IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CAC CASE NO: 186/CAC/JUNE20
CT CASE NO.: CR0003Apr20
CC CASE NO.: 2020APR0035

In the appeal of:

BABELEGI WORKWEAR AND INDUSTRIAL SUPPLIES CC	Appellant
and	
THE COMPETITION COMMISSION	Respondent
HEALTH JUSTICE INITIATIVE	First Amicus
OPEN SECRETS NPC	Second Amicus

FILING SHEET

TAKE NOTICE that the First and Second Amicus file herewith the First and Second Amicus' heads of argument.

DATED ON THIS 27th day of August 2020 at Bryanston.

WEBBER WENTZEL
1st and 2nd Applicants' Attorneys
90 Rivonia Road, Sandton
Johannesburg, 2196
Tel: 011 530 5232
Fax: 011 530 6232
Email: dario.milo@webberwentzel.com /
dominika.pietrzak@webberwentzel.com /
lebohang.makhubedu@webberwentzel.com /
thandekile.mbatha@webberwentzel.com
Ref: D Milo / D Pietrzak / L Makhubedu / T Mbatha / 3042837

TO:
The Competition Appeal Court
The Registrar of the Competition Appeal Court
Email: CAC@comptrib.co.za; Tebogom@comptrib.co.za

AND TO:
Klagsbrun Edelstein Bosman Du Plessis Inc.
Attorneys for Appellant: Babelegi Workwear and Industrial Supplies CC
(186/CAC/Jun20)
Ref: MB001065/ D Jacobs / E Meyer
Email: danie@kebd.co.za / elizna@kebd.co.za

The Competition Commission
Ref: 186/CAC/Jun20
Email: candices@compcom.co.za; bakhem@compcom.co.za;
makgalem@compcom.co.za

Buang Jones
Attorney for the Third Amicus Curiae: South African Human Rights Commission
Ref: GP/2021/0074/BJ/MHP
Email: bjones@sahrc.org.za

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FIRST AND SECOND AMICUS CURIAE'S WRITTEN SUBMISSIONS

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INTRODUCTION

1 During the first few months of the worldwide the COVID-19 pandemic, and shortly before the President's declaration of a state of national state of disaster in South Africa, Babelegi Workwear Overall Manufacturers & Industrial Supplies CC ("**Babelegi**") dramatically increased the prices of FFP1 masks.[1]

2 The Competition Commission ("**the Commission**") referred a complaint against Babelegi on 9 April 2020. It alleged that Babelegi had contravened section 8(1)(a) of the Competition Act 89 of 1998 ("**the Competition Act**") read with regulation 4 of the Consumer and Customer Protection and National Disaster Management Regulations and Directions. The matter was heard on 24 April 2020. The Tribunal found that Babelegi had acted in breach of section 8 and imposing an administrative penalty of R76 040. Babelegi appeals against the Tribunal's order and Reasons. It urges this Court to dismiss the Commission's referral.

3 Health Justice Initiative ("**HJI**") and Open Secrets NPC ("**OS**") were admitted as *amicus curiae* and granted leave to make written and oral submissions. The amici have also filed an application for leave to adduce further evidence.

4 In these submissions, the amici provide this Court with the constitutional and human rights framework within which to consider excessive pricing cases arising during a world health crisis. There are three main pillars to this framework:

[1] Record, p20 - 23, paras 40 - 50.

4.1 First, in a global pandemic and public health crisis, excessive pricing in the form of price gouging implicates constitutional rights.

4.2 Second, in the context of a pandemic, private firms who trade in PPE and medical supplies are bearers of both positive and negative constitutional obligations towards members of the public. Price gouging constitutes a breach of those obligations.

4.3 Third, the competition authorities are well-placed, and constitutionally obligated, to protect, promote and fulfil the rights of South African consumers during a pandemic by dealing decisively with excessive pricing of PPE and medical supplies.

4.4 This requires:

4.4.1 An interpretation and application of the excessive pricing provisions of the Competition Act that best protects the rights of consumers; and

4.4.2 An effective penalty regime that vindicates the constitutional rights at stake in price gouging conduct.

5 These key principles must inform the jurisprudence adopted by this Court, particularly:

5.1 the interpretation of section 8 of the Competition Act;

5.2 the determination of market power in the context of a pandemic;

5.3 the kinds of acceptable justifications for price increases during a pandemic; and

5.4 the threshold for the difference in price charged by the firm and the competitive price; and

5.5 the appropriate remedy in cases of price gouging.

6 We address these topics in the following order:

6.1 First, we set out the constitutional framework through which this matter should be decided;

6.2 Second, we apply these principles to the issues arising in this appeal.

7 There is also an acute awareness internationally of the prevalence of price gouging during times of crisis and disaster. In case it is of assistance to this Court, we have accordingly summarised the applicable principles in the United States in an appendix to these submissions.

