IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CASE NO: 186/CAC/JUN20

CT CASE NO: CR003Apr20

CC CASE NO: 2020Mar00101/2020Mar0063

In the matter between:

BABELEGI WORKWEAR AND INDUSTRIAL SUPPLIES CC Appellant

and

COMPETITION COMMISSION OF SOUTH AFRICA Respondent

RESPONDENT'S HEADS OF ARGUMENT

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INTRODUCTION

1. It has been universally recognised that the conoravirus pandemic has been a "*global disaster*".[1] The outbreak and rampant spread of the novel coronavirus worldwide has had a tremendous negative impact on the health, income and social welfare of individuals and on the normal functioning of markets.

2. In South Africa this has been observed most markedly in the disruption of supply and demand of essential products, including the Dust Mask FFP1 Pioneer ("FFP1 masks") that are the subject of the complaint referral in this matter.[2]

3. As set out more fully below, Babelegi shamelessly took advantage of the disruption in supply and demand brought about by the pandemic to repeatedly increase its prices for FFP1 masks by astonishing amounts during the period 31 January to 5 March 2020 (the "complaint period"). Over that period, Babelegi increased its prices for FFP1 masks, through a series of price increases, by a total of 888%, from R50.60 per box of 20, excluding VAT ("per box") to R500 per box. This reflected an increase in Babelegi's margin on sales of FFP1 masks from 23% to 1119% over the

[1] *Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others* (5807/2020) [2020] ZAWCHC 56 (26 June 2020), at para 156.

[2] Babelegi Appeal Record (Record) Vol. 1 p137 para 41.3, and Record Vol. 1 p 141 para 50.5; Order and Reasons for Decision, Record Vol. 6 p 562 para 14 - lines 8 – 15. Record Vol. 2 p137 para 41.3, and Record Vol. 2 p 141 para 50.5; FTI Economic report para 48 Record Vol. 3 p 290 – line 25.

complaint period, which yielded a weighted average mark-up of over 500% over that period.[3] These price increases by Babelegi are common cause.

4. Remarkably, there was no increase in Babelegi's costs of procuring FFP1 masks over this entire period. All that had changed was the disruption in supply and demand for such markets brought about by the pandemic. The only reason subsequently proferred by Babelegi for its conduct was that it anticipated that its costs of procuring FFP masks might increase in the future, and that it needed to increase its prices to cover that anticipated cost increase.

5. However, as we show below, this was an *ex post facto* rationalisation. It was a wholly unsubstantiated claim that was inconsistent with the evidence regarding the manner in which Babelegi priced its products before, during and after the complaint period. Furthermore, the evidence relied on by Babelegi for its alleged anticipation of future cost increases did not remotely justify the massive price increases repeatedly pushed through by Babelegi over the course of the complaint period. Babelegi therefore failed to provide any satisfactory explanation for its dramatic price increases.

6. In the circumstances, the only conclusion to be drawn is that Babelegi's conduct reflected price-gouging through the exploitation of the market power it enjoyed as a result of the dislocation in supply and demand for FFP1 masks brought about by the coronavirus pandemic. This price-

[3] Record, Vol. 2, Commission's Supporting Affidavit, pp. 114 - 117, paras 59 – 67 read together with the answering affidavit at Record, Vol. 2, p.176 paras 106.1 – 1064.

gouging conduct was, furthermore, to the detriment of consumers who were desperate for FFP1 masks in order to protect them from the health dangers associated with the coronavirus.

7. We submit, in the circumstances, that Babelegi's conduct constituted the most egregious form of excessive pricing in contravention of section 8(1)(a) of the Competition Act, 89 of 1998 (the "Act").[4] It constituted the naked exploitation of consumers who were at their most vulnerable in seeking to protect themselves agains the ravages of the coronavirus. As such, the Tribunal was wholly justified in finding that Babelegi's conduct constituted a contravention of section 8(1)(a) of the Act and in imposing an administrative penalty of R76 040 on it. Indeed, we submit that this penalty was an extremely modest one in the circumstances.

8. We accordingly submit that there is no merit in Babelegi's appeal, and that it falls to be dismissed with costs.

ISSUES ON APPEAL

9. We submit that there are two principal questions raised in this appeal:

9.1. Firstly, whether the unique and unprecedented economic

[4] It is common cause that "price gouging" is a species of excessive pricing, and is to be determined in terms of section 8(1)(a) (Record, Vol. 5, Transcript, p 488 lines 2 – 8; and Record Vol 5. p 502 lines 2 - 3.)

circumstances brought about by the COVID-19 conferred market power on Babelegi as contemplated in section 7(c) of the Act; and

9.2. Secondly, whether Babelegi's dramatic price increases of products sought by consumers in order to protect themselves in the pandemic, constituted an abuse of that market power in contravention of section 8(1)(a) of the Act.

10. Context matters, and we demonstrate below that:

10.1. in the context created by the onset of coronavirus pandemic, Babelegi was a dominant firm with market power;

10.2. Its increased prices were excessive;

10.3. Babelegi has failed to show that its increased prices were reasonable; and

10.4. The penalty imposed on it was appropriate in the circumstances.

11. We note that the Commission's case in the Tribunal was not based on the Consumer Protection and National Disaster Management Regulations published by the Minister of Trade and Industry on 19 March 2020 (the "Regulations"). It is accordingly not necessary in this case for this Court to consider the impact of the Regulations on the prosecution of excessive pricing complaints.

12. The structure of these heads of argument is as follows:

12.1. First, we provide the context in which we submit this matter should

be determined.

12.2. Second, we consider the relevant statutory framework in terms of which Babelegi's conduct must be assessed.

12.3. Third, we address the principles that should govern the determination of this appeal.

12.4. Fourth, we demonstrate that Babelegi's pricing conduct during the complaint period clearly constituted excessive pricing.

12.5. Fifth, we show that the penalty imposed on Babelegi was appropriate, and there is no warrant to interfere with the Tribunal's exercise of its discretion in that regard.

12.6. Finally, we deal with Babelegi's contentions on urgency, and the approach this Court should take to costs.

RELEVANT CONTEXT

13. The purpose of the Act is, *inter alia*, to promote and maintain competition in the Republic in order to provide consumers with competitive prices and product choices[5] and, importantly, to advance the social and economic welfare of South Africans.[6]

14. This matter must be considered within the context of the current

[5] Section 2(b) of the Act.
[6] Section 2(c) of the Act.

unprecedented health crisis,[7] which has brought about an unparalleled demand for FFP1 masks. Babelegi accepts that this case should be considered within the context of a period of a pandemic or a national disaster, such as COVID- 19.[8]

15. Since the onset of the coronavirus pandemic, FFP1 masks have been used by members of the public as a means of protecting themselves and others against the spread of the potentially fatal COVID-19 virus.[9] It is common cause that this has led to panic buying of face masks, including FFP1 masks.[10] It is for that reason that face masks have been declared an essential good.[11]

16. It is this context of the coronavirus pandemic and the surge in demand for face masks that Babelegi's conduct during the complaint period must be assessed. This context has afforded Babelegi the opportunity to exploit consumers and customers, by charging an excessive price for its FFP1 masks. Babelegi's pricing conduct is a direct response to and as a result of the COVID-19 pandemic and its unprecedented impact on the world in general, including South Africa.

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[7] *Muhammed Bin Hassim Mohammed and Others v The President of the Republic of South Africa and Others* (Case No.21402/20) at para 10

[8] Record, Vol. 5, Transcript, p 487 lines 15 – 19.

[9] Record, Vol. 2, Answering Affidavit, p. 175 lines 11 – 13.

[10] Record, Vol. 2, Answering Affidavit, p. 166 para 86.3.2.3 lines 15 – 17.

[11] See Annexures A and B to the Regulations, and the Amendments to the Disaster Management Regulations, published in Government Notice No. 398 of Government Gazette 43148 on 25 March 2020.

17. Price increases applied in an emergency, such as the present crisis, have the most detrimental impact on poor individuals and families, as well as small businesses, who are already the most vulnerable during such crisis. Such price increases can put basic necessities out of the reach of poor people who desperately need them to protect themselves and their families, and impose high costs on small businesses seeking to protect their employees.[12]

18. The expedient investigation, prosecution and adjudication of excessive pricing cases (including the present matter), in the midst of the COVID-19 pandemic, is necessary to curb anti-competitive behaviour, and thereby protect consumer welfare in such circumstances.

LEGISLATIVE FRAMEWORK

The Excessive Pricing Prohibition

19. Prior to the amendments effected to the Act on 12 July 2019, the Act contained a definition of "*excessive price*", being "a *price for a good or service which—(aa) bears no reasonable relation to the economic value of* that *good or service; and (bb) is higher than the value referred to in subparagraph (aa)".*

20. Following the 12 July 2019 amendment of the Act, section 8 now reads as

[12] *What's the Matter with Price Gouging*? Jeremy Snyder, 2009, Business Ethics Quarterly 19:2 (April 2009); ISSN 1052-150X at 282 – 283.

follows:

"8(1) It is prohibited for a dominant firm to—

(a) charge an excessive price to the detriment of consumers or customers.

