tribunal dismissed the submission that Babelegi could not have known that it would be treated as a dominant firm. In the Tribunal's view, that submission could not prevail since 'ignorance of the law is not an excuse'.[74] In any event, so held the Tribunal, 'as a matter of economics, in a crisis period such as Covid-19, the actual conduct of a firm can be used as a proxy to assess its market power'.[75]

III.4 Excessive pricing

38. The Tribunal recognised that section 8(3) 'demands as a first step' the determination of whether the price charged is higher than the 'competitive price'.[76] Noting Babelegi's objection to the use of a 'simple test' in a case under

[73] Tribunal decision para 89 Vol 6 p 580 // 16 – 18.
[74] Tribunal decision para 90 Vol 6 p 581 // 1 – 7. Of course, this was not a question of ignorance of the law: the very point was that, even with knowledge of the definition of dominance in section 7 and the prohibition in section 8(1)(a), Babelegi's owners could not have guessed that the firm would be treated as a dominant firm.
[75] Tribunal decision para 92 Vol 6 p 581 // 9 – 11.
[76] Tribunal decision para 94 Vol 6 p 581 // 18 – 20.

section 8(1)(a),[77] it nonetheless held that the simple test is appropriate 'in the context of disrupted competitive conditions such as the Covid-19 health crisis'.[78] According to the Tribunal:

'In such a scenario one can determine whether a firm's price or mark-up margin increased materially relative to what was previously charged or applied, and if so, whether that increase is justified by any cost increases from a supplier further up the value chain'.[79]

39. For this approach it found support in the judgment of this court in *Sasol* [80] and *Mittal,*[81] to the effect that a substantial increase upon the normal price without any corresponding rise in costs may provide *prima facie* indication that the price is higher than the economic value, without the need to quantify the economic value more precisely.[82]

40. The Tribunal considered that there was no reason to conclude that Babelegi's price in December 2019 was not a normal price,[83] and referred to authority concerning United States 'price gouging' regulation for the use of pre-crisis pricing as a comparator.[84] It declined to accept, by reference to the Consumer

[77] Tribunal decision para 98 Vol 6 p 582 // 5 – 12.
[78] Tribunal decision para 99 Vol 6 p 582 // 13 – 15.
[79] Tribunal decision para 99 Vol 6 p 582 // 15 – 18.
[80] Supra.
[81] Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another (70/CAC/Apr07) [2009] ZACAC 1 (29 May 2009).
[82] Tribunal decision para 100 Vol 6 p 582 / 24 – p 583 / 4.
[83] Tribunal decision para 101 Vol 6 p 583 // 6 – 14.
[84] Tribunal decision paras 102 – 103 Vol 6 p 583 / 16 – p 584 / 16.

Protection Regulations, that the DTI Minister assumed the Complaint Period as a 'normal period' for purposes of comparison.[85]

41. The factors considered by the Tribunal to be relevant for determination of whether the price charged was excessive were: (i) a comparison of the prices charged prior to and during the Complaint Period, respectively; (ii) the number and size of price hikes; and (iii) the length of time the prices were charged and how the price increases related to 'Covid-19 events'; (iv) differences in mark-ups prior to and during the Complaint Period; (v) actual price increases by suppliers faced in the relevant period; (vi) whether any advantage was due to commercial efficiency or investment.[86]

42. The Tribunal recorded that Babelegi did not dispute the relevance of price increases,[87] but that it relied on the fact that price increases could be justified in light of anticipated supplier price increases.[88]

43. Before turning to factual analysis, the Tribunal reached the conclusion that the relevant factors defined by it were found in section 8(3), which found application. It its view, 'the Consumer Protection Regulations are responsive to an existing health crisis situation and how to best manage that and does not create it'.[89] This, in apparent defence of the application of a test contained in

[85] Tribunal decision para 112 Vol 6 p 587 // 3 – 13.
[86] Tribunal decision para 107 Vol 6 p 585 / 12 – p 586 / 3.
[87] Tribunal decision para 108 Vol 6 p 586 // 4 – 5.
[88] Tribunal decision paras 109 – 110 Vol 6 p 586 // 6 – 21.
[89] Tribunal decision para 113 Vol 6 p 587 // 13 – 30.

the Consumer Protection Regulations whilst protesting that it was not applying the test therein provided for.

III.5 Tribunal's assessment of 'factual evidence relating to market power and excessive pricing'

44. The Tribunal recorded the large increases in Babelegi's prices over the Complaint Period, and the mark-ups as calculated.[90] These facts were common cause. It considered that Babelegi's first price increase occurred the day after the WHO declared a Public Health Emergency of International Concern, when its supplier had warned of supply disruption.[91] On 2 February 2020, the supplier informed Babelegi that its disposable masks were sold out.[92] The Tribunal notes that 'Babelegi's price increases get progressively bolder in February 2020' without it being exposed to supplier cost increases,[93] and that the price increase on 5 March 2020 coincided with the day the first Covid-19 case is confirmed in South Africa.[94] Finally, it recorded the 18 March 2020 price increase that is based on the increased supplier price, and which marks the return to 'normal' mark-up levels.[95]

45. Turning to the mark-up calculations of FTI Consulting based on weighted average sales,[96] the Tribunal concluded that the calculation distorts the

[90] Tribunal decision para 121 – 123 Vol 6 p 591 // 1 – 20.
[91] Tribunal decision paras 119.2 – 119.3 Vol 6 p 589 / 24 – p 590 / 11.
[92] Tribunal decision para 119.4 Vol 6 p 590 // 12 – 14.
[93] Tribunal decision para 119.5 Vol 6 p 590 // 15 – 18.
[94] Tribunal decision para 119.6 Vol 6 p 590 // 18 – 21.
[95] Tribunal decision para 119.7 Vol 6 p 590 // 22 – 26.
[96] Tribunal decision para 124 Vol 6 p 591 // 21 – 23.

position, because large volumes of sales went to Babelegi's sister company.[97] It also declined to consider pricing over the full period of 1 January 2020 to 31 March 2020, stating that the 'period prior to the Complaint Period and the period thereafter, as per the economic test in the context of a crisis such as Covid-19, serve as appropriate comparators on mark-ups and cannot be used to dilute the mark-ups during the Complaint Period.[98] The irony of declining to bring into account lower pricing *during* the national state of disaster in a case where it placed so centrally the effects of the disaster apparently escaped the Tribunal – as evidenced by the next paragraph, which characterised Babelegi's conduct as 'taking advantage of a crisis period, when customers and consumers are at their most vulnerable'.[99]

46. In a nod to Babelegi's submission that market power requires an ability to raise prices durably, the Tribunal concluded that 'the conduct is durable in the sense that it effected transactions at those high prices from 31 January to 5 March 2020'.[100]

47. Despite its assertion that it would not apply the Consumer Protection Regulations, and in the absence of any provision for it in section 8(3) that mandates it, the Tribunal stated that the 'economic test for potential exploitative pricing behaviour in the context of a crisis such as Covid-19

[97] Tribunal decision para 125 Vol 6 p 592 // 1 – 9.
[98] Tribunal decision para 126 BVol 6 p 592 // 8 – 19.
[99] Tribunal decision para 127 Vol 6 p 592 // 20 – 22.
[100] Tribunal decision para 127 Vol 6 p 592 // 22 – 23.

includes the assessment of whether a material price increase is substantiated by a corresponding increase in cost'.[101]

48. The Tribunal dismissed Babelegi's defence that it hiked prices in anticipation of supplier price increases, because: (i) it provided no evidence of actually purchasing from one supplier that had quoted increasing prices; and (ii) it only purchased at a higher price on 18 March 2020.[102]

49. Ignoring the fact that the Commission had given Babelegi 72 hours in the course of the Easter weekend to respond to the Complaint Referral, in the midst of a national lockdown precluding Babelegi from readily accessing documents and evidence,[103] the Tribunal criticised Babelegi for not presenting 'evidence' of 'the extent or quantum by which any supplier was anticipated to be increasing prices'.[104] It similarly criticised Babelegi for not presenting evidence 'in support of FTI's contention that cashflow or stock management issues warranted the price increases' and suggested that Babelegi could have made purchases from working capital.[105] Observing that Babelegi was able to order and purchase masks 'at a value multiple times even the profit [on masks]

[101] Tribunal decision para 129 Vol 6 p 593 *ll* 1 – 3.
[102] Tribunal decision paras 130 – 141 Vol 6 p 593 *l* 4 – p 596 *l* 10.
[103] AA para 16 Vol 2 p 127 *ll* 6 – 14: '*The effect of the Commission's notice period is that Babelegi has been required to answer this complaint referral without the benefit of a single business day to consult with its advisers, and that it has had to prepare this answer on religious holidays. This, in a period when neither I nor Babelegi's legal advisers are permitted to leave our homes without obtaining the requisite permits. I am advised that the Tribunal will take judicial notice of the difficulties in preparing an answer to a lengthy and complex application that includes economic analysis when I cannot even be in the same room as Babelegi's advisers to consult and prepare a response. The Tribunal will also appreciate that Babelegi has not had time to brief and/or consult with an economist*'.
[104] Tribunal decision para 135 Vol 6 p 594 *ll* 15 – 17.
[105] Tribunal decision para 137 Vol 6 p 595 *ll* 3 – 8.