THE CONSTITUTIONAL FRAMEWORK FOR EXCESSIVE PRICING CASES DURING A PANDEMIC

Price gouging threatens constitutional rights

8 Our Courts have recently underscored the constitutional and human rights dimensions of the Covid-19 pandemic, and the extraordinary scale of harm and devastation that Covid-19 threatens to bring about.

8.1 In *Democratic Alliance v President*, the Full Court of the Pretoria High Court explained that the "*invasion of the Covid-19 virus into South Africa, threaten[s] untold physical, social and economic harm*".[2]

8.2 In *Mohammed v President*, the Pretoria High Court held:

> *"This pandemic poses a serious threat to every person throughout South Africa and their right to life, dignity, freedom of movement, right to access healthcare and their right to a clean, safe and healthy environment. In a country where we are dominated by so much poverty, where people don't have access to basic amenities such as clean running water, housing, food and healthcare, the potential risk to those households poses a further threat which places an additional burden on the Government to combat – the risk then, in light of those circumstances rises exponentially".*[3]

8.3 In *Moela v Habib*, the Johannesburg High Court took a similar approach:

> *"The world has changed, and we are all in a quandary as to how to go about our daily lives in view of the pandemic. I would implore the applicants and all other students seeking to ignore the Directives issued by the University, in the spirit of Ubuntu, to follow the protocols issued by the University, the President, the NCID and the WHO. This is an unprecedented time for all of us. We are stronger if we work together. Nkosi sikelel' iAfrica."*[4]

9 Over and above the risk of the Covid-19 virus, a further threat to the public reared its head in the form of excessive pricing of PPE and medical supplies by

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2 *Democratic Alliance v President of the Republic of South Africa and Others (Economic Freedom Fighters Intervening)* [2020] ZAGPPHC 237 (19 June 2020) at para 1.

3 *Mohamed and Others v President of the Republic of South Africa and Others* [2020] 2 All SA 844 (GP) at para 62.

4 *Moela and Another v Habib and Another* (2020/9215) [2020] ZAGPJHC 69 at para 60.

private companies. The Commission was inundated with excessive pricing complaints in the first few weeks of the national lockdown.[5]

10 Price gouging during the Covid-19 pandemic is not only a breach of the provisions of the Competition Act, but exploitative conduct that infringes, and threatens to infringe, constitutional rights.

11 The conduct of Babelegi constitutes price gouging. It was common cause before the Tribunal that price gouging is a form of excessive pricing.[6] The Tribunal defined price gouging as a situation "*where firms take advantage of a crisis situation, civil emergency, disaster, or impending disaster to charge excessive prices for products that are used by citizens to cope with that situation*."[7]

12 The Commission's expert economist explained that "*price gouging is considered an especially concerning form of excessive pricing since it is likely to cut off poor consumers from goods essential to maintain their health, safety and welfare in a disaster context.*"[8]

13 The Tribunal found that "*Babelegi exploited this crisis situation, when it successively and massively increased both its prices and mark-ups for masks during the Complaint Period*."[9]

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5 Commission's Founding Affidavit, para 77, p32.

6 Tribunal Reasons, para 72, p575.

7 Tribunal Reasons, para 71, p575.

8 Commission's Supporting Affidavit, para 11, p93.

9 Tribunal Reasons, para 599, para 151.

14 For the purposes of the constitutional analysis, the mask is an item of PPE whose purpose is the prevention of the transmission of the coronavirus.

15 The Commission engaged in a careful analysis to conclude that masks were essential products in the context of Covid-19 emergency.[10] Babelegi disputed this, and the Tribunal found it unnecessary to decide the point.[11] It is common cause that masks have subsequently been declared an essential good under the Regulations.[12] The amici concur with the Commission's analysis, and the Tribunal's finding that PPEs, and particularly the FFP1 dusk mask "*became a product for people to use in trying to cope with Covid-19*".[13]

16 Babelegi's decision to increase prices, and the excessive prices that followed, had the potential to limit and prevent South Africans from accessing goods required to maintain their health, safety and welfare during the Covid-19 pandemic.

17 As a result, South African's health, safety and welfare were put at risk – and in some cases detrimentally impacted - by the price gouging conduct of Babelegi. This risk is disproportionately borne by poorer households who are more likely to be "*exposed to being unable to afford essential goods for their health and safety*" during a pandemic.[14]

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[10] Commission's Supporting Affidavit, paras 50 - 57, p110 - 114.

[11] Tribunal Reasons, para 88, p580.

[12] 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.

[13] Tribunal Reasons, para 73, p575.

[14] Commission's Supporting Affidavit, para 24, p104.