…..

8(2) If there is a prima facie case of abuse of dominance because the dominant firm charged an excessive price, the dominant firm must show that the price was reasonable.

8(3) Any person determining whether a price is an excessive price must determine if that price is higher than a competitive price and whether such difference is unreasonable, determined by taking into account all relevant factors, which may include—

(a) the respondent's price cost margin, internal rate of return, return on capital invested or profit history;

(b) the respondent's prices for the goods or services—

(i) in markets in which there are competing products;

(ii) to customers in other geographic markets;

(iii) for similar products in other markets; and

(iv) historically;

(c) relevant comparator firm's prices and level of profits for the goods or services in a competitive market for those goods or services;

(d) the length of time the prices have been charged at that level;

(e) the structural characteristics of the relevant market, including the extent of the respondent's market share, the degree of contestability of the market, barriers to entry and past or current advantage that is not due to the respondent's own commercial efficiency or investment, such as direct or indirect state support for a firm or firms in the market; and

(f) any regulations made by the Minister, in terms of section 78 regarding the calculation and determination of an excessive price."

21. It is thus evident that the term "economic value" has been replaced by that of a "competitive price" as the appropriate benchmark for purposes of

determining whether or not a price is excessive.

22. It is also evident that, under the Act as amended, there are two legs to the excessive pricing test. The first is whether the relevant price is "*higher than a competitive price*". If so, the second is whether any such difference is "unreasonable". It is furthermore apparent from sectiron 8(2) that, if the first leg of the test is satisfied, the onus falls onto the respondent to prove that the supra-competitive price is reasonable having regard to all relevant factors.

23. Excessive pricing constitutes a contravention of section 8(1)(a) only if it is committed by a "*dominant firm*". In order for a firm to be considered dominant:

    23.1. its annual turnover or assets in the Republic must be valued at or exceed R5 million,[13] which threshold it is common cause that Babelegi meets;[14] and

    23.2. it must meet the requirements for dominance in terms of section 7 of the Act.

24. In the present matter the relevant threshold is that reflected in section 7(c) of the Act, which provides that *"A firm is dominant in a market if …it has less than 35% of that market, but has market power*". Therefore, any firm

[13] See section 6 of the Act, read with Determination of Threshold published under General Notice 253 in Government Gazette 22025 dated 1 Februay 2001.

[14] Annexure BB1 Financial Statements to the Answering Affidavit Record Vol. 2 p 194.

that has market power constitutes a dominant firm, regardless of its market share.

25. In terms of section 1 of the Act, "*market power*" 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"* (emphasis added).

26. From what follows below it is evident that Babelegi enjoyed market power conferred by the COVID-19 crisis during the complaint period, and was therefore a dominant firm for purposes of section 8 of the Act.

THE PRINCIPLES

Market definition and market power

27. Babelegi contends that market definition is a jurisdictional prerequisite for the application of section 8(1)(a) of the Act.[15] This contention appears to be premised on the reference in sections 7 and 8 of the Act to the word "market".

28. This is, with respect, incorrect. As the Commission's expert, Ms Buthelezi explained, market definition is not an end in itself, but is simply an analytical tool to be utilised for purposes of determining whether or not a firm has market power. A market definition exercise is therefore, not necessary in

[15] Record Vol. 6, Notice of Appeal, p 617, para 4, line 2. See also Babelegi's Heads of Argument, p. 29 – 32, paras 70 – 77.

circumstances where there is direct evidence of market power from the economic conduct of the respondent firm.[16] In the words of Ms Buthelezi:

> "*16. In the context of an abuse case, market definition is primarily undertaken in order to determine the firm's market share and whether the that share exceeds the thresholds for a presumption of market power. However, as provided for by section 7(3), market power can also be inferred from the economic behaviour of the firm. For instance, the mere ability to price excessively is indicative of market power as defined, as it demonstrates a lack of constraint such that there is an ability to control prices and/or behave independently of competitiors and customers*."[17]

29. Babelegi's expert, Professor Theron, agreed that "*there's no doubt about it*" and accordingly that "*it doesn't matter whether you start with your market definition or you start with examining the conduct", although she stated that other relevant factors also need to be taken into account*".[18]

30. The Tribunal was therefore correct in finding that:

> "*Market delineation is merely a mean to an end. It establishes the market in which the firm's market share is determined to see if the set thresholds under section 7(a) and (b) for assumed dominance have been met. Market power is the ultimate consideration for dominance and section 7(c), which is relevant in this case, has market power at its core.*"[19]

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[16] Record, Vol. 1, Commission's Supporting Affidavit, pp. 95-6, paras 15 – 16.
[17] Record, Vol. 1, Commission's Supporting Affidavit, pp. 95 – 96, para 16.
[18] Record, Transcript, Vol 5 pp. 509 – 510, lines 20 – 25 and 1 – 8. See also Record, Answering Affidavit, p. 163, para 84.2.
[19] Record, Vol. 6, Tribunal decision, pp. 578-9, para 83. See also *Federal Trade Commission v. Indiana Federation of Dentists* 476 U.S. 447 (1986) p. 476.

31. Similarly, the Tribunal explained in *Dischem* that:

> "*While market shares and defining the relevant market are usually the analytical tools deployed in the enquiry to assess the extent of a firm's market power, these are not the only tools available to a competition regulator. In some cases direct evidence in the form of price increases or the imposition of terms and conditions could also be relied upon in assessing whether the firm enjoys market power*."[20]

32. The OECD indicates that "in *some cases it may be preferable to look for direct evidence of exploitation of market power (for example, abnormally high prices or profits) rather than focus on market definition."*[21]

33. Kaplow goes so far as to argue that the process of market definition is circular, because it is premised on an assumption of market power. As he stated:

> "*There does not exist any coherent way to choose a relevant market without first formulating one's best assessment of market power, whereas the entire rationale for the market definition process is to enable an inference about market power. Why ever define markets when the only sensible way to do so presumes an answer to the very question that the method is designed to address? A market definition conclusion can never contain more or better information about market power than that used to define the market in the first*

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[20] *Competition Commission of South Africa v Dis-Chem Pharamacies Limited* Case No. CR008Apr20 decided on 7 July 2020 (*Dischem*) at para 102.

[21] Anderson R *et al "Abuse of Dominance*" in Khemani R. S et al A Framework for the Design and Implementation of Competition Law and Policy (OECD, Paris) available at http://www.oecd.org/regreform/sectors/aframeworkforthedesignandimplementationofcompetitionlawandpolicy.htm p71

> *place. Even worse, the inferences drawn from market shares in relevant markets*."[22]

34. As the Tribunal also correctly observed, market definition becomes problematic and impractical in crisis situations where the market in question has been disrupted or distorted by the crisis.[23] As Professor Theron acknowledged, the application of the SSNIP test in this case "*is made complex by the fact that panic buying in the face of the Covid-19 pandemic obscures the general function of the specific FFP1 dust mask*".[24]

35. The fact that, in this case, it is wholly unnecessary to engage in a formal market definition exercise to establish market power is evident from the fact that the traditional SSNIP test enquires whether it would be profitable for a hypothetical monopolist to raise prices by 5-10%. In this case, however, the evidence showed that Babelegi was able to profitably raise prices by 888% during the complaint period without any increase in its costs, as set out more fully below. There is accordingly no doubt that Babelegi enjoyed market power during the complaint period, without any recourse being required to a market definition exercise.

36. Where there is direct evidence of pricing power of this sort, a technical market definition exercise to establish market power would be wholly

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[22] Kaplow L Why (Ever) define Markets? 124 Harv. L. Rev. 437.
[23] Record, Vol. 6, Tribunal decision, p. 579, para 86.
[24] Record, Vol. 3, FTI Economic Report, p. 289, para 44.

unnecessary and impractical given the difficulties of such an exercise in a crisis period as acknowleged by Professor Theron.

37. Given the difficulties and time it would entail, a requirement to conduct a formal market definition exercise would also have the serious consequence of preventing the Commission from pursuing excessive pricing complaints with the urgency required in order to prevent and deter price-gouging conduct in economic crises such as that brought about by the Covid-19 pandemic.

Temporary market power

38. It was also clear on the evidence before the Tribunal that a firm may enjoy market power in the circumstances of an economic crisis even if it would not otherwise do so. This is so because the competitive constraints subject to which a firm operates in “normal” market conditions may not apply in an economic crisis where patterns of supply and demand are disrupted. As a result, an otherwise non-dominant firm may enjoy temporary market power until such time as normal supply and demand conditions are restored.

39. This is particularly the case for goods perceived as necessary for the health and safety of consumers, as such goods are subject to urgent demand, and consumers are unable to defer consumption until normal supply resumes.