that is put up for February 2020', the Tribunal concluded that there was no justification for a price increase to cover anticipated inflated prices.[106]

50. The Tribunal concluded that no 'substantiation' was provided for the submission that it is standard practice for firms to increase their prices in anticipation of supply disruptions.[107] (This, despite the FTI Report placing reliance on the OECD's recognition that it is appropriate in 'price gouging' cases to 'account for increased costs, *including anticipated costs,* that businesses face in the marketplace. … 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'*.[108]). Accordingly, it held that there was no 'rational and valid explanation' for the price increases.[109]

51. Recording the position adopted by Dr Liberty Mncube for Babelegi that market power cannot exist in a market where supply responses are immediate, the Tribunal found that there was no evidence of a supply threat during the Complaint Period, with price increases enduring 'for a significant period of time' (referring to the 35 days constituting the Complaint Period).[110]

52. In the Tribunal's estimation the February 2020 mask sales were 'substantial': it brought into account not only the 76 boxes of masks sold to third parties, but

[106] Tribunal decision para 138 Vol 6 p 595 // 8 – 17.
[107] Tribunal decision para 140 Vol 6 p 595 // 21 – 23.
[108] See full extract in FTI Report para 80 Vol 3 p 297 / 28 – 298 / 14.
[109] Tribunal decision para 141 Vol 6 p 596 // 5 – 10.
[110] Tribunal decision para 143 Vol 6 p 596 // 17 – 29.

also the sale of masks to Belegi, the sister company, holding that Belegi 'on-sells these masks bought at Babelegi's increased price and then adds a further margin of its own',[111] although there was no evidence on the record of what happened with the masks that were sold to Belegi. In the face of evidence of significant drops in sales during the Complaint Period, the Tribunal concluded that there were no constraints on Babelegi's pricing.[112]

53. The Tribunal declined to bring into account evidence of competitive prices in the period of national disaster beyond the Complaint Period, finding that these were not relevant to establishing a competitive price. It preferred to focus its analysis narrowly on the Complaint Period.[113] In order to justify ignoring prices levied by competitors in the time of crisis, it held that 'the prices of other suppliers are not the appropriate benchmark of what the competitive price would be under the counterfactual'.[114] (Of course, those prices would provide an indication of whether the price increases were being set independently of the conduct of competitors, as an indicator of market power, but the Tribunal made no comment on this.)

[111] Tribunal decision para 144 Vol 6 p 596 / 30 – p 597 / 6.
[112] Tribunal decision para 145 Vol 6 p 597 // 7 – 14.
[113] Tribunal decision paras 146 – 147 Vol 6 p 597 / 14 – p 598 / 2.
[114] Tribunal decision para 148 Vol 6 p 598 // 3 – 7.

III.6 The Tribunal's conclusions on 'market power/dominance and *prima facie* case'

54. The Tribunal formed the view that Babelegi and its economic advisers' 'concessions' led to the conclusion that 'conditions for exploitation of the crisis situation and market power existed from the end of January due to the Covid-19 health crisis' and that Babelegi did so exploit conditions when it increased its prices and mark-ups.[115] This meant that it had the 'ability to effect material price and mark-up increases', leading the Tribunal to the inference that 'Babelegi had market power during the Complaint Period since it behaved to an appreciable extent independently of its competitors, customers or suppliers' and its conclusion that Babelegi was a 'dominant firm during the Complaint Period'.[116] This, in the absence of any evidence on competitor pricing in the Complaint Period,[117] evidence of at least threats of price increases by suppliers,[118] evidence of an actual supply increase faced by Babelegi on 18 March that outstripped even the progressively higher prices charged by Babelegi in the Complaint Period,[119] and evidence of lower sales volumes during the Complaint Period (with only 13% of sales in the first quarter of the year in those 35 days).[120]

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[115] Tribunal decision para 151 Vol 6 p 598 / 27 – p 599 / 5.
[116] Tribunal decision para 152 Vol 6 p 599 // 6 – 13.
[117] See Tribunal decision para 146 Vol 6 p 597 // 14 – 21. There was evidence of mask prices in the period of national disaster, as appears from Appendix 1 to the FTI Report Vol 3 p 305.
[118] Appendix 2 to FTI Report Vol 3 p 306.
[119] Tribunal decision para 119.7 Vol 6 p 590 // 22 – 26.
[120] FTI Report Table 4 Vol 3 p 297.

55. The conclusion reached was that on the evidence, the Commission discharged the onus of 'showing a *prima facie* case of abuse of dominance', and the onus shifted to Babelegi in terms of section 8(2).[121]

III.7 Reasonableness

56. The Tribunal concluded that Babelegi's differences between Babelegi's prices during the Complaint Period and before were 'so blatantly stark that there can be no question about there being no reasonable relation between them'.[122]

III.8 Detriment

57. The Tribunal noted the Commission's reliance on adverse effect on poor families and small business,[123] and Babelegi's submission that the small number of sales to its regular customers did not show such a general effect.[124] The Tribunal complained that it 'lacked evidence' to show that these customers were not small businesses, criticizing Babelegi for this.[125] The observations on the expectations on Babelegi to have produced this evidence over the course of a long weekend under lockdown apply here once more, even assuming Babelegi ought to have known that such evidence would be expected of it.

58. The Tribunal, apparently assessing the situation through the prism of experiences during lockdown, rather than acknowledging the conduct taking

[121] Tribunal decision para 154 Vol 6 p 599 // 22 – 25.
[122] Tribunal decision paras 158 – 159 Vol 6 p 600 // 10 – 29.
[123] Tribunal decision para 161 Vol 6 p 601 // 6 – 11.
[124] Tribunal decision paras 163 – 164 Vol 6 p 601 // 12 – 18.
[125] Tribunal decision para 163 Vol 6 p 601 // 14 – 17.

place before the first Covid-19 case had been reported in South Africa, made assumptions about customers and consumers being 'desperate and forced to pay an inflated price because their choices are limited' or they have 'no viable alternatives'.[126] It came to the conclusion that Babelegi's prices were exploitative and to the detriment of consumers.[127]

III.9 Tribunal's conclusion

59. In light of the analysis, the Tribunal found Babelegi contravened section 8(1)(a): 'While the Commission has presented evidence that warrants a finding of excessive pricing, Babelegi has failed to discharge its onus to rebut the Commission's case'.[128]

III.10 Penalty calculation

60. The Commission sought a penalty expressed as 'treble damages',[129] a term used in United States law to indicate permission to a court to triple the amount of actual/compensatory damages to be awarded to a prevailing plaintiff.[130]

61. The Tribunal, asserting that it would use the six-step methodology generally applied for penalty calculation,[131] calculated the base amount by applying 30% to the 'affected turnover', on the basis that Babelegi was exploiting customers

[126] Tribunal decision para 166 Vol 6 p 602 // 2 – 4.
[127] Tribunal decision para 176 Vol 6 p 604 // 19 – 24.
[128] Tribunal decision para 177 Vol 6 p 604 // 26 – 29.
[129] Tribunal decision para 182 Vol 6 p 605 // 20 – 24.
[130] Penalty submissions para 17 Vol 6 p 549 // 18 – 21.
[131] Tribunal decision para 187 Vol 6 p 606 // 24 – 27.

in a time of crisis.[132] It applied a multiplier based on contravention of 35 days.[133]

62. In step five, the Tribunal ignored the result of its calculation in steps one to four. Its discussion on mitigating and aggravating factors glossed over considerations such as Babelegi's cooperation and/or the fact that Babelegi could not have been expected to be treated as a dominant firm,[134] focusing instead on the fact that the Commission was put to prosecuting Babelegi when it declined to admit dominance[135] and the importance of deterrence.[136] The Tribunal placed emphasis on the asserted need to ensure that the fine ought to exceed the amount of gains improperly made. The Tribunal then included profits from sales to Babelegi's sister company in a calculation of 'excessive profits', and concluded that since the amount was higher than the one rendered by the step 4, the penalty had to be adjusted upwards.[137]

63. Building on that proposition, the Tribunal held that Babelegi's defence that its prices during the Complaint Period were aligned to that of competitors did not 'pass muster', [138] and considered as a 'grossly aggravating factor' the fact that the price increases 'took place amidst the Covid-19 health crisis – a time when

[132] Tribunal decision paras 187.2.1.2 – 187.2.1.3 Vol 6 p 607 // 10 – 17.
[133] Tribunal decision para 187.3 Vol 6 p 607 // 18 – 22.
[134] Tribunal decision para 187.5.11 Vol 6 p 610 // 20 – 30.
[135] Tribunal decision para 187.5.2 Vol 6 p 608 // 9 – 11.
[136] Tribunal decision paras 187.5.3 – 187.5.7 Vol 6 p 608 / 12 – p 609 / 20.
[137] Tribunal decision para 187.5.8 Vol 6 p 609 / 21 – p 610 / 5. See also Tribunal decision para 187.5.12 Vol 6 p 611 // 6 – 7.
[138] Tribunal decision para 187.5.9 Vol 6 p 610 // 13 – 15.

the South African consumers and customers are specifically vulnerable – which Babelegi sought to profiteer from'.[139]

64. Under the guise of its consideration of mitigating and aggravating factors, the Tribunal then effectively calculated a penalty based on two and a half times the 'improper gains' of Babelegi's charges of FFP1 masks.[140] It provided no explanation for departing from the six-step methodology.