18 Excessive pricing and price gouging, particularly in a society in which inequality and poverty are rife, has a profound impact on patients in both the private and public sector. Babelegi's conduct implicates:

18.1 The section 27 right to access to healthcare services;[15]

18.2 The section 12 right to freedom and security of the person, which includes the right to bodily integrity;[16]

18.3 The section 10 right to dignity;[17]

18.4 The section 11 right to life;[18]

18.5 The section 28 right of children to basic health care services.

19 Section 27(1)(a) of the Constitution provides that everyone has the right to have access to healthcare services. Subsection (2) provides that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right.

20 The right to have access to healthcare services must be read and understood purposively and within its context.[19] In *Pharmaceutical Society* the SCA held

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[15] Section 27(1)(a) provides:

"Everyone has the right to have access to health care services, including reproductive health care".

[16] Section 12(2) provides:

"Everyone has the right to bodily and psychological integrity which includes the right—

(a) to make decisions concerning reproduction;

(b) to security in and control over their body; and

(c) not to be subjected to medical or scientific experiments without their informed consent.

[17] Section 10 provides: "*Everyone has inherent dignity and the right to have their dignity respected and protected".*

[18] Section 11 provides: "*Everyone has the right to life*."

[19] *Soobramoney v Minister of Health (KwaZulu Natal)* (CCT32/97) 1998 (1) SA 765 (CC) (27 November 1997).

that 'access' to health care services required services to be both physically accessible and affordable, and was of the opinion that prohibitive pricing of medicines may infringe this standard.[20] This view was supported in a concurring judgment by Moseneke J in the subsequent appeal to the Constitutional Court.[21]

21 The disproportionate impact of excessive pricing on poorer sections of South African society exacerbates and entrenches socio-economic inequality. The constitutional commitment to addressing these conditions is expressed in the preamble of the Constitution:

> *"We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to –*
>
> *Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; …*
>
> *Improve the quality of life of all citizens and free the potential of each person."*

22 This commitment is also echoed in section 7, where the Bill of Rights affirms the democratic values of human dignity, equality and freedom.

Constitutional obligations of private firms

23 Section 8(2) of the Constitution extends the application of the Bill of Rights – and its obligations – to natural and juristic persons in certain circumstances.[22] It imposes human rights duties on corporate bodies and ensuring their accountability for human rights violations. The Constitutional Court has noted

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[20] *Pharmaceutical Society of South Africa v Tshabalala-Msimang 2005 (3) SA 238 (SCA*) at paras 42, 53 and 77.

[21] *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (2) SA 311 (CC) para 706.

[22] Section 8(2) provides that: '*a provision in the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right*'.

that: "*In subjecting private power to constitutional control, section 8(2) recognises that private interactions have the potential to violate human rights and to perpetuate inequality and disadvantage*."[23]

24 Indeed, an approach to constitutional rights that applies only to the state is inconsistent with the transformative nature of the constitution and "*unmindful of modern day reality - that in many instances the abuse of the exercise of power is perpetuated less by the State and more by private individuals against other private individuals.*"[24]

25 The wording of section 8, however, acknowledges that not every right, and not all obligations imposed by a particular right, are capable of horizontal application.

26 The extension of the application of the Bill of Rights to non-state actors imposes a '*negative*' obligation on private parties to not to interfere with or diminish the enjoyment of a right.[25]

27 The Constitutional Court has recently considered the broader objective of section 8 in relation to the obligations of an independent school to provide a basic education.[26] In *AB and Another v Pridwin Preparatory School* [2020] ZACC 12 (17 June 2020) the Court criticised the school's "*aversion to constitutional obligations*" and emphasised the transformative purpose of

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[23] *Pridwin* at para 131.

[24] As Madala J notes in his dissenting judgement in *Du Plessis v De Klerk* 1996 (3) SA 850; 1996 (5) BCLR 658.

[25] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 8 BCLR 761 CC (2011)

[26] *AB and Another v Pridwin Preparatory School and Others* (CCT294/18) [2020] ZACC 12 (17 June 2020).

section 8(2) "*to improve the lives of all citizens and undoing the status quo of entrenched inequality and disadvantage in our society.*"[27]

28 The Court affirmed the extra-curial statements of Madlanga J that:

> *"If we are to take seriously the transformative injunction of our Constitution to '[i]mprove the quality of life of all citizens and free the potential of each person', then our private interactions cannot be left out of the reach of those human rights obligations that may appropriately be borne by private individuals. We cannot take a business as usual approach and maintain the status quo insofar as our private interactions are concerned.*
>
> *. . .*
>
> *Simply put: if we refuse to impose human rights obligations on private individuals for fear of interfering with their autonomy, we risk maintaining a perverse status quo which entrenches a social and economic system that privileges the haves, mainly white people in the South African context. By imposing certain human rights obligations on private individuals and companies, we acknowledge that our current social and economic realities have arisen out of our perverted past and cannot be sanitised."* [28]

29 This approach had previously been firmly endorsed by Moseneke DCJ in his own extra-curial writing as follows:

> *"[T]he Constitution harbours a transformative mission with an altruistic rather than individualistic hue. The foremost purpose of the change sought by the Constitution is not only freedom, but also the achievement of equal worth and social justice.*
>
> *. . .*
>
> *[P]rivate power cannot be held to be immune from constitutional scrutiny. This is particularly so, as we have already seen, when*

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[27] *Pridwin* at para 20.