40. In this regard, Ms Buthelezi explained in her evidence that:

> "*17. States of disaster often provide the conditions for temporary market power to be held by market participants that may not otherwise have market power outside of the disaster period. It is for this reason that price gouging is made possible. From an economics perspective, this is because the normal competitive constraints that would otherwise contain these firm's pricing are removed allowing them to exercise market power. The removal of constraints may occur for several reasons, many of which are conceptually related to a narrowing of the geographic market for products as a result of disruptions to the normal functioning of markets.*
>
> *18. First, there may be a disruption to supply due to the disaster, or there is a delay in the supply response to a spike in demand in a particular geographic area subject to the disaster. The result is that those sellers holding stock in those areas are temporarily protected from competitors bringing in new stock in response to a price increase. This is particularly the case for goods essential to their health, safety and welfare of consumers as they are required immediately and consumers are unable to defer consumption until normal supply resumes. The ability to defer consumption might otherwise place limits on any temporary market power. From an economic perspective, this may be considered as a temporary narrowing of the geographic market for such goods., which may confer market power on smaller participants in the market that might not otherwise hold market power when there is not a State of Disaster. There is also a temporal dimension to market power based on the disruption to the normal competitive market and the inability of consumers to defer consumption.*
>
> *23. …[R]estrictions on the movement of consumers in the context of a disaster may also serve to narrow the geographic market and confer market power to sellers that lie within their immediate catchment area for the period of*

the disaster. These sellers will be protected temporarily from suppliers further away which consumers might otherwise have gone in the face of a price increase."[25]

41. This is, furthermore, exactly what took place in South Africa when the COVID-19 pandemic hit this country. As Ms Buthelezi explained:

> "*19. In the context of the COVID- 19 disaster, the simultaneous outbreak of the virus across the globe has resulted in the disruption of the normal international supply channels for many essential goods and services required in response to the disaster. This includes a general disruption to the movement of goods internationally in order to limit the spread of the virus.*
>
> *20. In addition, the simultaneous increase in demand globally for many essential products, especially protective health & hygiene products (such as face masks, hand sanitiser and personal protective equipment (PPE)), has restricted the normal supply channels to South Africa for these products. This has been exacerbated further by some countries imposing export bans on such products as well as essential food commoodities.*
>
> *21. A similar effect occurs within the national borders. Products in demand in all areas are likely to be used to satisfy localised demand first and consumers or customers are likely to face restrictions in sourcing from other parts of the country. This means that what would otherwise be national geographic markets narrow, permitting localised suppliers to gain temporary market power.*
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> *22. Importantly, within the context of the COVID- 19 virus,*

[25] Record, Vol. 1, Commission's Supporting Affidavit, pp. 96 – 97, paras 17 – 18 and p. 98, para 23. See also Record, Vol. 4, Transcript, p. 399, line 19 to page 404, line 11

> *the fact that it started in other parts of the world first meant that some of these supply disruptions occurred prior to the announcement of a state of disaster in South Africa. The announcement of a global disaster by the World Health Organisation at the end of January further exacerbated supply disruptions. Asa result, the conditions already existed in February for suppliers and resellers of essential hygiene products to hold temporary market power nationally. Furthermore, in anticipation of the announcement of a state of disaster, such conditions become more acute in the early March*."[26]

42. In addition:

> "*24. The COVID- 19 disaster has resulted in considerable restrictions on the movement of consumers. The lockdown period has confined consumers to their residence and permitted grocery and pharmacy shopping in their immediate neighbourhood only. This is likely to provide many retailers with a captive set of consumers, especially in the context of pervasive exclusive lease arrangements*."[27]

43. As the Tribunal correctly observed,[28] neither section 7 nor section 8 of the Act place any minimum time frame on dominance for purposes of section 8(1)(a). Likewise, nothing in the definition of "*market power*" in the Act limits that notion from including a temporary or short-term exercise of

[26] Record, Vol. 1, Commission's Supporting Affidavit, pp. 97 – 98, paras 19 – 22.
[27] Id at pp. 98 – 99, para 24.
[28] Record, Vol. 6, Tribunal Decision, p. 571 para 52.

market power.

44. It would also be contrary to the purposes of the Act for the requirement of market power to be limited in such a manner, as that would prevent price-gouging in times of temporary economic crisis – such as the current COVID-19 crisis – from being sanctioned under the Act. It would clearly not be consonant with the purposes of the Act were the competition authorities powerless to prevent the exploitation, through price-gouging, of customers and consumers rendered vulnerable by the disaster. This would lead to a serious under-enforcement of the excessive pricing provisions of the Act.

45. The Tribunal was therefore correct in concluding that:

> "*73. In crisis situations such as the Covid-19 health crisis, there are typically abnormal disruption 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 holding 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.*"[29]

and

> "*75. In the context of a health crisis such as Covid-19, customers in ceetain markets typically do not have the ability to defer their consumption (of items such as masks), which might under normal economic conditions have placed limits on any*

[29] Record, Vol. 6, Tribunal Decision, p. 575, para 73.

> *market power of the seller. In other word, in the context of a crisis such as 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*."[30]

46. As the Tribunal observed in *Dischem*:

> "*The notion of temporary market power is nothing more than the notion of market power enjoyed by a firm in a particular economic context, brought upon by extraneous events such as a natural disaster, which confers on a firm advantages that it would not otherwise enjoy.*"[31]

47. The applicability of the excessive pricing provisions of the Act to economic crises evincing temporary market power was forshadowed by the previous president of the Tribunal, David Lewis, when he wrote in 2009 that:

> *"A competition authority may conceivably be called upon to act as a price regulator in instances that may be characterised as price gouging. For example, were section 8(a) to be invoked in the event of a natural disaster, which had given rise to a temporary monopoly in some or other unregulated product or service that was vital to the life of the affected community, say ambulance services or fuel for heating, and this was exploited to effect a significant temporary price rise, the competition authority could easily assume the role of temporary price setter."*

48. The existence of temporary market power in the context of a natural disaster has been recognized in competition law jurisprudence

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[30] Id at p. 576, para 75.
[31] *Dischem* para 108.

internationally.[32]

49. As long ago as 1977, the European Commission ("EC") found in *ABG Oil*[33] that temporary market power can be brought about by a crisis or disaster.

49.1. In that matter the EC noted, under the discussion of dominance,[34] that the 1970s oil crisis was caused by "*a simultaneous reduction in the supply of oil offered on the world market combined with a substantial increase in the price demanded for it.*"

49.2. The EC found that only the international refiners in the Netherlands had "*access to oil supplies at economically viable prices*" and that the sudden shortage led to "*a restriction of both actual and potential competition*" between them.

49.3. Each of the firms in that matter was found to be dominant during the crisis, since "*their customers can become completely dependent on them for the supply of scarce products. Thus, while the situation continues, the suppliers are placed in a dominant position in respect*

[32] See *Benzine en Petroleum Handelsmaatschappij BV and others v Commission of the European Communities.* (29 June 1978) [ECLI:EU:C:1978:141] ('ABG oil') p9.5.77; and generally Ramos J "The Lucky Monopolist', in Ramos J *Firm Dominance in EU Competition Law: The Competitive Process and the Origins of Market Power* International Competition Law Series, Volume 83 (Kluwer Law International 2020) pp. 223- 244.

[33] ABG Oil Companies (IV/28.841, 77/327/EEC 19 April 1977). The European Court of Justice overturned the decision on other grounds on appeal (Case 77/77 – *BP v Commission* ECLI:EU:C:1978:141).

[34] *Id* pp 8-9.

of their normal customers" (emphasis added).

50. In relation to the Commission's prosecution of excessive pricing cases in the current COVID-19 crisis itself, Professor Massimo Motta has confirmed that temporary market power may arise:

> "*[F]irms that may be accused of price gouging might not necessarily be dominant in ordinary times. However, they may well be in our exceptional times. Consider markets for food and groceries. Normally, they are defined geographically in a broad way, because consumers can move and shop around. But during a period of confinement, people are obliged to buy their shopping next door, thus becoming captive of local shops. Even if they have very little market share in a "normal times" market, these shops may be dominant during the crisis. Note that in such cases insufficient supply is not the problem: Some firms may simply take advantage of consumers' impossibility to shop around. (And here, one cannot argue that price regulations are inefficient: There is no lack of supply.) In cases of excess demand, even a small firm may have considerable market power. Under normal demand conditions, if any firm tried to set a high price, its rivals would use their spare capacity to undercut it and sell more. But, if at that high price, each firm's demand is higher than its capacity, there would be no incentive to cut prices. When firms already sell at capacity, by lowering their price they would sell the same amount, but make less profit. In other words, when demand is much higher than capacity, even "small" firms may be endowed with significant market power, that is, they may be dominant.*" [35]
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> (Emphasis added).