IV. CENTRAL ISSUES

65. The principal issue for determination in this appeal is whether Babelegi was appropriately treated as a dominant firm subject to the prohibition in section 8(1)(a) of the Competition Act. We submit that the Tribunal erred in two fundamental respects in the assessment of dominance:

65.1. it disregarded the need to delineate the relevant market, despite section 7 defining dominance in relation to a market throughout the provision; and

65.2. it conflated the test for market power with the test for excessive pricing.

66. The second issue in this appeal is whether the Tribunal could infer market power on the part of Babelegi, in the Complaint Period, on the available facts. The fundamental errors of the Tribunal under this heading are submitted to be –

[139] Tribunal decision para 187.5.10 Vol 6 p 610 // 16 – 19.
[140] Tribunal decision para 187.5.14 Vol 6 p 611 // 14 – 23.

66.1. improper reliance on conjecture, supposition and inference; and

66.2. failure to bring all available facts into account.

67. Third, the appeal raises the proper assessment of an 'excessive price' by reference to relevant considerations. The major flaws in the Tribunal's analysis here include –

67.1. its failure to engage with the meaning of a 'competitive price'; and

67.2. its disregard for factors patently relevant to the determination of whether the price was excessive in the market circumstances.

68. Finally, the appeal is concerned with the propriety of the penalty calculation. Babelegi submits that the Tribunal departed from penalty calculation precedent to apply something akin to 'treble damages', without proper basis to do so.

V. THE DOMINANCE ERROR

V.1 The importance of the determination of dominance

69. The prohibition of abuse of dominance rests on the notion that a 'special responsibility' rests on firms of a particular kind. If a firm is dominant in terms of section 7, then it is on notice that it is prohibited for it to engage in any of the conduct listed in section 8(1) and in section 9. If a firm is not dominant, then it *is entitled* to price 'excessively'. Moral outrage does not provide a basis for prohibiting 'excessive pricing' by firms that are not dominant.

V.2 Failure to delineate the market

70. The Tribunal was wrong to demand no attempt at market definition.

71. Its finding that it is not required is inconsistent with the plain language of section 7, which makes express reference to dominance 'in a market'. Put differently, the definition of dominance in the statute requires relationship to 'a market'.

72. As a matter of practice, and as a first step, 'the relevant market is defined in relation to which market power may exist'.[141] Even if some international commentators consider that market definition should be abandoned, that view is not universally held. Whish and Bailey comment that 'market definition has played, and continues to play, and important role in EU and UK competition law'.[142] According to the European Commission's *Notice on the Definition of the Relevant Market for the Purposes of EU Competition Law,*[143]

'Market definition … serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systemic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure'.

[141] R Whish & D Bailey *Competition Law* 9ed at p 26.
[142] Whish at p 41.
[143] OJ [1997] C 372/5 at para 2.

73. We submit that there is no justification for jettisoning market definition in a time of crisis when it is possible to define a temporal market more narrowly by limiting it to the period of crisis, as the European Commission did in *ABG*,[144] a case concerned with the oil crisis of the 1970s.

74. As we have discussed, the case of *Arriva The Shires* offers no support for the proposition that no market definition is required, since dominance was not disputed in the case. Cases where allegations of abuse are *dismissed* on the basis that the conduct does not fall within the prohibition against abuse *even if* the firm were considered dominant[145] are also no authority for avoiding the market definition exercise.

75. And even if foreign judgments indicate a willingness to dispense with the market definition requirement, they cannot be relied on if they are inconsistent with local laws. The Tribunal held in *FFS Refiners (Pty) Ltd and Eskom EB Cochrane South Africa (Pty) Ltd / EThekweni Municipality National Electricity Regulator*[146] that:

> 'in terms of the framing of section 8 of the Competition Act, parties are required to establish dominance before they can move onto the abuse leg of the provision. This is a necessary prerequisite specified by the language of the section - *if there is no dominance, the party cannot be guilty of an abuse of dominance.* Therefore, in order to succeed on an abuse of dominance claim, *it is essential that the*

[144] OJ [1977] L 117/1.
[145] See, for example Case C77/77 *BP v Commission* EU:C:2012:770.
[146] (64/CR/SEP02) [2003] ZACT 9 (21 February 2003).

complainants plead dominance in respect of the market in which they allege abuse. This must be alleged in the complaint referral – it would not assist the respondent for this to be clarified only at the hearing or some later stage'.[147]

76. The Tribunal is, of course, not bound by its own precedent.[148] However, when it applies the general law, it must 'apply it as it finds it, whether in previous decisions by itself', or the judgments of this court.[149] As this court explained in *Standard Bank*,[150] citing the Constitutional Court's judgment in *Turnbull-Jackson*,[151] reliance on precedent serves the 'maintenance of certainty of the law and equality before it'. Moreover,

'It enables the citizen, if necessary with the aid of practising lawyers, to plan his private and professional activities with some degree of assurance as to their legal effects; it prevents the dislocation of rights, particularly contractual and proprietary ones, created in the belief of an existing rule of law; it cuts down the prospect of litigation; it keeps the weaker judge along right and rational paths, drastically limiting the play allowed to partiality, caprice or prejudice, thereby not only securing justice in the instance but also retaining public confidence in the judicial machine through like being dealt with alike.'[152]

77. In the context of an excessive pricing complaint, market definition is all the more important: whilst the '*market power*' test for dominance finds general

[147] *FFS* at para 13. Emphasis supplied.
[148] *The Standard Bank of South Africa Limited v The Competition Commission of South Africa* [2018] ZACAC 5 (31 May 2018) at para 21.
[149] *SBSA* at para 22.
[150] Supra at para 18.
[151] *Turnbull-Jackson v Hibiscus Court Municipality and Others* 2014 (6) SA 592 (CC).
[152] *Hibiscus* at para 54.

application to section 8 contraventions, the excessive pricing prohibition specifically demands consideration of market share, in circumstances where section 8(3)(*e*) specifically lists market share as a relevant factor to be taken into account in the determination of whether a price is excessive. That, in turn, requires market definition.

V.3 The test for dominance

78. The Tribunal held that the 'core concept behind dominance from both an economics perspective and in terms of the Act … is whether a firm holds market power'.[153] Market power is defined in section 1 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'.

79. There are three elements to the definition of market power, which require consideration. Sutherland & Kemp note that while there is a disjunctive in the definition, a 'strong argument for the existence of market power is likely to rely on more than one of these elements.'[154]

80. Generally speaking, the notion of independence (as contained in the definition) is related to the degree of competitive constraint exerted on the firm in question. Market power entails that these competitive constraints are not sufficiently effective and hence that the firm in question enjoys substantial

[153] Tribunal decision para 54 Vol 6 p 571 // 27 – 29.
[154] Sutherland & Kemp, Competition Law of South Africa 7.7.6.1.

market power over a period of time. This means that the firm's decisions are largely insensitive to the actions and reactions of competitors, customers and, ultimately, consumers.

81. Sutherland & Kemp note that the element of independence is taken from the European Court of Justice's definition of 'dominant position', to the effect that 'the term relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.'[155] They explain: [156]

'The qualification that the firm must behave "to an appreciable extent" independently of other market participants provides room for a court to consider the relevance and meaning of the firm's independent action. That independent action should be of the quality and degree that makes it relevant to price control and the ability to exclude competitors, or, in the words of the EU definition, the ability "to prevent effective competition being maintained on the relevant market". The ability to restrict market output may be indicative of the ability to charge supra-competitive prices, while the restriction of service, quality or innovation may mean that customers are paying supra-competitive prices for the existing levels of service, quality or innovation. In the absence of any indication of an ability to control price of exclude competition, a court should be reluctant to find market power on the basis of independent action alone.'

[155] Sutherland & Kemp, Competition Law of South Africa 7.7.6.4.
[156] Sutherland & Kemp, Competition Law of South Africa 7.7.6.4.