[28] Madlanga "*The Human Rights Duties of Companies and other Private Actors in South Africa"* (2018) 29 Stellenbosch Law Review 359 at 364 and 368.

private power approximates public power or has a wide and public impact".[29]

30 There is also academic support for the private sector to be held accountable for its conduct implicating rights in the Bill of Rights. Pieterse argues that:

> *"The increasing capacity of private entities to determine access to socio-economic amenities clearly suggests that the transfer of state-like powers and functions to the private sector should be accompanied by a similar transfer of socio-economic responsibility and accountability. But, even beyond the corporatisation of welfare functions, it would be incongruous to preclude socio-economic rights from applying in any so-called 'private' interactions, since this would remove the protection awarded by the rights from the very context where the consequences of socio-economic rights violations are most often felt.*

and

> *"While the obligation to progressively achieve universal access to health care services by way of reasonable measures indeed attaches only to the state, this is but one of the myriad of (positive and negative) obligations generated by s 27(1). Subject to the (express and implied) limitations on horizontal application derived from s 8 of the Constitution, all obligations inherent in s 27(1)(a) except for that set out in s 27(2) should in principle be viewed as capable of attaching to private entities."* [30]

31 In *Strydom v Afrox Healthcare Ltd* [2001] 4 All SA 618 (T) the High Court regarded section 27(1)(a) as indirectly applicable to private hospitals and held that the right of access to health care services awarded patients a legitimate expectation that the services to which they have access would be rendered with skill and care by professional and trained health care personnel. The SCA

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[29] Moseneke "Transformative Constitutionalism: Its Implications for the Law of Contract" (2009) 20 *Stellenbosch Law Review* .

[30] Pieterse M "Indirect horizontal application of the right to have access to health care services" 2007 SAJHR 159 159. See also S Ellmann 'A Constitutional Confluence: American "State-action" Law and the Application of South Africa's Socio-economic Rights Guarantees to Private Actors' in P Andrews & S Ellmann (eds) The Post- Apartheid Constitutions: Perspectives on South Africa's Basic Law (2001)

overturned the judgment on appeal, but assumed in favour of the applicant that the right could be horizontally applied.[31] Pieterse welcomes this as the "*most definite affirmation of the horizontal dimensions and implicit quality standards inherent in s 27(1)(a) in South African jurisprudence to date.*"[32]

32 Against this backdrop, it is clear that companies have an obligation not to impair or diminish the enjoyment of rights by individuals. Traders of PPE who excessively increase their prices during a time of pandemic impair and diminish South Africans' rights to life, dignity, security of the person, access to healthcare and equality. Profiteering during a pandemic will directly and indirectly jeopardise the rights of many individuals in South Africa. Price gouging is therefore a breach of the negative obligations of suppliers of PPE to refrain from infringing or impairing the rights of their customers.

33 But the enquiry does not end there. The Constitutional Court has, in fact, sometimes moved beyond negative obligations and held that private persons may bear positive obligations under the Bill of Rights.[33]

34 In *Daniels v Scribante and Another* 2017 (4) SA 341 (CC) the respondents argued that the Extension of Security of Tenure Act 62 of 1997, which provides that a Court may order owners to pay compensation for occupiers' improvements when the occupiers are evicted, amounts to imposing a positive duty on a private person to give effect to social rights which is not permitted by the constitution. The Constitutional Court held that section 8(2) of the

[31] Afrox Healthcare Bpk v Strydom [2002] 4 All SA 125 (SCA);.

[32] Pieterse p167.

[33] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011] ZACC 33; *Daniels v Scribante and Another* 2017 (4) SA 341 (CC).

Constitution does not exclude the possibility of imposing such duties and that the right in section 25(6) obliges owners to assist occupiers to live in houses that do not violate their human dignity.

35 The Court, however, was constrained. The imposition of positive obligations would only occur in specific circumstances, determined on a case-by-case basis. Horizontality '*cannot be determined a priori and in the abstract*'[34]. Its application arises when certain factors are present. These include: the nature of the right; the history behind the right; what the right seeks to achieve; how best that can be achieved; the potential that the right may be invaded by persons other than the state; and, whether letting private persons off the proverbial hook negates the essential content of the right.