51. Likewise, in the United Kingdom, the Competition and Markets Authority

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[35] Motta, 2020, Daily Maverick, *Price Regulation in a time of Crisis can be risky,* available at https://www.dailymaverick.co.za/opinionista/2020-04-22-price-regulation-in-times-of-crisis-can-be-tricky/.

("CMA") has stated that the particular circumstances of the Covid-19 crisis might confer dominance on a firm, allowing it to price excessively.[36]

52. The CMA's approach has subsequently been confirmed by the UK's chief economic advisor, Dr Mike Walker, who stated that the Tribunal's decision in this matter "*represents a short-term tightening of competition policy to deal specifically with problems caused by the coronavirus*".[37]

The test for excessive pricing in the context of price-gouging

53. Whilst in many circumstances, proof of excessive pricing is a fraught exercise, entailing difficult questions regarding the identification and quantification of an appropriate competitive benchmark, and of the extent to which that is exceeded by the respondent firm, the proof of excessive pricing in a price-gouging context is a far simpler exercise. This is because the respondent firm's own pricing level prior to the onset of the economic crisis can generally be used as a measure of the competitive benchmark for the product in question, and then compared to the firm's prices for that product once the crisis has hit.

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[36] CMA Guidance (25 March 2020) CMA approach to business cooperation in response to COVID-19 (available at https://www.gov.uk/government/publications/cma-approach-to-businesscooperation-in-response-to-covid-19/cma-approach-to-business-cooperation-in-response-tocovid-19#fn:5).

[37] *Excessive Pricing is evidence of dominance*, UK official says: Emily Craig, 10 June 2020. See also Costa-Cabral and others, TILEC Discussion Paper, *EU Competition Law and COVID-19*, 22 March 2020, page 11.

54. Absent any explanation by the respondent firm as to why the pre-crisis price level does not represent a competitive benchmark, and absent any identification by that firm of changes in costs or other factors that may account for the price change, it may be inferred that any price increase represents profiteering by the respondent firm arising from the increased demand and/or reduced supply for the relevant product brought about by the economic crisis. Indeed it is common cause in this case that Babelegi's price rises for FFP1 masks was a direct result of the suppy and demand price imbalances brought about by the Covid-19 pandemic.[38]

55. As Ms Buthelezi explained in her evidence:

> "*27. Section 8(3) provides the range of assessment criteria that may be used for determining if a price is excessive. However, the practice pf price gouging is a relatively specific practice of raising prices in anticipation of or in response to a disaster, and therefore requires a relatively simple test in order to detect excessive pricing. This test is whether prices increased materially relative to what was previously charged, and if so, whether that increase is justified by any cost increases from a supplier further up the value chain. Given that price gouging is often undertaken by distributors and retailers, whether or not there is a cost justification is readily identifiable by whether the ordinary mark ups of the distributor or retailer under competitive conditions prior to the national disaster increased following the disruption to the market and price increases.*"[39]

[38] Record, Vol. 6, Tribunal Decision, p. 574 paras 66 and p. 575, para 69.

[39] Record, Vol. 1, Commission's Supporting Affidavit, p. 100, para 27. See also Record, Vol. 4, p. 409, line 9 – p.410, line 4.

56. This approach is consistent with the approach of this Court in *Mittal*[40] where it stated that "*where the dominant firm raises the normal price for its product substantially without any corresponding rise in costs, this may indicate* prima facie *that the new price is higher than economic value without the need to quantify the latter more precisely*."

57. Similarly, in *SCI*[41] this Court stated that:

> "*where 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, then the need to quantify economic value more precisely before concluding that the actual price bears no reasonable relation to it may fall away. In this way a* prima facie *case would have been made out, leaving it to the respondent firm to adduce evidence to the contrary if it is to avoid the case against it becoming conclusive*."

58. It is evident from the above statements that a substantial price rise, without any corresponding increase in costs, may give rise to a *prima facie* case of excessive pricing absent the consideration of any other factors. This is particularly the case in price-gouging cases where, absent a satisfactory explanation by the respondent firm, all other factors in the market can be regarded as equal before and after the onset of the economic crisis.

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[40] M*ittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another* (70/CAC/Apr07) [2009] ZACAC 1 at [50]. See also *United Brands Company and United Brands Continental BV v The Commission of the European Communities* [1978] 1 CMLR 429 at [250].

[41] *Sasol Chemical Industries Limited v Competition Commission* (131/CAC/Jun14) [2015] ZACAC 4; 2015 (5) SA 471 (CAC) (17 June 2015) at [102].

59. David Lewis, in the note referred to above, confirmed that it is a "*relatively simple technical task*" to identify excessive pricing by a firm in price-gouging cases, namely by comparing the prices before and after the onset of the economic crisis.[42]

60. Professor Motta also agrees with this approach, stating in respect of cases in the COVID-19 crisis that '*Using the pre-crisis price as a benchmark is sensible because demand and supply conditions at that time were presumably "normal".*' [43]

61. In the circumstances, we respectfully submit that the Tribunal was correct in concluding that the relevant economic test for determining whether or not a firm's price is excessive in the context of disrupted competitive conditions is a simple one, namely "*whether the firm's price or markup 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*".[44]

62. As set out further below, Babelegi has not provided any satisfactory explanation as to why its prices for FFP1 masks increased so dramatically after the onset of the demand and supply disruptions caused by the Covid-19 pandemic in South Africa. It can therefore safely be concluded that

[42] Lewis, *supra*.
[43] Motta, *supra*.
[44] Record, Vol. 6, Tribunal Decision, p. 582, para 99.

Babelegi's price increases were solely to profiteer from the dramatically increase demand for such masks as a result of the pandemic.

Detriment to consumers

63. Section 8(1)(a) of the Act provides that it is prohibited for a dominant firm to charge an excessive price "*to the detriment of consumers or customers*".

64. Regarding the establishment of consumer detriment, this Court stated in Mittal that this requires a value judgment,[45] and that "*it does not appear to be in dispute that, if the prices complained of are held to be excessive, detriment to consumers will have resulted*".[46]

65. There can be no doubt that a material increase in the price of essential goods in a health crisis likewise causes harm to consumers and customers, especially to those members of society who are most vulnerable and least able to afford face masks they regard as valuable in protecting themselves against the serious health dangers associated with the Covid-19 pandemic.

[45] *Mittal*, supra, para 55.
[46] *Mittal*, supra, para 55.

66. We therefore respectfully submit that the Tribunal was correct in concluding that excessive pricing in the context of the Covid-19 pandemic is detrimental to consumers and customers in South Africa.[47]

THE MERITS OF THE EXCESSIVE PRICING COMPLAINT

Babelegi's price increases

67. It is common cause that, during the complaint period, Babelegi engaged in a series of dramatic price hikes in respect FFP1 masks in response to disrupted supply and demand conditions caused by the global Covid-19 pandemic in South Africa. These price hikes were made notwithstanding that the cost incurred by Babelegi for purchasing FFP1 masks remained unchanged, at R41 per box of 20, excluding VAT ("per box"), throughout the complaint period.

68. The chronology of relevant dates regarding the impact of the pandemic on the South African economy, and the sequential price hikes made by Babelegi as a result thereof, are set out in paragraph 119 of the Tribunal's decision and are not repeated here. It suffices to summarize the following:

    68.1. In December 2019, prior to the pandemic, Babelegi charged a price of R50.60 per box of FFP1 masks, which reflects a mark-up of 23%.

[47] Record, Vol. 6, Tribunal Decision, pp. 601 – 604, paras 161-176.

68.2. On 30 January 2019, the World Health Organisation ("WHO") declared Covid-19 a Public Health Emergency of International Concern ("PHEIC").

68.3. On the following day, 31 December 2019, Babelegi received a communication from a supplier (Dromex) stating, *inter alia*, that:

> "*Due to the Coronavirus crisis, the global demand for approved disposable masks has drastically increased and affected the availability of our dust mask range*".[48]

68.4. On the same day, Babelegi increased its walk-in price for FFP's to R91 per box, which reflects a mark-up of 122%.

68.5. On 2 February 2020, Babelegi received another communication from Dromex stating, *inter alia*, that its masks were sold out due to overwhelming demand, and stating that it would "*take a while*" for it to restock. Dromex requested customers, in the circumstances, not to quote on any of its products "*until the situation is back to normal*".[49]

68.6. On 4 February 2020, Babelegi increased its bulk price for FFP's to R85 per box, which reflects a mark-up of 107%.

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[48] Record, Vol. 3, FTI Report, p. 306, appendix 2.
[49] Id.

68.7. On 9 February 2020, Dromex repeated that it was out of stock, and that various of its masks "*will not be available for the majority of the coming year*". Dromex also repeated that customers should not quote on any of these items "*until further notice*".[50]

68.8. On the following day, 10 February 2020, Babelegi put through a further dramatic increase in its bulk price for FFP's to R350 per box (more than four times the previous price of R85 per box), which reflects a mark-up of 753%.