82. Therefore, the relevant factors that must be considered in the market power assessment, include the: (i) presence of constraints imposed by the existing supplies from, and the position on the market of, actual competitors (the market position of the dominant firm and its competitors); (ii) constraints imposed by the credible threat of future expansion by actual competitors or entry by potential competitors (expansion and entry); and (iii) constraints imposed by the bargaining strength of the firm's customers (countervailing buyer power).

83. In the present case, the Tribunal was confined to a consideration of 'market power' since the Commission did not challenge the FTI Report conclusion that Babelegi's market share – even when grossly overestimated – is less than 5%, well short of even the 35% threshold in section 7(b).[157] Notably, the European Commission considers that low market shares are generally a good proxy for the absence of substantial market power.[158] O'Donoghue and Padilla point out that 'very low market shares are considered *definitive indicators of the absence of dominance*. Thus, in *SABA II*, a market share of 10% was considered to be conclusive evidence of the absence of dominance.'[159]

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[157] FTI Report paras 61 – 63 Vol 3 p 293 *ll* 16 – 31. As explained, the Commission did not engage in market definition and was therefore unable to present any version on market share.

[158] Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings (EC Guidance) at para 14 – accessible at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52009XC0224%2801%29. Note: the reference should now be read as a reference to Article 102 of the Treaty on the Functioning of the European Union.

[159] Robert O'Donoghue and Jorge Padilla, *The Law and Economics of Article 102 TFEU* 2 Ed 2013 Chapter 3 p 115. Emphasis supplied.

84. Indeed, even a firm with high market shares may not be considered to hold market power. According to the OFT (now CMA), [160]

'One must also take into account a number of other factors in assessing dominance. For example, despite a high share of the market under any plausible market definition, a firm may not be dominant where one or more of the following hold [such as that] there are very low barriers to entry into the relevant market and the threat of potential entry is sufficient to discipline firms with high market shares.'

85. That such conditions prevailed in the present instance, was clear. The FTI Consulting report discussed examples of switching and new entry into the facial mask market include Cape Union Mart's K-Way brand and First Ascent (both traditionally producing outdoor apparel and accessories), Polo South Africa (clothing), Reliance Clothing in a joint venture with Mike's Sports and Expand A Sign (portable branded gazebos, banners and inflatables). In addition, it noted that entrepreneurs started to manufacture cloth masks on a small scale and that individuals were making masks for personal use by using old t-shirts and the like. Moreover, according to a report attached to the Commission's founding papers, a single dust mask manufacturer in Centurion was producing at least two million masks a month at that time, in response to the outbreak of Covid-19.[161] That is at least 64 500 masks per day. It was FTI's

[160] OFT (July 2001): The role of market definition in monopoly and dominance inquiries. Economic Discussion paper 2, Prepared for the OFT by NERA.
[161] Annexure IL2, particularly at Vol 1 p 40.

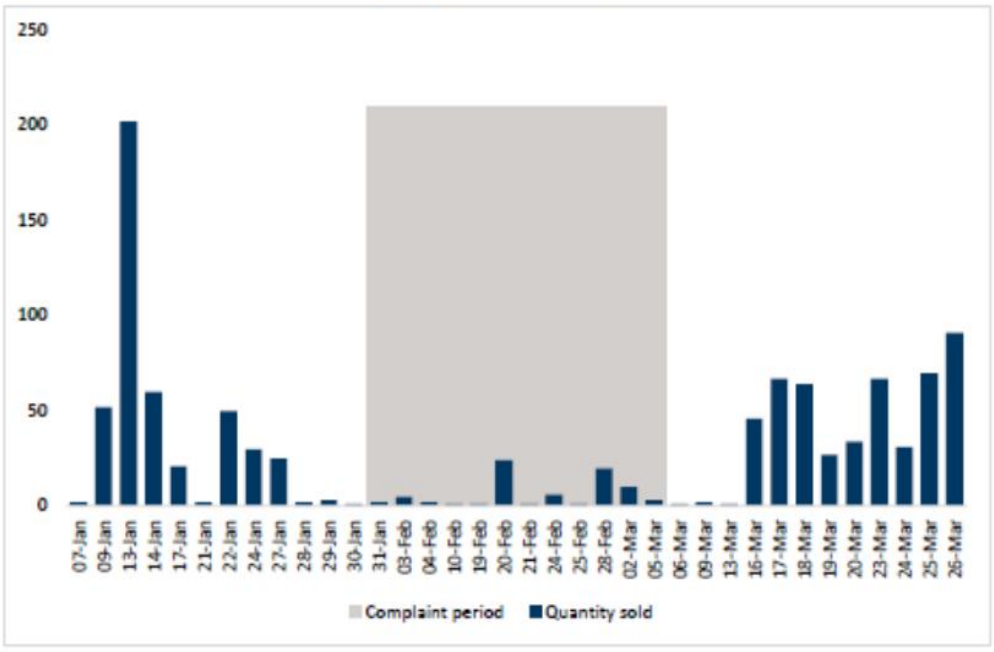
view that Babelegi could not be considered dominant in such a dynamic market.[162]

86. The European Commission adopts an economic definition for market power in that it 'considers that an undertaking which is capable of profitably increasing prices above the competitive level for a significant period of time does not face sufficiently effective competitive constraints and can thus generally be regarded as dominant'.[163] Further, the European Commission observes that 'what is a significant period of time will depend on the product and on the circumstances of the market in question, but normally a period of two years will be sufficient'.[164] [165]

87. On the facts, Babelegi could not price high with impunity. A consideration of sales to customers other than its sister company in the period 1 January to 31 March 2020 reveals a direct relationship between increasing prices and a drop in sales:

[162] At para 56 Vol 3 p 292 *ll* 9 – 18.
[163] EC Guidance at para 11.
[164] EC Guidance at Footnote 6.
[165] The OECD correctly notes that 'Competition authorities may identify "situational monopolies", i.e. situations where a firm holds significant market power during a very narrow amount of time (Costa-Cabral et al., 2020, p. 11[8]).This concept, however, is broadly untested under competition law.' – see OCED, 26 March 2020, Exploitative pricing in the time of COVID-19

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



V.4 Conflation of the test for market power with the test for excessive pricing

88. The OFT (now CMA) explains that: [166]

'An undertaking's conduct in a market or its financial performance may provide evidence that it possesses market power. Depending on other available evidence, it might, for example, be reasonable to infer that an undertaking possesses market power from evidence that it has:

- Set prices *consistently* above an appropriate measure of costs, or
- *Persistently* earned an excessive rate of profit.'

[166] Assessment of Market Power (2004) with emphasis supplied, accessible at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284400/oft415.pdf

89. It points out that high prices or profits alone are not sufficient to shower a firm with substantial market power. In the same vein, O'Donoghue and Padilla explain that relying on abusive conduct as evidence of dominance is problematic in certain respects, *inter alia* as follows:[167]

89.1. first, this approach runs the risk of being circular. A company may be found 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 on actual abusive character. If used at all, this approach should therefore be a complement rather than a substitute for the careful analysis of the market and market conditions in the assessment of dominance;

89.2. second, in exploitative abuses for instance, if it must be shown that excessive prices persist for long periods and the market resists change, dominance is a likely explanation; and

89.3. third, determining if a firm is earning an economic profit requires accounting properly for other factors, for example, the economic risk to generate income.

[167] Supra at Chapter 3 p 129.

90. In addition, Ratshisusu and Mncube point out that 'demand is a relevant factor to the assessment of when prices are excessive because customers are generally willing to pay more for features they consider valuable. Those specific features do not necessarily imply higher production costs, but they increase the economic value of the product. For example, the economic value of hand sanitizers and face masks in the Covid-19 crisis period cannot be measured by any reliable cost-price formula.'[168]

91. Consistently with this, Sutherland & Kempt caution that '[e]vidence of the firm charging excessive prices may seem an obvious indicator of the power to control price, but this should *always be considered in the light of other facts*, including the duration of the excessive pricing and whether the high prices are explained by some factor that is consistent with healthy competition.'[169]

92. The bottom line is this: the test for market power is separate and distinct from excessive pricing. In addition to the foregoing considerations, this is because all forms of abuse of dominance that are prohibited under section 8 (and not only excessive pricing under section 8(1)(a)) are contingent on a finding that a firm is dominant in terms of section 7.

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[168] Hardin Ratshisusu and Liberty Mncube, Addressing excessive pricing concerns in time of the COVID-19 pandemic—a view from South Africa. Journal of Antitrust Enforcement, 2020, 8, pp 256–259

[169] Sutherland & Kemp, Competition Law of South Africa 7.7.6.2(e). Emphasis supplied.