36 On this score, the Constitutional Court has set out a number of factors that circumscribe when positive obligations may apply. These are:

36.1 the importance of the right in sustaining a constitutional democracy;[35]

36.2 the urgency of the right and the extent to which the violation of a right may lead to a constitutional crisis;[36]

36.3 the link between the right and fundamental human dignity;[37]

36.4 whether the private person is a 'gate keeper' in that it is the only entity that is able to fulfil the right; [38]

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[34] *Daniels* at para 41 citing Currie and De Waal The Bill of Rights Handbook 6 ed (Juta & Co Ltd, Cape Town 2013) at 50.

[35] *Khumalo and Others v Holomisa* 2002 (5) 5 SA 401 (CC).

[36] *Juma Musjid* para 37; *Blue Moonlight* para 39.

[37] *Daniels* paras 33-34.

36.5 the ability of the private person to fulfil the right;

36.6 the vulnerability of the right-holder;[39] and

36.7 whether the application of section 8(2) would be just and equitable in exceptional circumstances.[40]

37 The amici contend that, given their power and ability, in a time of crisis and desperate need, there was not only a negative obligation but also positive obligation upon corporations actively to help facilitate access to potentially life-saving PPE.

38 The amici submit, moreover, that where there is a special relationship between a juristic person and an individual, and the power and capability to fulfil that individual's right rests wholly within the control of the juristic person, section 8(2) will impose positive obligations.

39 The present case is precisely such a situation.

39.1 The South African health system is severely constrained, and unable to provide adequate healthcare services and PPE to everyone in need. There was no national roll-out of masks or other PPE. Individuals were required to purchase mask for themselves.

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[38] *Chirwa v Transnet Limited and Others* 4 SA 367 CC (2008) para 186; *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* 4 SA 179 CC (2014) para 59; *Black Sash Trust* para 8.

[39] *Juma Musjid* para 43.

[40] *Black Sash Trust* para 51; *Blue Moonlight p*ara 39.

39.2 This occurred in the context of an impending national lockdown and advice to wear face-masks, to limit travel and exposure to crowded places such as shopping centres and retail stores.

39.3 In these circumstances, corporate entities who trade in PPE or other medical supplies that can prevent or limit the transmission of Covid-19 during worldwide pandemic and health crisis (i) hold unusual power in relation to their customers; (ii) have a special relationship with South Africans that require those products to cope with the pandemic; and (iii) have the power and capability to fulfil the individual's rights through access to those products.

40 If permitted leave to adduce the evidence, the amici will provide evidentiary support for this conclusion through the expert views of:

40.1 Dr Naledi, who provides an overview of the impact of Covid-19 on South Africa's health system and on access to health services. She emphasises the important role of prevention in managing the pandemic, and explains the peculiar challenges facing many South Africans in trying to take the preventative measures – such as wearing face-masks.

40.2 Dr Naledi also outlines the challenges faced by the health system – the key vehicle to deliver health rights to people in South Africa. She explains that in the context of a vulnerable and struggling public health system, it is absolutely essential to prevent and manage a communicable and fast-moving virus within our country. Non-pharmaceutical interventions are being proven to be lifesaving, and

are a key element of many countries, including South Africa's public health response to the pandemic.

40.3 Dr Naledi also explains how socio-economic factors influence access to health services and health outcomes during a pandemic. This is particularly noticeable in the present pandemic where communities are being asked to prevent the disease themselves through behaviour change or individual action such as wearing a mask in public. These steps are extremely difficult for large sections of society who rely on public transport, do not have access to proper sanitation, and live in densely crowded neighbourhoods. The state has not implemented a national roll-out of face masks, instead, it requires everyone to purchase or make their own mask. In this context, the excessive pricing of PPE creates a further (and potentially insurmountable) barrier to access to healthcare and has the potential to constrain the population's response to Covid-19.

40.4 Bassier provides evidence of the devastating job losses in the formal and informal employment sectors during this period and the increase in poverty flowing from the loss of income. He explains how people's socio-economic circumstances impact their access to PPE because:

40.4.1 people in lower social and economic classes bear the brunt of the socio-economic consequences of the pandemic. This means that increases to the prices of essential items, such as PPE to reduce risk of infection from COVID-19, become substantially more prohibitive;

40.4.2 people in lower social and economic classes are often required to work at the 'frontline' of the pandemic or are unable to negotiate appropriate social isolation in the workplace, or at home, and are in particular need of PPE;

40.5 In his view, access to essential preventative equipment cannot be considered or addressed in isolation from this context. Access to essential products became substantially constrained for large proportions of the South African population. For this reason, he concludes that excessive pricing of PPE and medical supplies in a pandemic has a disproportionate effect on people in lower social and economic classes in our country.