68.9. On 2 March 2020, Dromex indicated that it was still experiencing high demand and stock outs, and that there was a "*possibility of an amended price list in the coming weeks*".[51]

68.10. On 5 March, 2020, Babelegi increased the price of FFP's yet higher, to R500 per box, which reflects a mark-up of 1119%.

68.11. That price endured until 18 March 2020, when Babelegi increased its price yet again to R550. On that day, however, Babelegi (for the first time) paid an increased price for FFP1 masks, of R440 per box. Babelegi's mark-up from that date was therefore 25%, which mark-up it retained after that date.[52]

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[50] Id.
[51] Id.
[52] Id, p. 295, Table 3.

69. The costs, prices and mark-ups before, during and after the complaint period are summarized in the following table:

	Cost box	Cost/mask	Selling/box	Selling/mask	Profit (R)	GP%	Mark-up
09 Dec	41	2.05	50.6	2.53	9.6	18.97	23%
31 Jan	41	2.05	91	4.55	50	54.94	122%
4 Feb	41	2.05	85	4.25	44	51.76	107%
10 Feb	41	2.05	350	17.5	309	88.28	753%
05 Mar	41	2.05	500	25	459	91.80	1120%
18 Mar	440	22	550	27.5	110	20.00	25%
26 Mar	440	22	550	27.5	110	20.00	25%

70. It is evident from this table that Babelegi increased its prices for FFP1 masks over the complaint period by a total of 888%, from R50.60 per box to R500 per box. This reflected an increase in Babelegi's margin on sales of FFP1 masks from 23% to 1119% over the complaint period, which yielded a weighted average mark-up of over 500% over that period. These price increases by Babelegi are common cause.[53]

71. In addition, Table 2 below[54] shows how absolute margins in Rands, increased by 4681% from 9 December 2019 to 5 March 2020. Put differently, absolute margins increased more than 11-fold during that period.

[53] Record, Vol. 2, Commission's Supporting Affidavit, pp. 114 - 117, paras 59 – 67 read together with the answering affidavit at Record, Vol. 2, p.176 paras 106.1 – 1064.
[54] Also not disputed by Babelegi – Babelegi's Submissions on Admissions Record Vol.6 p 538 para 21.

Table 2: Babelegi absolute margins earned on FFP1 Masks

Date	Gross margin (Rands)	Cumulative increase in absolute in margin (%)
9-Dec	9.6	-
31-Jan	50	421%
4-Feb	44	358%
10-Feb	309	3,119%
5-Mar	459	4,681%
18-Mar	110	1,046%
26-Mar	110	1,046%

72. The table reflecting Babelegi's price and cost increases below is also common cause[55]

Table 3: Comparison of price and cost increases faced by Babelegi (December 2019 – March 2020)

Date	Cost/box (R')	Cost increases (%)	Selling price /box (R')	Selling price increases (%)
9-Dec	41	-	50.6	-
31-Jan	41	0%	91	80%
4-Feb	41	0%	85	-7%
10-Feb	41	0%	350	312%
5-Mar	41	0%	500	43%
18-Mar	**440**	**973%**	**550**	**10%**
26-Mar	440	0%	550	0%

Market power

73. It is plain from the above figures that Babelegi enjoyed very considerable market power in the supply of FFP1 face masks throughout the relevant period. Babelegi admitted that "*FFP1 masks have been purchased in the*

[55] Record Vol. 6, Babelegi's submissions on Admission, p 536 para 19.

context of Covid-19 because they are considered to offer some protection".[56]

74. Given that it faced no increase in costs over the relevant period, there is no explanation for its ability to increase the price of FFP1 masks by 888% over that period other than it had, and was abusing, market power as a result of the disruption of supply and demand conditions caused by the Covid-19 pandemic.

75. As noted above, "*market power*" means "*the power of a firm to control prices . . or to behave to an appreciable extent independently of its competitors, customers or suppliers*". This is precisely what the above conduct by Babelegi indicates. It was profiteering from the extreme shortage of masks in South Africa as a result of the extreme demand for such masks both in South Africa and internationally as a result of the Covid-19 pandemic. Babelegi does not dispute that its price increases were a function of these fundamentally disrupted market conditions.

76. Babalegi argues, with reference to a news article dated 11 March 2020,[57] that mask manufacturers were producing large amounts of dust masks in response to COVID-19, and that this is indicative of the fact that it did not hold market power during the complaint period. However, this ignores the

[56] Record Vol.6, Babelegi's Submissions on list of Admissions and Concessions in the answering affidavit, p 533 para 11.
[57] Record Vol.1, Founding Affidavit, annexure IL2, pp 37 – 41.

fact that the masks referred to in the article relied on by Babelegi in support of this argument related to the manufacturing level and not the retail level. In addition, that article not only related to a period after the end of the complaint period, but also noted that the relevant supplier was unable to meet the demand for its products. Babelegi itself confirmed, in the course of oral submissions, that "at the moment in the medical industry, global supply chains are completely falling apart".[58] This is also evident from the communications from Dromex referred to above.

77. Mr Nienaber's complaint that he was unable to find any other supplier of FFP1 masks[59] (which was not disputed by Babelegi) is also indicative of the market power afforded to Babelegi by virtue of the fact that it had stock of FFP1 masks.[60]

78. Since Babelegi's conduct clearly demonstrated its ability to price independently of suppliers, customers and consumers, the precise determination of the relevant market, and its market share therein, is unnecessary for purposes of proving that Babelegi was a dominant firm for purposes of section 8(1)(a) of the Act. That it evident from the direct evidence of Babelegi's pricing conduct during the complaint period.

79. Babelegi also alleges that it experienced an immediate push back or

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[58] Record Vol.5, Transcript, p 506 lines 5 – 7.

[59] Record Vol.1 p 48; Annexure IL6 Copy of CC1 form Submitted by Mr Nienaber accompanying letter and invoice.

[60] Record Vol.2 p 142 para 51.

response upon increasing its prices[61], but that is not borne out by the evidence, which shows Babelegi becoming more and more emboldened in its price increases over the course of the complaint period. Had this not been profitable for Babelegi, it would not have done so, and it adduced no evidence to the contrary.

80. The substantial size of the price increases alone proves Babelegi's market power. These price increase could not have been effected unless Babelegi was confident that no other channels were available to its customers. Had any other retailers had excess stock, Babelegi would not have been able to repeatedly increase its prices in the dramatic manner it did. This accords with the Commission's case that Babelegi was dominant.

Temporary market power

81. As outlined above, the simultaneous outbreak of COVID-19 across the globe resulted in the disruption of the normal international supply channels for many essential goods and services required in response to the disaster. Some of the supply disruptions occurred prior to the announcement of a state of disaster in South Africa and the conditions therefore already existed from the end of January 2020 for suppliers and resellers of FFP1 masks to hold temporary market power.

[61] Record Vol. 5, Transcript, p 507 line 23-24.

82. As set out above, the supplier notices relied on by Babelegi itself reflect that there was a severe shortage of FFP1 masks from 31 January 2020 onwards. On Babelegi's own version, it increased its prices in the face of this supply shortage and the dramatically increased demand for FFP1 face masks. It is precisely the knowledge of this shortage that led Babelegi to realise it had the power to independently raise its prices, which is subsequently did in the most dramatic fashion.

83. While initially denying this in its papers, Babelegi conceded in the course of oral argument that market power may be temporary.[62] Babelegi however persists in the submission[63] that it cannot be considered dominant in respect of the sale of FFP1 masks if its market power is not exercised for a "significant period of time". Babelegi goes so far as to suggest[64] that "normally a period of two years will be sufficient" to constitute a significant period of time.

84. However, as explained above, the existence of market power in this case must be appraised in the context of an economic crisis in which goods perceived as necessary for the health and safety of consumers are subject to urgent demand, and consumers are unable to defer consumption until normal supply resumes.

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[62] Record Vol. 5, Transcript, 490 line 10 -13 and line 16-19; and Transcript,Record Vol. 5 491 line 24 – p 492 line 4

[63] Babelegi's Heads of Argument, p. 36, para 86.

[64] Id.

85. In addition, as the supplier notices summarized above indicate, there was no prospect of an immediate supply-side response to increased prices given the extent of the supply/ demand imbalance caused by the pandemic both in South Africa and internationally.

86. In these particular circumstances, Babelegi was able to profiteer from the stock of FFP1 masks to which it had access, and it shamelessly did so, as its dramatic price increases over the complaint period indicates.

87. There is accordingly no warrant for Babelegi's contention that market power can only arise if it persists for a significantly longer period of time. As noted above, there is no minimum time limit attached to the definition of "*market power*" in the Act, and there is no economic basis for such an approach, which would mean that price-gouging in the special circumstances of an economic crisis could never be challenged as excessive pricing.

88. It is furthermore evident from the chronology of events set out above that Babelegi was able to sustain its supra-competitive prices for a significant period of time after the onset of the pandemic, to such an extent that it was able to push through numerous, increasingly bold, price increases during the complaint period.