93. In addition, the fact that a firm charges an excessive price does not on its own indicate market power as defined in section 1, as a firm that is found *not* to be dominant may permissibly charge an excessive price. And a firm that *is* dominant and *does* price excessively may still not fall foul of section 8(1)(a), because excessive pricing does not always harm consumers and may (as was recognised in *Sasol*)[170] be a driver of the competitive process.

94. It is therefore necessary to separate the enquiry into market power from the inquiry into whether a firm's conduct constitutes excessive pricing.

95. The Tribunal failed to distinguish between market power and excessive pricing, and instead conflated them:

95.1. At paragraphs 64 to 93, the Tribunal set out its assessment of dominance, as indicated by the paragraphs being prefaced by the heading 'Dominance' and the subheading 'Assessment'. However, instead of having regard to the definition of 'market power', the Tribunal had regard to 'Babelegi's pricing conduct',[171] and considered the context for 'an excessive pricing assessment' rather than for market power.[172] As part of its assessment of dominance, the Tribunal also stated that the 'current

[170] *Sasol* at para 2
[171] Tribunal decision para 67 Vol 6 p 574 *ll* 21 – 24.
[172] Tribunal decision para 68 Vol 6 p 574 / 25 – p 575 / 5.

context … is pricing conduct during a health crisis',[173] and considered 'the economic test for excessive pricing when markets have been disrupted, for example by a crisis such as Covid-19'.[174] It therefore appears that the assessment into the conduct which is alleged to be excessive pricing is conducted instead of an assessment of dominance. This arises because the Tribunal conducted only an economic test for dominance, and did not consider the legal test.[175]

96. The Tribunal's conclusion on market power, under the heading 'Conclusion on market power / dominance and *prima facie* case', is that: [176]

'The above evidence of Babelegi's conduct shows that it 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. *Based on the evidence of its own conduct, and considering the context of Covid-19, 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.* Babelegi is therefore a dominant firm during the Complaint Period in terms of section 7(2) of the Act.'

97. By conflating the test for market power with the test for excessive pricing, the Tribunal failed to determine whether, as a matter of law (rather than as a

[173] Tribunal decision para 69 Vol 6 p 575 *ll* 6 – 13.
[174] Tribunal decision para 70 Vol 6 p 575 *ll* 14 – 15.
[175] Tribunal decision para 92 Vol 6 p 575 *ll* 9 – 13.
[176] Tribunal decision para 152 Vol 6 p 599 *ll* 6 – 13.

matter of economics), Babelegi has market power in terms of section 7 read with section 1 of the Competition Act.

98. As this court had to do in *Sasol*, this case also 'compels this court to engage with all of this complexity and controversy which is inherent in the doctrine of excessive pricing'[177] as well as dominance. However, it is now asked to do so in the 'not ordinary' market circumstances that arise from the Covid-19 pandemic, prior to government intervening through the promulgation of specific regulations aimed at addressing the type of conduct impugned in these proceedings.

V.5 Babelegi is not a dominant firm

99. The irony in this matter, is that Babelegi, by virtue of its most recent financial year, is considered under the Competition Act as a 'small business' insofar as it is treated as a wholesaler, or a 'medium business' insofar as it is treated as a manufacturer,[178] and consequently receives additional protection against unfair pricing practices of dominant firms under section 8(4). Indeed, the Competition Amendment Act, 2018, specifically amends the Competition Act 'to protect and stimulate the growth of small and medium businesses'.[179] This is the category of firm that has been treated as dominant in these proceedings.

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[177] Id.
[178] Competition Act section 1 definition of 'small business' and 'medium business', read with Government Notice 987 in *Government Gazette* 42578 of 12 July 2019 and the Schedule thereto.
[179] Competition Amendment Act, 2018.

100. It is also notable that a firm must enjoy a R5 million turnover to be treated as dominant.[180] Babelegi, as a diversified firm, met this threshold by taking into account the total turnover on all products. However, taking into account only Babelegi's turnover on all types of masks, that threshold would not have been met.[181]

101. Finally, as the discussion on market power reveals, Babelegi's conduct was not consistent with any traditional notion of the existence of market power.

VI. THE INFERENCE ERROR

VI.1 Introduction

102. For purposes of this appeal, Babelegi accepts that worldwide market conditions were affected by Covid-19. It also accepts that markets may be smaller in geographic scope in times of crisis, when there are restrictions on movement. That may notionally lead to parties not generally enjoying market power, having market power in times of crisis.

103. As the Tribunal records, Babelegi also did not challenge the Commission's conclusions on the levels of its price increases and the margins demanded in the Complaint Period.

104. The true question was whether: (i) the market conditions affecting Babelegi showed that *it* gained market power in the Complaint Period; and (ii) the price

[180] Determination of Threshold published under General Notice 253 in *Government Gazette* 22025 of 1 February 2001 as amended by General Notice 562 in *Government Gazette* 22128 of 9 March 2001.
[181] Penalty submissions para 11.2 Vol 4 p 336 *ll* 13 – 14.

was not a competitive price as contemplated by section 8(3) of the Competition Act. Neither of those questions were appropriately considered by the Tribunal, which satisfied itself with a simple consideration of the price charged and inferences drawn therefrom.

VI.2 Inference

105. The Tribunal is obliged to make a finding on the existence or non-existence of alleged facts.[182] A finding of contravention requires '[c]redible evidence' of such contravention,[183] and insufficiency of evidence 'cannot be ignored'.[184] Thus,

> 'There can be no proper inferences drawn unless there are *objective facts* from which to infer the facts sought to be established. *If there are no positively proved facts from which the inference can be drawn, the method of inference fails and what is left is mere speculation.*'[185]

106. In *Oceana Group Ltd and another v Competition Commission*[186] the Tribunal was criticized for drawing inferences from speculative evidence and coming to conclusions not based on the facts.[187] What is required, so held this court, is an assessment of the 'reliability and convincing nature of the evidence

[182] *Competition Commission of SA v Gralio (Pty) Ltd* [2011] 2 CPLR 225 (CAC) ('***Gralio CAC***') at para 51.
[183] *Gralio CAC* at para 52.
[184] *Gralio CAC* at para 51.
[185] *Gralio CAC* para 53. Emphasis supplied.
[186] [2014] 2 CPLR 372 (CAC).
[187] *Oceana* at para 51.

adduced by [all] parties' and a consideration 'whether this evidence, read carefully as a whole, can sustain the conclusions reached'.[188]

107. Whilst *Oceana* is a judgment relating to a merger, the sage advice to the Tribunal on the assessment of evidence finds equal application in the prohibited practice realm. The general rule that appears from the *dicta* of the Tribunal and this court is that the evidence must be evaluated as a whole, and that conclusions reached must be based on facts derived from that evidence, as opposed to speculation as to what might have happened.

107.1. That approach is mandated by the South African approach to evidence more generally. In *S v Naik*[189] the court referred to what had been said by Lord Wright in *Caswell v Powell Duffryn Associated Collieries Ltd:*[190] 'Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish … But if there can be no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture'.

[188] *Oceana* at para 50.
[189] 1969 (2) SA 231 (N) at 234.
[190] 1940 AC 152 169; 1939 3 All ER 722 at 733.

107.2. It is also consistent with the European approach to evidence in the competition sphere, requiring the evidence to be 'sufficiently precise, consistent and convincing'.[191]

108. Overall, at the very least, any inferences drawn must be the most readily apparent and acceptable inferences in the circumstances.[192]

109. In the present case, the Tribunal decision is rife with speculation and inference. Examples include the following statements:

109.1. 'An international or global spike in demand for products such as masks *could* mean that import channels are no longer available for the importation of masks into South Africa, or that masks are not available in South Africa for local use because they are being exported from South Africa due to the increased international demand for masks. In other words, a twofold challenge *may* present itself: a surging domestic and global demand for masks and a major disruption to the global supply of masks'.[193]

109.2. '… an event related to Covid-19, or a step taken to combat Covid-19 *may* trigger a number of other steps or effects'.[194]

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[191] See discussion in *Omnico (Pty) Ltd and another v Competition Commission and others* [2016] 2 CPLR 398 (CAC) at para 58, by reference to *European Commission v Tetra Laval* case C-12/03 [2005] ECR I-987.
[192] *AA Onderlinge Assuransie-Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A); see also *Cooper and Another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA).
[193] Tribunal decision para 12 Vol 6 p 561 *ll* 13 – 18. Emphasis supplied.
[194] Tribunal decision para 13.2 Vol 6 p 562 *ll* 4 – 5. Emphasis supplied.