The Competition Act is a transformative instrument

41 This Court is well-versed in the intersection between constitutional and competition law, and the public interest at the centre of this. At its core, the Competition Act seeks to protect, promote and fulfil constitutional rights. Davis JP recently stressed the importance of "*enforcing the vision of the Competition Act Competition Act 89 of 1998 as formulated and passed by the democratically elected Parliament of this country*". He noted that a significant part of this vision is the portion of the preamble that acknowledges the Act's role as a transformative instrument by recognising: *"[T]hat apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anti-competitive trade practices, and unjust*

restrictions on full and free participation in the economy by all South Africans."[41]

42 A key objective of the Competition Act is the advancement of the social and economic welfare of South Africans.[42] This objective gains heightened importance in times of crisis. The Competition Act is one of the ways in which certain rights indirectly attract horizontal application to private parties. In *Maphango* the Constitutional Court found, in relation to the right of access to housing, that one of the ways in which the right "*ripples out to private rights*" is in terms of legislation empowering the state to regulate the activity of private persons in the fulfilment of a right.[43]

43 If granted leave, the amici will rely on the evidence of Gray who provides an overview of South Africa's regulatory pricing mechanisms introduced through the National Drug Policy in 1996.

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[41] *Competition Commission v Bank of America Merrill Lynch International Limited*, CAC case no.: 175/CAC/Jul19, judgment delivered on 28 February 2020.

[42] Section 2 of the Competition Act sets out its purpose. It says:

> *"The purpose of this Act is to protect and maintain competition in the Republic in order –*
>
> *(a) to promote the efficiency, adaptability and development of the economy;*
>
> *(b) to provide consumers with competitive prices and product choices;*
>
> *(c) to promote employment and advance the social and economic welfare of South Africans;*
>
> *(d) to expand opportunities for South African participation in world markets and recognise the role of foreign competitors in the Republic;*
>
> *(e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy;*
>
> *(f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons; and*
>
> *(g) to detect and address conditions in the market for any particular goods or services, or any behaviour within such a market, that tends to impede, restrict or distort competition in connection with the supply or acquisition of those goods or services within the Republic."*

[43] *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC).

44 Gray explains that the pricing of PPE is not covered by South Africa's current health pricing regime. At this stage, excessive pricing of certain essential medical supplies for the prevention of COVID-19, such as face-masks, must be regulated by the Competition Act and emergency regulations. Gray stresses that:

44.1 access to essential medicines and health commodities must be addressed within the socio-political and economic context of the country;

44.2 the market alone cannot be relied upon to deliver affordable health products during a pandemic when demand can be expected to outstrip supply; and

44.3 an appropriate regulatory system is needed to protect the public, and public health, against the potential of exploitation and harm.

45 Gray describes the health sector reforms implemented over the last three decades, including the creation of the South African Health Products Regulatory Authority ("**SAHRPA**"), a statutory body responsible for health product regulation (but not for pricing interventions), the Single Exit Price ("**SEP**") regulating the pricing of medicines in the private sector, and the phased introduction of medical devices and in vitro diagnostic devices ("**IVDs**") price regulation through the Medicines and Related Substances Control Act 101 of 1965 and the Regulations thereto.

46 He discusses the limitations of the current health pricing regime, including:

46.1 PPE is exempted from the ambit of the SEP review and policy proposals. The opportunity to issue regulations for the selection of essential medical devices is provided by the National Health Act 61 of 2003, but has yet to be used to its full capacity;

46.2 the SEP is not designed to remedy unjustified pricing conduct or behaviour. For example, it permits a dominant player – even a single dominant manufacturer / supplier – to determine the initial private sector entry price of a medicine;

46.3 a non-surgical mask is not currently considered a medical device for the purposes of the Medical devices and IVD price regulation.

46.4 In consequence of the position described above, the provisions of the Competition Act and/or the emergency regulations currently in place are the sole means by which to regulate pricing and pricing conduct for the items listed above.

Interpretation of the Competition Act

47 The interpretation and application of the Competition Act must give effect to these objectives and vision. In *Cool Ideas*, the Constitutional Court said:

> *"A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:*
>
> *(a) that statutory provisions should always be interpreted purposively;*
>
> *(b) the relevant statutory provision must be properly contextualised; and*

(c) *all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).”*

48 Indeed, section 1(b) of the Competition Act requires that its provisions be interpreted in a manner consistent with the Constitution and a manner that gives effect to the purposes set out in section 2. The Act must be read purposively and within the socio-historical context of this country.[44]

49 The interpretative obligations, however, go further than simply requiring a reading of the provision that is consistent with the Constitution.

49.1 Section 39(2) of the Constitution requires that, when interpreting any legislation, every court must promote the spirit, purport and objects of the Bill of Rights. This duty is one in respect of which “*no court has a discretion*” and must “*always be borne in mind*” by the courts. This is so even if a litigant has failed to rely on section 39(2).[45] This is that if a provision is reasonably capable of two interpretations, section 39(2) requires the adoption of the interpretation that “*better*” promotes the spirit, purport and objects of the Bill of Rights. This is so even if neither interpretation would render the provision unconstitutional.[46]

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[44] *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another* (70/CAC/APR07) [2009] ZACAC 1 (29 May 2009).