Alleged conflation of the test for market power with the test for excessive pricing

89. Babelegi argues that the Commission and Tribunal conflated the test for market power with the test for excessive pricing. It contends that the fact that a firm charges an excessive price does not on its own indicate market power.

90. However, there has been no conflation as alleged. The separate requirements to establish market power and excessive pricing have been set out above. However, as explained above, evidence of excessive pricing does in certain circumstances, such as those present in this case, also serve as *prima facie* evidence of market power. It is the economic context of a health crisis that provides conditions for the existence of market power in relation to essential goods.

91. Disaster situations bring about typically abnormal disruptions to the market, such as a disruption to the supply of, or a spike in demand for, certain products necessary for citizens to cope with the challenges of that emergency or disaster. These disruptions remove the ordinary competitive constraints faced by certain firms, conferring upon retailers/distributors holding stock or local producers of essential items, a temporary form of market power which enables them to increase prices without constraint for

the period of the disaster. As outlined by Motta above, where demand exceeds capacity then even small firms may have market power.

92. There was no dispute between Babelegi and the Commission regarding the extent of the pricing, the cost, and the margins relevant to the complaint referral.[65] It was further common cause that the COVID-19 pandemic had led to increased sales of masks and hand sanitisers, as reported at the end of February 2020 and in March 2020.[66] It was also common cause that there existed stock shortages as Babelegi itself put up evidence of notifications by suppliers of such shortages. This was not speculation, as Babelegi seeks to paint the findings of the Tribunal, but rather their own evidence. Those shortages and increased demand were the market context that provides the basis for market power.

93. The disruption to the normal supply and demand dynamics around FFP1 masks which gave rise to a shortage in the market, and the fact that Babelegi held considerable stock acquired at a competitive price, afforded it temporary market power as evidenced by its ability to effect dramatic price increases in the price of FFP1 masks over the course of the complaint period.

94. Significantly, Babelegi has not adduced any evidence to indicate that its pricing conduct during the complaint period is not indicative of market

[65] Record Vol 6. Babelegi Submissions on Admissions p 535 – 537 para 17 -19.
[66] Record Vol.2, Answering Affidavit, p137 para 41.3 and Record Vol.6 p 530 para 6.

power, especially given that the costs it incurred for FFP1 masks remained unchanged throughout the complaint period.

95. In these circumstances, Babelegi's pricing conduct during the complaint period indicates that Babelegi was a dominant firm, as contemplated in section 7(c) of the Act, in that it it exerted market power by controlling prices and behaving to an appreciable extent independently of its customers and suppliers.

96. This determination of the Tribunal has subsequently received approval from the respected international competition economist, Dr Mike Walker, who stated[67], during a *Concurrences* webinar on enforcement during and after the coronavirus pandemic, that "*Being able to raise prices very dramatically is evidence of substantial market power, so it was right to classify the behaviour of the company in question as an abuse of dominance."*

Babelegi's excessive pricing

97. Section 8(3) of the Act identifies various the factors that may be relevant in determining whether or not an excessive price has been charged..

98. The factors listed in sections 8(3)(a) to (f) are factors that the Tribunal may

[67] *Excessive Pricing is evidence of dominance*, UK official says: Emily Craig, 10 June 2020.

take into consideration in making such determination. Contrary to what Babelegi submits,[68] section 8(3) is clear that the Tribunal is not obliged to take any or all of these factors into account, when they are not relevant or necessary in the circumstances of the case at hand.

99. When a functionary is entrusted with a discretion, the weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue, is a matter for the functionary to decide. The weight or lack of it to be attached to the various considerations that go to making up a decision, is that of the decision-maker i.e. the Tribunal.[69] This discretionmay only be interfered with if the Tribunal was wrong on the law or the facts or if it applied its discretion injudiciously.[70]

100. As noted above, this Court stated in *SCI*[71] that a robust approach may be appropriate in certain cases:

> "*Where 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, then the need to quantify economic value more precisely before concluding that the actual price bears no reasonable relation to it may fall away. In this way a* prima facie *case would have been made out, leaving it to the respondent firm to adduce evidence to the contrary if it is to avoid the case against*

[68] Babelegi's Heads of Argument, p. 28, para 67.
[69] *MEC for Environmental Affairs and Development Planning v Clairison's CC* [2013] ZASCA 82; [2013] 3 All SA 491 (SCA); 2013 (6) SA 235 (SCA) at [20] - [22].
[70] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) at paras 85 – 88.
[71] *SCI* at para 102.

it becoming conclusive."

101. In the context of this case, we submit that the factors that are relevant to the determination of this matterinclude:

101.1. Babelegi's prices for the FFP1 masks prior to the Covid-19 pandemic;[72]

101.2. The number of price hikes implemented by Babelegi over a short period of time, and subsequent to the onset of the Covid-19 pandemic and the panic buying of customers and consumers;

101.3. the material extent of the increase in Babelegi's markup during the complaint period[73];

101.4. the absence of any supplier price increase during the complaint period[74]; and

101.5. the fact that Babelegi's ability to price higher without constraint by consumers or customerswas is not due to its own commercial efficiency or investment, but rather a direct result of the COVID-19 pandemic and in relation to FFP1 masks which customers and consumers sought in an effort to mitigate the impact and spread of

[72] See sections 8(3)(a), 8(3)(b)(iv), 8(3)(d).
[73] See sections 8(3)(a), (c) and (d).
[74] See sections 8(3)(a) and (c).

the virus[75].

102. Contrary to what Babelegi contends[76], it is evident that the Tribunal gave consideration to the factors that the parties identified as having relevance to the determination of this issue and that it provided motivation for its consideration of the factors it deemed relevant, in terms of section 8(1)(c).

103. The only explanation proffered by Babelegi for its price increases, in its submissions to the Commission and in its Answering Affidavit, was that it anticipated increase in supply costs as a result of the notifications it received from suppliers of stock shortages.[77]

104. We submit, however, that this is *ex post facto* rationalisation that is wholly unsubstantiated and also inconsistent with Babelegi's own evidence in these proceedings.

105. In particular, there is nothing in the supplier correspondence relied on by Babelegi[78] that it would be necessary, for stock replacement purposes, to increase its prices by 888% over the course of the complaint period. We note the following in this regard:

[75] See section 8(3)(e).
[76] Record Vol.6, Notice of Appeal, p 619 para 6.8 lines 4-6.
[77] Record Vol.2 Answering Affidavit p 177 para 107.3.
[78] Record, Vol. 3, FTI report, p. 306, appendix 2.

105.1. Babelegi's evidence was that the only supplier from whom it procured FFP1 masks during the complaint period was Sicuro. It does not appear that any of the supplier notices relied on by Babelegi were from Sicuro.

105.2. There is no evidence in the supplier notices that costs would increase with effect from 31 January 2020, or at any other time during the complaint period. All that Dromex said on 31 January 2020 was that future pricing would be affected by the Rand/ Dollar exchange rate. Even as at 2 March 2020, Dromex simply stated that "*there is a possibility of an amended pricelist in the coming weeks*". As a matter of fact, Babelegi's costs for FFP1 masks only increased on 18 March 2020.[79]

105.3. There is no evidence that costs were expected to rise by anything remotely close to 888% during the complaint period. As indicated above, the only clear indication was that prices would be affected by fluctuations in the Rand/ Dollar exchange rate. There is no correlation whatsoever between the contents of the supplier notices and the extent and timing of Babelegi's frequent price increases during the complaint period.

[79] Record Vol.2 Answering Affidavit p 156 para 70.3; and Babelegi Submissions on Admissions, Record Vol 6. p 536 para 19.

105.4. Babelegi's anticipatory costs argument does not explain the numerous, increasingly bold, price increases it pushed through during the course of the complaint period. If Babelegi had been motivated by anticipated costs, it would have effected a single price increase in line with the expected increase in costs of FFP1 masks.

105.5. Babelegi's anticipatory costs argument is inconsistent with the fact that it charged a mark-up of 23% prior to the complaint period, and a constant mark-up of 25% from 18 March 2020 onwards. Babelegi does not explain why it anticipated constancy in the cost of FFP1 masks from 18 March 2020. We submit that the far more likely explanation for Babelegi's pricing conduct after 18 March 2020 is that Babelegi chose to restrain itself from that date given the promulgation of the Regulations on 19 March 2020.

105.6. Indeed, there is no evidence at all that Babelegi based its price increases before, during or after the complaint period on any anticipated price increases. On the contrary, the obvious reason for those price increases was profiteering in the knowledge that there was an extreme shortage of FFP1 masks in South Africa at the time.

105.7. We point out further in this regard that it took only 1 day for stock ordered to be provided and that, on the date of the order being placed, stock was sold at an increased price, despite it being stock that Babelegi had purchased previously at the usual supplier price.

It is further evident that Babelegi was able to sell FFP1 masks on 19 March 2020 at the further increased price (as paid by Mr Nienaber).