109.3. 'Given [Covid-19's] global scale and effects, many markets *may* have been affected or distorted'.[195]

109.4. 'It is *common knowledge* that the global spread of Covid-19 increased the demand for personal protective equipment and gear, which include face masks'.[196]

109.5. 'In crisis situations such as the Covid-19 health crisis, there are *typically* abnormal disruptions to certain markets …. This *may* confer upon the firms, for example retailers or distributors holding stock, or local producers of relevant items, market power'.[197]

109.6. 'In this case Babelegi *may* have market power in the Complaint Period'.[198]

109.7. 'In the circumstances of Covid-19 even small firms may have market power'.[199]

109.8. 'The circumstances of the Covid-19 crisis *can* provide the conditions for market power to be conferred'.[200]

110. But which *facts* were available to it that Babelegi actually held market power in these circumstances? None, other than the price increases, which are not properly to be taken into account in isolation, given the criticisms against such an approach discussed hereinabove.

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[195] Tribunal decision para 13.3 Vol 6 p 562 // 6 – 7. Emphasis supplied.
[196] Tribunal decision para 14 Vol 6 p 562 // 8 – 9. Emphasis supplied.
[197] Tribunal decision para 75 Vol 6 p 576 // 10 – 15. Emphasis supplied.
[198] Tribunal decision para 76 Vol 6 p 576 // 19 – 20. Emphasis supplied.
[199] Tribunal decision para 80 Vol 6 p 578 // 3 – 4. Emphasis supplied.
[200] Tribunal decision para 89 Vol 6 p 578 // 16 -17. Emphasis supplied.

111. The same facts – pricing and no actual purchase from a supplier at an increased price – were used to come to the conclusion that the price was excessive within the meaning of the statute, that is above the competitive level. Because the Tribunal relied on inference and speculation, it failed to actually consider the appropriate test under section 8, and the facts relevant thereto, as is discussed more fully in the next section of the heads.

VII. EXCESSIVE PRICING

VII.1 Introduction

112. Prior to the amendment effected in 2019, the Competition Act provided for application of the test put forward in *United Brands* in Europe: section 1 determined that an 'excessive price' meant ' a price for a good or service that bears no reasonable relation to the economic value of that good or service; and is higher in value'. The meaning of the phrase 'excessive pricing' was considered in two cases before this court, but shortly after the phrase was clarified, the definition in section 1 was removed and replaced by the broader, more discretionary approach provided for in section 8(3).

113. It is submitted that the construction of section 8(3) demands the reader to determine whether a price is higher than a competitive price and if the difference between the price charged and the competitive price is unreasonable. These are the fundamental considerations under section 8(3).

The various factors listed in the subsections to 8(3) are factors to be brought into account in the assessment of these fundamental considerations.

VII.2 Relevant factors

114. Sub-section 3: fundamental test of relationship to competitive price

114.1. The search for what a '*competitive price*' might be cannot be limited to a consideration of the prices paid and charged by a respondent alone. This appears clearly from the variety of relevant factors identified in the various subsections to section 8(3).

114.2. The recognition in the amendment to the Competition Act that a number of factors ought to be brought into account gives expression to the observations of this court in *Mittal*[201] that 'in determining the economic value of a good or service, the cost savings to the firm resulting from the subsidised loan or the lower than market rental – *or indeed any other special advantage, current or historical, that serves to reduce the particular firm's costs below the notional competitive norm ought to be disregarded.* Thus economic value is a *notional objective competitive-market standard, and not one derived from circumstances peculiar to the particular firm.* If the firm's price is no higher than the economic value, no contravention of section 8(a) can arise'.[202]

[201] *Mittal* at para 43.
[202] Emphasis supplied.

114.3. Although the test is no longer 'economic value' but now refers to a 'competitive price', the considerations remain the same. In *Mittal*,[203] this court made reference to *Napp Pharmaceutical Holdings Ltd & Others v General of Fair Trading,*[204] where it was remarked that:

'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 the 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 excessive prices, although there are, no doubt, other methods'.

114.4. Motta & De Streel make the point that 'a competitive price is not only determined by supply-side factors (in particular the cost of production), but also by demand-side factors (demand elasticity, willingness and ability to pay)'.[205]

114.5. The Commission's case really paid no attention to the level of the competitive price. The Commission did not discharge the duty of proving a price level above the competitive level, since its founding papers

[203] Supra at para 48.
[204] [2002] CAT 1 para 392.
[205] Motta & De Streel p 33.

assumed that reliance on the test in the Consumer Protection Regulations was sufficient. It was not. The Tribunal erred in condoning the Commission's failure in this regard.

115. Sub-section 8(3): fundamental test of reasonableness

115.1. Section 8(3) demands of the person determining whether a price is excessive to consider the reasonableness of a price found to be higher than a competitive price. The section thus retains the reasonableness assessment that was to be found under section 8(*a*) of the Competition Act prior to amendment.

115.2. In the view of this court, 'a proportionality enquiry appears to be indicated to determine the reasonableness component of the test for excessive pricing'.[206] According to the case precedent, the assessment of reasonableness (unlike economic value) entails a consideration of 'circumstances peculiar to the particular dominant firm'.[207]

115.3. One of the relevant circumstances that cannot be discounted, must be cost increases that had been announced (even if Babelegi was not yet making purchases at that price). Another is that Babelegi does not manufacture masks itself, but purchases them from suppliers.

[206] *Sasol* at para 162.
[207] *Mittal* supra at para 43.

116. Sub-section 8(3)(*a*): Price-cost margin, internal rate of return, return on capital invested or profit history

116.1. In *Sasol*[208] this court relied on the unreported European decision in *Scandlines Sbverige AJ Helsingborg,* in which it was specifically noted that:

'While a comparison of prices and costs, which reveals the profit margin, of a particular company may serve as a *first step in the analysis (if at all possible to calculate), this in itself cannot be conclusive as regards the existence of an abuse under Article 82'*.[209]

116.2. Consistently with that, the matters listed in section 8(3)(*a*) are but part of the factors to be taken into account in the assessment of whether a price is excessive.

116.3. The prices charged and the margins were common cause. On a small number of sales in the Complaint Period, margins were very high, taking into account the historical purchase price of stock in hand. But they brought into account expected increases and the cost of replacing the stock, in line with OECD recognition that anticipated costs may be brought into account, as discussed in the analysis of the Tribunal's decision.

[208] Supra at paras 103 - 104.
[209] Emphasis supplied.

116.4. The court's attention is drawn to the analysis in paragraphs 83 and 84 of the FTI Report, which is illustrative of the effect on Babelegi if it did not increase its selling price.[210]

117. Sub-section 8(3)(*b*): The respondent's prices

117.1. The prices charged by Babelegi in the Complaint Period are common cause.

117.2. The consideration of the reasonableness of Babelegi's prices includes the anticipated higher supply prices as discussed in the previous section.

118. Sub-section 8(3)(*c*): Comparator firm prices and level of profits in a competitive market

118.1. In *Mittal*[211] this court recognised as a factor to be brought into account whether the actual price is shown 'to exceed the normal price for roughly similar products to a degree which is, on the face of it, utterly exorbitant'. In order to determine whether a price and/or levels of profit have this quality, the position in the market must be assessed. The consideration of the factor identified in section 8(3)(c) seeks to address this.

118.2. The Commission's superficial investigation that led to the Complaint Referral apparently did not include any consideration of comparator firm prices and level of profits in a competitive market. There is certainly no

[210] FTI Report paras 83 – 84 Vol 3 p 299 // 5 – 15.
[211] Supra at para 49.

reference to the prices demanded by any other suppliers in the period to be found in the Complaint Referral. The best evidence available is as set out in paragraph 68 of the FTI Report.[212] It stood uncontested.

118.3. When it suited its narrative, the Commission (in presenting the case) and the Tribunal (in deciding the matter) relied on the Complaint Period as an 'abnormal period' that led to dominance on the part of Babelegi, emphasizing 'unprecedented demand'. Both thus sought to equate the Complaint Period to the period of national disaster, but refused to accept price implications of heightened demand that were evident during the period of national disaster. The Tribunal was also dismissive of warnings of increased prices and supply limitations as set out in Appendix 2 to the FTI Report,[213] in the Complaint Period.

118.4. It was no answer for the Commission to say that during this period there was price gouging by a number of firms and so referencing the price gouging of others did not redeem Babelegi and its behaviour. Neither was it open to the Tribunal to reach that conclusion without any evidence other than the Commission's say-so.

[212] Vol 6 p 295 // 7 – 12.
[213] Vol 3 p 306.

119. Sub-section 8(3)(*d*): The length of time the prices have been charged at that level

119.1. The factor concerning the length of time that prices have been charged at the level complained of is a particularly relevant consideration in the present context. The inclusion of this consideration in the amended statute gives expression to the internationally accepted view that a supplier can only be found guilty of excessive pricing if prices are set significantly and 'persistently' above the competitive level as a result of market power. This means that sufficient time needs to pass to observe if price increases persist.