[45] Phumelela Gaming and Leisure Limited v Grundlingh and others 2007 (6) 350 (CC) at paras 26–27.

[46] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and another* 2009 (1) SA 337 (CC) at paras 46, 84 and 107.

49.2 When interpreting legislation that implicates a fundamental right enshrined in the Bill of Rights, a Court must read the particular statute "*through the prism of the Constitution*".[47]

49.3 As the Constitutional Court explained in *Fraser v ABSA Bank*, this is a "*mandatory constitutional canon of statutory interpretation*". The Court continued*:*

> *"Section 39(2) requires more from a Court than to avoid an interpretation that conflicts with the Bill of Rights. It demands the promotion of the spirit, purport and objects of the Bill of Rights. These are to be found in the matrix and totality of rights and values embodied in the Bill of Rights. It could also in appropriate cases be found in the protection of specific rights."*[48]

50 The importance of a purposive and constitutionally compliant interpretation of the Competition Act recently endorsed in *Pickfords*,[49] where the Constitutional Court had to decide whether section 67(1) of the Competition Act constitutes a prescription provision or a procedural time-bar provision, which in the event of non-compliance can be condoned in terms of section 58(1)(c)(ii) of the Competition Act. Majiedt J found, at paragraphs 37 and 38, that when contemplating competing principles of statutory interpretation:

> *"In applying these principles, particularly those expounded in Wary Holdings, one must determine which of the possible interpretations is the least limiting of the right of access to courts. Put differently, which of these two interpretations better promotes the spirit purport and objects of the Bill of Rights? To make that determination, it is necessary to consider the purpose of the Competition Act. In its*

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47 *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) at para 87.

48 *Fraser v ABSA Bank Ltd (NDPP as Amicus Curiae)* 2007 (3) SA 484 (CC) at para 47; see, also, *Laugh It Off Promotions CC v SAB International (Finance)* 2006 (1) SA 144 (CC) at para 48.

49 *Competition Commission of South Africa v Pickfords Removals SA (Pty) Limited* (CCT123/19) [2020] ZACC 14 (24 June 2020).

Preamble, the Competition Act stridently declares that it seeks to achieve, amongst other objectives, equal opportunity to all citizens to participate fairly in the economy, to establish a more effective and efficient economy in our country and to restrain particular trade practices which undermine a competitive economy. It sets out these broad objectives in greater detail in section 2 of the Act.

The Commission plainly plays a central role in attaining the objectives of the Competition Act. Its establishment, powers and functions are set out in Chapter 4. It is clear from the manner in which the Commission must operate, as envisaged in Chapter 5, through initiating complaints and referring them to the Tribunal, that access to the Tribunal is a crucial component of the Commission's work. Interpreting section 67 (1) of the Competition Act is imposing an absolute time-bar in the form of a prescription provision proper would clearly subvert access to the Tribunal."

Appropriate Relief

51 The Tribunal is empowered to make an appropriate order in relation to a prohibited practice. Section 58(1)(a) lists various orders available to the Tribunal but its wording makes clear that the Tribunal is not limited to these specific types of order.

52 Section 59 empowers the Tribunal to impose an administrative penalty in cases of excessive pricing under section 8(1) of the Act.[50] The doctrine of proportionality should apply to the determination of an appropriate administrative penalty: the penalty should be proportional in severity to the blameworthiness of the offending party, the nature of the offence and its effect on the South African economy in general and consumers in particular; it should not be imposed in order to destroy the business of the offending party.[51]

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[50] It provides: "*The Competition Tribunal may impose an administrative penalty only— (a) for a prohibited practice in terms of section 4 (1), 5 (1) and (2), 8 (1), 8 (4), 9 (1) or 9 (1A)*".

[51] *Southern Pipeline Contractors v Competition Commission* [2011] 2 CPLR 239 (CAC) para 9.

53 The amici submit that in addition to the principles developed under competition law, in cases involving price gouging the Tribunal and this Court must ensure any remedy is effective and vindicates constitutional rights.

54 In *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) Ackermann J held:

> *"Given the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal."*[52]

THE APPLICATION OF THESE PRINCIPLES TO THE ISSUES IN DISPUTE

55 It was common cause before the Tribunal that the essential elements of a section 8(a) contravention are dominance, an excessive price, and detriment to consumers or customers.[53]

56 Babelegi's attempt to create distance between its conduct and "*price gouging*" is unavailing. It contends that "*[d]ifferent public policy rationales apply when*

[52] Quoted with approval in *Mvumvu and Others v Minister of Transport and Another* 2011 (2) SA 473 (CC) at para 48.

[53] Tribunal Reasons, para 48, p570 – 571.

contrasting price gouging prohibitions and excessive pricing abuses under competition law",[54] and seeks to move the focus from the policy considerations and consequences of its conduct to the technical test required by the Act.