105.8. FTI argued that Babelegi may have to fill back orders with new stock sourced at higher prices[80]. But this is again wholly speculative, unsubstantiated and inconsistent with the submissions made by Babelegi to the Commission during the investigation, and the case made out by Babelegi in its Answering Affidavit.[81]

105.9. There is no evidence that Babelegi filled back orders with new stock sourced at the higher price. Rather, the common cause evidence is that, throughout the complaint period, Babelegi sold stock sourced at the lower price and only took possession of new stock on 19 March 2020.[82]

105.10. On the date of the order being placed (i.e. 18 March 2020), stock was sold at an increased price of R450.00 to R550.00 per box, reflecting that sales were made from stock that Babelegi had purchased at the previous supplier price of R41.00 per box.

105.11. The quick supply and turnover of stock indicates that there was no risk that the FFP1 masks would not be available to

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[80] Record Vol.3 FTI Economic Report, p 297 para 17.

[81] Record, Founding Affidavit Vol. 1, p 19 para 38.3 – 38.4; and Annexure IL11 to Founding Affidavit p 72 par 4.

[82] Record Vol.2 Answering Affidavit p 168 para 89.3 line 13-15; and annexure IL20 to the Founding Affidavit Record Vol.1 p 81.

Babelegi's customers, or that they would be sold at below cost. Had this truly been Babelegi's concern it would have been able to sell the masks at its usual (pre Covid-19) mark-up, taking into account the increased supplier price. However, rather than do this, it instead decided to profiteer off the crisis in respect of FFP1 masks, which were regarded necessary by members of the public to respond to the crisis.

105.12. In fact, the evidence shows that Babelegi, which normally made roughly R6 336.00 profit per month off such face masks, saw that profit increase 8-fold to R51 487.00 in February 2020 and then a further nine fold in March 2020 to R475 381.00. This is not consistent with the claim that Babelegi had to fill back orders with higher priced new stock or that it needed the cash to purchase new stock.

106. Babelegi also argues that the Tribunal failed to account for economic cost, including reasonable return and risk.[83] However, we submit that this is also simply an *ex post facto* afterthought that has no factual basis in the evidence before this Court. It is also inconsistent with the common cause evidence that Babelegi's costs (whatever they were) did not change over the course of the complaint period.[84] It was therefore not necessary for the

[83] Record Vol.3 FTI Economic Report, p 288 para 37; Record Vol. 6, Notice of Appeal p 619 para 6.6 lines 1-2; Babelegi heads of argument, p. 62, para 131.
[84] Record Vol. 6 Babelegi's submissions on Admissions p 536 para 19 and para 20.

Tribunal to pay any regard to this factor in its decision.

107. In the light of Babelegi's admissions regarding its pricing conduct during the complaint period, its failure to provide any justification on the facts for the increased prices charged, and the failure of FTI to provide any economic justification for the pricing conduct, it is submitted that the Tribunal correctly determined that Babelegi charged excessive prices for FFP1 masks, in breach of section 8(1)(a) of the Act, during the complaint period.

108. Babalegi's excessive pricing was clearly exploitative and was directed at taking advantage of consumers and customers at a time when FFP1 face masks were in high demand, in response to the international health crisis being experienced. There is simply no other reason for the repeated price hikes effected, other than an intention to profiteer.

Price increase is unreasonable

109. Section 8(3) of the Act provides that the determination of whether a price is excessive, requires a determination of whether or not the difference between the price and the competitive price is unreasonable.

110. The relevant factors indicated in section 8(3) that may be considered in the determination of whether a price is higher than a competitive price, find

identical application in the determination of whether or not the difference between the price and the competitive price is unreasonable. The factors indicated above in respect of the determination of an excessive price are equally applicable here.

111. No valid explanation is proffered by Babelegi for its significant price increase following the onset of the Covid-19 pandemic. We refer to thwat is stated above regarding Babelegi's contentions that its price increases during the complaint period were required in order to anticipate price increases by its supplier..

112. In the circumstances, we respectfully submit that the Tribunal was correct in finding that there was no reasonable basis for Babelegi's conduct in selling masks at more than 888% above the competitive price during the complaint period.

Detriment

113. Section 8(1)(a) requires that the excessive price be charged "*to the detriment of consumers or customers*". This requires a value judgment.

114. In *Mittal*[85] this Court reiterated that the phrase "*to the detriment of consumers*" is subordinate and should be treated as a superfluous

[85] *Mittal* supra para 55.

description of an excessive price, rather than a qualifier of its likely effects. "*What, after all, could more clearly inure to the detriment of consumers than an "excessive price"?*".[86]

115. As this Court went on to say in *Mittal*[87] an "*excessive price may be charged to a single customer*" and accordingly detriment to a single customer or consumer constitutes sufficient grounds on which to find that Babelegi has charged an excessive price in breach of section 8(1)(a) of the Act. The Tribunal correctly applied this principle[88] and rejected Babelegi's claim that there was negligible consumer harm as a result of its conduct.

116. The detriment to consumers is all the more abhorrent in this matter, because it was in respect of FFP1 masks in a time of crisis when such masks were seen as essential to protect the health, safety and welfare of consumers and customers. High prices not only harm directly those that purchase, but also exclude those that are unable to purchase, primarily the poor.

Penalty

117. The Tribunal is empowered by section 8(1)(a) to impose an administrative penalty for a prohibited practice.[89] Such administrative penalty may not

[86] *Mittal*, quoting the Tribunal at para 71
[87] Id para 55.
[88] Record Vol. 6 Tribunal Decision, pp. 603-605 para 174.
[89] Section 59(1)(a) of the Act.

exceed 10% of the respondent firm's annual turn-over in the Republic during its preceding financial year.[90] The cap of 10% imposed by the Act ensures that the respondent is treated fairly and its business not prejudiced by the imposition of the penalty.

118. When determining an appropriate penalty, the Tribunal is required to consider the factors listed in section 59(3) of the Act.[91] Determining an appropriate administrative penalty is, like sentencing in a criminal matter, case-specific. It is not, and can never be, scientific.[92]

119. In *Southern Pipeline Contractors*[93] this Court confirmed that an administrative penalty should promote the important objective of deterrence, and that it "*should be proportional in severity to the degree of blameworthiness of the offending party, the nature of the offence and its effect on the South African economy in general and consumers in particular".*

120. The Constitutional Court in *Pickfords*[94] stated that "*[d]eterrence and prevention are part and parcel of the objectives of the Competition Act, as far as transgressions are concerned. The Competition Act does not look*

[90] Section 59(2) of the Act.
[91] Section 59(3) of the Act.
[92] *Isipani Construction (Pty) Ltd v Competition Commission* [2017] ZACAC 3 at para 78.
[93] *Southern Pipeline Contractors and Another v Competition Commission* (105/CAC/Dec10, 106/CAC/Dec10) [2011] ZACAC 6 (1 August 2011) at [9].
[94] *Commission of South Africa v Pickfords Removals SA (Pty) Limited* (CCT123/19) [2020] ZACC 14 (24 June 2020) At [53].

only to the past in order to punish, but also seeks to deter future malfeasance. It is for this reason that, in a manner somewhat similar to the treatment of a record of previous convictions in sentencing in a criminal trial, section 59(3)(g) of the Competition Act requires the Tribunal to take into account previous contraventions of the Act when considering an appropriate penalty."

121. In *Isipani*[95] this Court referenced the six-step approach devised by the Tribunal in *Aveng*[96] to determine an appropriate administrative penalty. While the six-step approach goes a long way towards achieving a proportionate penalty, this Court remarked that *"[t]here may at some future point be cases where it cannot or ought not to be followed as its application, or the outcome of its application, would not serve the interests of justice."* It is submitted that the present matter is such a case.

122. In *Dis-Chem*[97] the Tribunal found that the six-step methodology on its own did not allow for a suitably substantial penalty, in the context of a price gouging complaint referral. Having regard to Dischem's overcharge for the complaint period, the Tribunal accordingly increased the penalty determined in that manner substantially, taking into account all the

[95] *Isipani Construction (Pty) Ltd v Competition Commission* (144/CAC/Aug16CT, 019950) [2017] ZACAC 3 (14 September 2017) at [79].
[96] *Competition Commission v Aveng (Africa) Ltd t/a Steeledale and Others* (84/CR/Dec09, 08/CR/Feb11) [2011] ZACT 18 (6 April 2011).
[97] *Competition Commission of South Africa v Dis-Chem Pharamacies Limited* Case No. CR008Apr20 decided on 7 July 2020.

mitigating and aggravating factors as contemplated in section 59 of the Act.[98]

123. The settled principle of law is that the imposition of a penalty or sentence is pre-eminently a matter for the discretion of the trial court.