119.2. The Complaint Period spans little more than a month. Factually, there is no evidence of persistence, and indeed, Babelegi's margin returned to normal by 19 March 2020, on the Commission's own analysis.[214]

120. Section 8(3)(*e*): Structural characteristics of the relevant market

120.1. Motta and De Streel have argued that that exceptional circumstances justify resorting to excessive pricing actions.[215] In the context of the European Union, they suggested a four-condition test in 2003: (i) high and non-transitory barriers to entry leading to a monopoly or near monopoly; (ii) this (near) monopoly being due to current or past exclusive or special

[214] Commission Supplementary Economic Report Table 2 Vol 4 p 353.
[215] 'Excessive Pricing in Competition Law: Never say Never?' in *The Pros and Cons of High Prices* Konkurrensverket Swedish Competition Authority 2007.

rights; (iii) no effective means to eliminate the entry barriers; and (iv) no sector regulator being competent to regulate the excessive prices.[216] The authors hold the view that in respect of excessive prices, 'the conditions for antitrust intervention should be very strict'.[217]

120.2. According to Motta and De Streel's analysis in 2007, the 'exceptional circumstances' that justify the use of excessive pricing actions are:

120.2.1. high and non-transitory entry barriers leading to a super dominant position;[218]

120.2.2. the super-dominant position is due to current/past exclusive/special rights or to un-condemned past exclusionary anticompetitive practices;[219] and

120.2.3. no sector-specific regulator has jurisdiction to solve the matters.[220]

120.3. This court made reference to Motta and De Streel's writing in *Mittal,*[221] although it criticised the Tribunal for dealing with market structure rather than price level.[222] Of course, that criticism was lodged at a time before the introduction of section 8(3)(e), which now expressly demands consideration of market structure as one of the factors relevant to determining whether a firm can be found to have contravened section

[216] At p 14.
[217] At p 15.
[218] At pp 22 – 23.
[219] At pp 24 – 26.
[220] At pp 26 – 29.
[221] Supra at para 77 read with fn 135.
[222] *Mittal* supra at para 28.

8(1)(*a*). The criticism no longer holds the force that it did at the time *Mittal* was heard and determined. Section 8(3)(e) now sets market structure as a relevant factor to be brought into account. It makes specific reference to market share, the degree of contestability of the market, barriers to entry and past or current advantage not due to the respondent's own commercial efficiency or investment.

120.4. An analysis of the facts of this case indicate that the market structure does not suggest the appropriate application of the excessive pricing provision.

120.5. *Market share*

120.5.1. The Commission deliberately elected not to conduct a market share calculation. It also did not comment on the market share analysis contained in the FTI Report, as discussed above. That analysis – which renders a 4.7% market share for FFP1 masks stands uncontested.

120.5.2. The market share is most likely a gross overestimate in the context of the case: the Commission argued (and the Tribunal found) that FFP1 masks are being used by members of the public as a means of protecting themselves and others against the spread of Covid-19. That must mean that the market is much broader than FFP1 dust masks. But even if the market is confined to dust masks, the market shares must be taken to be insignificant. Babelegi sold 76 boxes of

masks to third parties in the complaint period, that is 1 520 masks over the period of a month. At that time, a single dust mask manufacturer in Centurion was producing at least 2 million masks a month, according to a report the Commission relies on, as discussed. When imports are brought into account, the number of masks available in the market must be taken to be significantly more.

120.6. *Degree of contestability and barriers to entry*

120.6.1. The evidence on contestability of the market through substitution stood uncontested.

120.7. *Past or current advantage*

120.7.1. There is no evidence on the record to suggest that Babelegi enjoyed past or current advantage as contemplated in section 8(3)(e).

121. Section 8(3)(*f*): Regulations

121.1. The Consumer Protection Regulations purportedly are regulations under section 8(3)(*f*). But they found no application. The Tribunal, disregarding the various relevant factors in section 8(3), simply imported the test under the regulations through the back door. It then give primacy to the imported test over all of the factors listed by the legislature in section 8(3), on the basis that it enjoys a discretion. We submit that discretion was not rationally exercised.

VIII. THE RED HERRING OF 'PRICE GOUGING'

122. In considering the appropriate economic test to apply in the determination of whether a price is excessive within the context of the Covid-19 pandemic, the Tribunal came to the conclusion that the test in these circumstances is a simplistic one, being whether a firm's price or mark up or margin increased materially relative to what was previously charged or applied, and if so, whether that increase is justified by any cost increases from a supplier further up the value chain.[223]

123. The Tribunal found support for this economic test in the approach taken by many states in the United States in their application of price gouging prohibitions in times of crisis.[224] Although varying laws apply in the different states, generally these laws prohibit an increase in price of essential goods and services above a certain threshold or ceiling (usually above a given percentage of the average price preceding the state of emergency), and many allow for a price increase if there is a legitimate cost increase due to the state of emergency.[225]

124. These price gouging prohibitions, which seek to protect vulnerable consumers from short-term exploitation in relation to essential goods and services in a time of crisis must, however, be considered in context.

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[223] Tribunal decision para 98 Vol 6 p 562.
[224] Tribunal decision paras 102 – 103 Vol 6 pp 583 - 584.
[225] Price Gouging Laws by State, available at https://consumer.findlaw.com/consumer-transactions/price-gouging-laws-by-state.html.

125. The United States' antitrust laws do not make provision for excessive pricing contraventions, and therefore agencies are not empowered to act directly against exploitative pricing abuses under competition laws. To prevent exploitative pricing of certain goods and services during periods of abnormal supply disruption, the authorities must rely on instruments such as price gouging prohibitions or consumer protection laws, and in this respect President Trump on 23 March 2020 signed an executive order for purposes of preventing price gouging and hoarding of essential goods and services services needed to respond to the Covid-19 pandemic. Importantly, unlike provisions contained in European and South African competition law, these price gouging prohibitions and consumer protection laws apply to any firm – regardless of the existence of market power.[226] In addition, in most states, price gouging prohibitions take effect only upon the declaration of a state of emergency.[227]

126. Price gouging prohibitions must therefore be contrasted with exploitative pricing practices which fall within the scope of competition law in South Africa and Europe. In these jurisdictions, exploitative pricing amounts to an abusive practice by a dominant firm. Competition agencies therefore have to establish

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[226] *Exploitative pricing in the time of COVID-19,* accessible http://www.oecd.org/competition/Exploitative-pricing-in-the-time-of-COVID-19.pdf..

[227] So, for example, the Alabama law is applied to conduct '*during a declared state of emergency*', the Arkansas law is applicable to conduct '*after a declared state of emergency*', as is the California law. The same is true of the Connecticut law and law applicable in the District of Columbia. The situation is the same in Florida and Georgia, and the Hawaiian law applied to increases in price after declaration of a state of emergency. The Idaho law also applies only after a declaration of a state of emergency, as does the Illinois law and the Kentucky law. See AA para 81.3 Vol 2 p 161 / 20 – p 162 / 10.

that the firm in question has a dominant position, and that abusive pricing conduct took place. This requires a full analysis of the market conditions and the constraints posed by the relevant crisis, and a consideration of various methods used to identify excessive prices, including price-cost tests, price-comparisons, profitability analysis, and a combination of various methods.[228]

127. Different public policy rationales apply when contrasting price gouging prohibitions and excessive pricing abuses under competition law.[229] Although the principles relating to price gouging can be instructive in determining whether the price of face masks is excessive within the context of face masks sold during the Covid-19 crisis, these principles cannot supplant the enquiry required in terms of the provisions of section 8(1)(a) of the Competition Act.

128. To the extent that 'price gouging' can be considered a species of excessive pricing,[230] the onus was on the Commission to make out a case against Babelegi of excessive pricing within the confines of section 8(1)(a) of the Competition Act, read together with section 8(2) and section 8(3).

129. This means that the Commission was required to plead and prove all elements of a section 8(1)(a) contravention for Babelegi to have engaged in excessive pricing in contravention of the Competition Act. As set out above, the section

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[228] Jenny, F (2018), "Abuse of Dominance by Firms Charging Excessive or Unfair Prices: An Assessment"; *Mittal; Sasol; United Brands*; *Akka v Laa* Case C-177/16..

[229] *Exploitative pricing in the time of COVID-19,* accessible http://www.oecd.org/competition/Exploitative-pricing-in-the-time-of-COVID-19.pdf.

[230] Tribunal decision para 98 Vol 6 p 582.

contemplates a broad and holistic enquiry into whether a price is excessive on the basis of all relevant factors as set out in section 8(3). These factors are effectively a codification of the principles applicable to determining whether a price is excessive as laid down by this court in *Mittal* and *Sasol*.

130. Practically, this entails that the Tribunal is required in an excessive pricing enquiry to have regard to the structural characteristics of the relevant market; the respondent firm's profitability; comparisons to the respondent firm's prices in other contexts or markets, or to the prices charged by comparable firms; the competitive constraints imposed on the respondent firm; and the economic conditions that existed at the time of the respondent firm's conduct.

131. In this case the Tribunal misdirected itself in purporting to conduct this enquiry as required in section 8(1)(a), but in doing so disregarding or failing to give sufficient weight to evidence before it in respect of these factors. The Tribunal failed to assess by reference to evidence before it whether the prices charged by Babelegi were above the competitive price and/or whether the pricing was unreasonable in the circumstances, and within the particular context and characteristics of the market and the competitive forces and constraints that prevailed during the relevant period. This failure included a failure to account for economic cost, which includes, *inter alia,* reasonable return and risk. [231]

132. In failing to conduct the full assessment required and electing rather to apply

[231] Notice of Appeal paras 6.6 and 8 Vol 6 p 619.

the simple economic test which it ultimately relied on, the Tribunal effectively crafted a test under section 8(1)(a) to specifically suit the unique and exceptional circumstances of a National State of Disaster as a result of the Covid-19 pandemic.[232]

133. While it may be that, during the context of a crisis such as the one brought about by the Covid-19 pandemic, it is particularly instructive to rely on price-cost analysis and pricing benchmarks in conducting an enquiry into whether a price is excessive, ultimately a careful analysis of market conditions and a firm's behaviour within those conditions needs to be conducted.

134. The Tribunal, in concluding the simplistic economic test was appropriate in this case, failed to conduct this careful analysis. Instead, it effectively imported the test for price gouging as applied in other jurisdictions including the United States within the context of a section 8(1)(a) case for excessive pricing, when it is not supported by the wording of section 8(1)(a), read together with section 8(2) and section 8(3) of the Competition Act.[233] .[234] That is a test which happens to accord with the one contained in the (ostensibly non-applicable) Consumer Protection Regulations.

135. In this regard our courts have cautioned that relying on precedent from foreign

[232] Notice of Appeal paras 6.2 and 6.3 Vol 6 p 618.
[233] Notice of Appeal para 9 Vol 6 p 619.
[234] Notice of Appeal para 9 Vol 6 p 619.

jurisdictions requires circumspection.[235]

IX. THE FINE

IX.1 Introduction

136. The Tribunal imposed a penalty of R76 040 on Babelegi. Babelegi's position, for the reasons as set out above, is that the Tribunal erred in finding that it had contravened section 8(1)(a) of the Competition Act for the Complaint Period. Accordingly, it is submitted that the Tribunal's decision to impose an administrative penalty on Babelegi must be set aside.

137. Even if this court were to uphold the finding of contravention, the penalty imposed must be set aside: this court is entitled to interfere with an administrative penalty on appeal if the Tribunal exercised its discretion in calculating the penalty on wrong principle.

138. The Tribunal's penalty calculation is wholly inappropriate. It paid mere lip service to the six-step methodology in *Aveng*, as a cover for a penalty calculation based on multiplying 'excessive profits'. In doing so, the Tribunal sought carefully to avoid the criticisms against the use of the 'treble damages' principles contended for by the Commission, by 'limiting' the multiplication to two and a half. It could hardly have been more obvious in its attempt to impose a penalty akin to 'treble damages' in the face of criticism. Although purporting

[235] *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) at para 26; *S v Makwanyane* 1995 (3) SA 391 (CC) at para 39.

to apply the six-step methodology, it jettisoned completely the calculation rendered by the first four steps, in order to use the 'excessive profit' calculation to determine the penalty. Its discussion of the penalty is infused with moral outrage targeted at Babelegi that it 'should have known better', in a manner of speaking. This, despite the Tribunal's own recognition in earlier cases that the South African penalty regime is 'not a criminal one' and that 'competition transgressions contain no moral or normatively condemnatory aspect'.

IX.2 The law on penalties

139. The power of the Tribunal to impose penalties derives from section 58(1)(a)(iii) of the Competition Act. The Tribunal 'may', in terms of that provision, 'make an *appropriate order* in relation to a prohibited practice' and such order may include the imposition of 'an administrative penalty in terms of section 59'. Section 59(3) prescribes the factors that 'must' be taken into account in the calculation of the appropriate penalty.

140. The 2019 amendment to the Competition Act now requires the Tribunal, under section 59(3)(d), to bring into account the market circumstances in which the contravention took place, 'including whether, and to what extent, the contravention had an impact upon small and medium businesses'.

141. Whilst there is no scientific approach to the calculation of penalties, the guiding principle is fairness and proportionality: there needs to be 'proportionality between the sanction and the firm's degree of blameworthiness and that the

penalty should not only advance the object of deterrence but also not lose sight of fairness to the offending firm'.

IX.3 Inappropriate departure from established penalty calculation principles

142. In *Aveng*[236] the Tribunal developed the six-step methodology for calculating an appropriate penalty. In *Reinforcing Mesh Solutions (Pty) Ltd and others v Competition Commission and others*,[237] this court approved of the Tribunal's approach to calculating a penalty, in line with its earlier finding that it was necessary to adopt the most plausible and justifiable means to substantiate the determination of the penalty, after examining the section 59(3) factors.

143. The judgment in *Isipani Construction (Pty) Ltd v Competition Commission*[238] allows for departure from that methodology where it is appropriate. However, in the present case, the Tribunal asserted that it was not departing from the six-step methodology. And yet it did.

144. Notably, there was no basis for departing from accepted case precedent and guidelines, and that the Commission has not properly motivated for such a basis. It certainly did not make out a case for such an approach in its founding papers, or even in replying papers.

[236] Supra.
[237] [2013]2 CPLR 455 (CAC).
[238] [2017] ZACAC 3 (14 September 2017) at para 79.

IX.4 The penalty is punishment for Babelegi exercising its right to adjudication

145. In the period from 20 April 2020 to 6 August 2020, the Tribunal confirmed 31 consent agreements with firms alleged to have contravened excessive pricing provisions of the Competition Act read together with the Consumer Protection Regulations. An estimated 93% involve SMMEs, who appear to have settled to avoid protracted (and expensive) litigation: about 26% of the firms expressly denied contravention of the excessive pricing provisions of the Competition Act.[239] By and large, the penalties and/or donations demanded were nominal amounts, with the only penalties exceeding those imposed on Babelegi appearing to have been imposed on much larger firms, with higher turnover and/or a national footprint.

146. Despite the Tribunal's recognition of Babelegi's cooperation, it gave Babelegi no credit.

147. Section 34 of the Constitution provides that 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'. It is inappropriate and unconstitutional for the Tribunal to record that Babelegi's insistence that it was not a dominant firm required of the Commission to 'focus its resources during the lockdown period towards the prosecution of the matter'. Babelegi was entitled to test the

[239] These estimations are based on consideration of the non-confidential information in the consent orders

entirely novel proposition that it, with a market share of less than 5%, in a time period prior to the declaration of a disaster, was to be treated as a dominant firm under the Competition Act.

148. The approach is particularly inappropriate in circumstances where Babelegi had offered to make a donation of goods with a value of approximately R100 000 prior to referral, and later offered settlement on the basis of a R50 000 penalty. As Babelegi pointed out:

'Had the Commission acted reasonably, it might have not created the drama and publicity of a referral on the eve of the Easter weekend (and concomitant adverse publicity for Babelegi), but it could have had either a donation worth R100 000 or an agreed penalty of R50 000. As the Commission persisted with prosecution in the face of these offers, Babelegi's ability to make a donation or payment has diminished.'

X. CONCLUSION

149. There can be no doubt that, in times of crisis, governments may exhibit a greater desire to regulate pricing of essential goods to consumers. However, as the OECD recognises, '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'.[240]

[240] *Exploitative pricing in the time of COVID-19,* accessible http://www.oecd.org/competition/Exploitative-pricing-in-the-time-of-COVID-19.pdf.

150. In *Goldfields Ltd v Harmony Gold Mining Company Ltd*[241] this court made the point, reiterated in *Mittal*[242] that 'great care should be taken to ensure that a purposive approach to the interpretation of the [Competition] Act engages with the wording of the Act and its overall architecture, rather than seeking to ignore the latter in order to promote a particular policy objective which is both contested and controversial'.

151. The sentiment applies with great force in the context of the present case. The Tribunal cannot ignore the absence of relevant facts. It can also not bring into account atmospheric allegations and submissions on the build-up to the declaration of Covid-19 as a pandemic, and the protection of the public interest in a time of crisis to infuse the Competition Act with meaning not to be found in its text. The mere fact that a national disaster was declared some two weeks after the relevant Complaint Period cannot be relied upon to introduce into South African law a notion of 'temporary market power' that is sufficient to establish dominance within the meaning of section 7(*c*) without the need to even attempt market definition, and to subject a small business to an excessive pricing finding when the factors that would demand excessive pricing analysis are not even present.

[241] Case No 43/CAC/Nov04.
[242] Supra at para 27.

152. Babelegi prays for an order upholding the appeal with costs, including the costs occasioned by the employment of two counsel.

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14 August 2020