124. When determining an appropriate penalty, the Tribunal is required to consider the following factors:[99]

124.1. the nature, duration, gravity and extent of the contravention – the exploitation of vulnerable consumers and customers in respect of FFP1 masks, essential in the fight against Covid-19, during a period when bulk buying and a mass scramble for masks in reaction to the crisis was experienced, must be considered as both grave and reprehensible;

124.2. any loss or damage suffered as a result of the contravention – consumers and customers were forced to buy FFP1 masks at vastly inflated prices, or to purchase fewer masks than they otherwise would have done given such prices;

124.3. the behaviour of Babelegi – in the present matter Babelegi

[98] Dischem judgment paras 240 - 241
[99] Section 59(3) of the Act.

unrelentingly denied that it priced the FFP1 masks excessively, justifying its conduct with references to unsubstantiated and speculative cost increases;

124.4. 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 and firms owned or controlled by historically disadvantaged persons – the contravention took place subsequent to and in response to the onset of the COVID-19 pandemic – a time when the South African consumers and customers are incredibly vulnerable – which factor Babelegi sought to profiteer from;

124.5. the level of profit derived from the contravention –the Commission estimated that, during the complaint period, Babelegi enjoyed an additional profit attained through its excessive pricing of at least R37 800.00;

124.6. the degree to which Babelegi has co-operated with the Commission and the Tribunal –Babelegi has repeatedly denied the contravention, despite its admission that its mark-up exceeded 500% on average during the complaint period, requiring the Commission to focus its limited resources during lockdown towards the prosecution of this matter;

124.7. whether Babelegi has previously been found in contravention of this Act – this was not alleged by the Commission; and

124.8. whether the conduct has previously been found to be a contravention of the Act – this was not alleged by the Commission.

125. The penalty must be proportional in severity to the degree of blameworthiness of the offending party, the nature of the offence and its effect on the South African economy in general and consumers in particular and must be high enough to have a deterrent effect.[100]

126. The Commission submits that there is no warrant for interfering with the penalty imposed by the Tribunal on Babelegi in the exercise of its discretion. Indeed, we submit that such penalty, R76 040, is very modest in the light of the egregiousness of Babelegi's conduct.

URGENCY

127. The Commission sought condonation from the Tribunal, in terms of the Rules for the Conduct of Proceedings of the Competition Tribunal[101], and leave for the matter to be heard on an urgent basis. While the Commission

[100] *Southern Pipeline Contractors and Another v Competition Commission* [2011]2 CPLR 239 (CAC) at [9].
[101] Record Vol. 1 Notice of Motion p 1 lines 14 -16.

may have referred to the Tribunal Rules for Covid-19 Excessive Pricing Complaint referrals (COVID Rules), this was clearly not determinative of the matter. The Tribunal decided to hear the matter on an urgent basis in terms of its discretionary powers under section 27 of the Act, read with Tribunal Rule 55, as it was entitled to do.[102]

128. The issue of whether or not the Tribunal should have made such determination is immaterial to the question now before this Court, which is whether the complaint referral ought to have been dismissed.[103]

129. We point out, however, that there is no basis upon which to interfere with the Tribunal's decision to hear this matter on an urgent basis. Notwithstanding that Babelegi's own excessive pricing had ceased, it was nevertheless still of cardinal importance that the application be determined on an urgent basis given its ramifications for the regulation of price-gouging more generally in the South African economy during the Covid-19 pandemic.[104]

130. Babelegi was also afforded an additional period within which to file its expert report.[105] At no stage did Babelegi indicate that it wished to

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[102] Record, Vol. 6, Tribunal decision, pp. 564 – 565, para 26.
[103] See *Commissioner for South African Revenue Service v Hawker Air Services (Pty) Ltd; Commissioner for South African Revenue Service v Hawker Aviation Services Partnership and Others* (379/05) [2006] ZASCA 51; 2006 (4) SA 292 (SCA) ; [2006] 2 All SA 565 (SCA) (31 March 2006) at [11].
[104] Record, Vol. 6, Tribunal decision, pp. 564 – 565, para 26.
[105] Record Vol. 6 Tribunal Decision, p 565 para 28.

supplement its answering affidavit within that period, electing instead to stand by the evidence contained therein. The Tribunal in fact called for additional submissions on certain issues[106] and was clearly satisfied that sufficient factual and economic evidence had been presented to it, as it elected not to call for any further evidence on any issue.

131. While Babelegi now contends[107] that the Tribunal determined the matter without the benefit of oral evidence and the ordinary pre-trial procedures (including exchange of discovery), it provides no substantiation for why such delays should have been occasioned. It does not even indicate that there is any additional evidence it would have relied on in that event that might have altered the Tribunal's determination.

132. Babelegi was afforded a reasonable opportunity to present full and comprehensive factual and economic evidence and argument in opposition to the Commission's case. All relevant questions of fact and law requiring detailed argument were raised and fully ventilated.

133. Although the Tribunal was approached on urgency the Tribunal had ample time for mature reflection and the consideration of legal argument made by Babelegi's senior counsel and the Commission's representatives. In addition, issues of economics were argued by the economists in the matter, in order to assist the Tribunal in a comprehensive understanding of the

[106] Record Vol.6 Tribunal Decision, p 566 para 32.
[107] Record Vol.6 Notice of appeal p 616 para 3 lines 18 -22.

relevant economic issues and the facts related thereto. Babelegi was accordingly not exposed to any real prejudice by virtue of the hearing of the matter on an urgent basis.

CONCLUSION

134. For all the reasons set out above, we respectfully submit that the Tribunal correctly determined that Babelegi contravened section 8(1)(a) by engaging in excessive pricing during the complaint period, and that the penalty the Tribunal impose on Babelegi was appropriate in all the circumstances.

135. During the complaint period, Babelegi hiked up its prices for FFP1 masks by a shocking amount (888%), without any concomitant cost increases, specifically in order to profit from the increased demand and reduced supply for FFP1 masks. These were products that were in extremely high demand by customers and consumers to assist in preventing the spread of infection and in protecting the health of consumers and customers, in the midst of the COVID-19 pandemic. Such conduct cannot be viewed as anything other than price-gouging of the most egregious sort.

136. We therefore respectfully submit that that there is accordingly no merit in Babelegi's appeal and it should be dismissed, with costs, including the costs of two counsel.

137. However, in the event that the Tribunal finds that the appeal should be upheld we submit that this is a matter in which it would not be appropriate for the Commission to be burdened with an adverse order of costs.

138. In *Mittal,*[108] this Court, in responding to concerns regarding the "spectre of price regulation" made it clear that an excessive pricing inquiry, if necessary, is mandated by the provisions of the Act and said:

> *"The powers and duties of the competition authorities, and their limitations, are contained in the Act. The authorities are not called upon to set a price for a good or service. It is incumbent on the Tribunal, if necessary to determine if a specific price is 'excessive' in contravention of s 8(a). There is no suggestion in the Act that the competition authorities should regulate and set prices. To the extent that the enquiry requires the examination of a possible excess of the charged price over economic value, as defined, that enquiry is required by virtue of the express formulation implied by the Act."*[109]

139. As this Court recently indicated in *Beefcor* [110]

> *"The Commission is the only organ of State empowered to investigate and police restrictive practices and abuse of market dominance in the South African economy. That it requires extensive powers to enable it to carry out its function is undeniable. It is a venerable public institution which has played and continues to play an essential role in securing the protection and promoting the welfare of the economy and the economic rights of citizens. <u>The importance of its role is brought into sharp focus in times, such as</u>*

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[108] *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another*(70/CAC/Apr07) [2009] ZACAC 1 (*Mittal*).

[109] Id at para 47.

[110] *Competition Commission of South Africa v Beefcor (Pty) Ltd and Another* [2020] ZACAC 5 (3 August 2020) at para 42.

the present, when the economy is reeling from the effects of corruption, poor leadership and the general havoc which the Covid 19 pandemic has brought to the world." (Emphasis added).

140. We submit that:

140.1. The Commission is litigating within the course of its statutory duties and is not an ordinary civil litigant;[111]

140.2. The ordinary rule that costs follow the result is accordingly not applicable;[112]

140.3. The imposition of a costs order against the Commission would have far reaching consequences particularly in relation to its ability to properly carry out its statutory functions. In this regard it is important to note that the Commission's already limited budget allocation has been significantly reduced as a result of COVID-19. A cost order against the Commission would render it effectively incapable of litigating further in the course of its functions, thereby denying it the ability to pursue its mandate;

140.4. The complaint referral and opposition to this appeal were undertaken by the Commission in a manner that is not

[111] *Competition Commission of South Africa v Pioneer Hi-Bred International Inc and Others* (CCT 58/13) [2013] ZACC 50; 2014 (3) BCLR 251 (CC); 2014 (2) SA 480 (CC) (18 December 2013) (*Pannar*) at [23].
[112] *Pannar* at [23].

unreasonable, frivolous or vexatious;

140.5. The Commission's referral of the complaint and its opposition to this appeal are actions undertaken in order to protect a public interest, within the context of the devasting social and economic impact of COVID-19.

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24 August 2020