57 But this starkly shows the importance of the amici's intervention in this matter. This Court should not merely confine its focus to the narrow application of the provisions of the Competition Act devoid of its context. Rather, it must look broadly at the constitutional implications of exploitative pricing conduct, and consider the interpretation and application of the Act against this backdrop. Within the constitutional framework, it becomes clear that the inference of market power through increased prices during a pandemic, and the simple economic test to determine whether a price increase was excessive, is the approach most likely to fulfil the objectives of the Competition Act and protect the constitutional rights of South Africans.

58 We now turn to consider the elements in dispute in this appeal.

The determination of dominance and market power in a pandemic

59 Section 8(1)(a) only prohibits the conduct of "*a dominant firm*". The threshold question for the application of section 8 is whether the dominance requirements of section 6 and 7 of the Act are met.[55] The Act defines dominance on the basis of either certain market share thresholds in a market, or in terms of market power.[56]

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[54] Babelegi's heads of argument para 127.

[55] *Mittal Steel* at para 30.

[56] Market power is defined in the Act as "*the power of a firm to control prices, or to exclude competition and to behave to an appreciable extent independently of its competitors, customers and suppliers.*"

60 The Commission's case on dominance is based on market power.[57] In particular, the Commission argues that Babelegi held temporary market power during the Complaint Period as a result of the WHO's declaration of a Public Health Emergency of International Concern, the increased demand for face mask in the months preceding the announcement of the national state of disaster.[58] In these conditions, the Commission argues that Babelegi exerted market power by behaving to an appreciable extent independently of its competitors, customers and suppliers.[59]

61 Babelegi submitted before the Tribunal, and raises as a ground of appeal, that it did not enjoy such market power, and should therefore not be subject to the excessive pricing provisions of the Competition Act.[60]

62 The Tribunal found that: "*During a crisis period, the actual conduct of a firm can be used as a proxy to assess its market power. This is done having regard to the factual evidence regarding the pricing during the complaint period and the comparative period.*"[61] The Tribunal concluded 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.[62]

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[57] It was common cause that Babelegi's annual turnover or assets in the Republic equated to, or exceeded, R5 million and that it fell within section 6.

[58] Commission's Founding Affidavit, para 58 – 59, p26.

[59] Commission's Founding Affidavit, para 61, p27.

[60] The amici do not engage with Babelegi's argument in respect of the Tribunal's failure to delineate the market.

[61] Tribunal Reasons, para 92,p 581..

[62] Tribunal Reasons, para 89, p580.

63 The Tribunal moreover found that "*Babelegi successively and boldly increase[d] its mask prices during this period, thus behaving to an appreciable extent independently of its competitors, customers or suppliers.*"[63]

64 Similarly, in *Dis-Chem*, the Tribunal's ultimate finding in respect of dominance was that: "*a store, by merely having PPE products in the context of such excess demand could enjoy market power. Multiple firms – even stores located in the same shopping mall – could conceivably exercise market power.*"[64]

65 The amici agree with the Commission that the Covid-19 circumstances have conferred market power upon Babelegi during the Complaint Period which afforded it the opportunity to exploit customers by charging an excessive price.[65]

66 Babelegi argue that its conduct was not consistent with any traditional notion of the existence of market power[66] and that the Tribunal's finding was made without a proper factual basis and solely on the basis of its price increases.[67]

67 But Babelegi's approach is altogether too myopic. These '*traditional notions*' are not sufficient in circumstances where the pricing conduct of corporate entities infringes on constitutional rights. A more stringent approach is required. In this context, the fact of the price increase alone is sufficient to demonstrate that Babelegi was able to act to an appreciable extent

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63 Tribunal Reasons, para 145, p597.

64 The Competition Commission v Dis-Chem Pharmacies Limited CR008Apr20 (7 July 2020) para 139 and 140.

65 Tribunal Reasons, para 53, p571.

66 Babelegi's heads of argument, para 101.

67 Babelegi's heads of argument, para 110.

independently of its competitors, customers or suppliers, and held the necessary market power to be regarded as a dominant firm.

The proper interpretation and application of section 8(3)

68 Section 8(3) requires that, when determining an excessive price, one must determine "*if that price is higher than a competitive price*" and "*whether such difference is unreasonable*" by having regard to the context – i.e. "*determined by taking into account all relevant factors*".[68]

69 The Tribunal found that the appropriate economic test to assessing an excessive price in times of crisis such as Covid-19 is to consider whether "*the firm's price or markup or margin increased materially relative to what was previously charged or applied, and if so, whether that increased is justified by any cost increases from a supplier further up the value chain*."[69] The basic test for the first leg of the section 8(3) test is "*whether the price exceeds what the firm would have obtained in a counterfactual world of normal and sufficiently effective competition*."[70]

70 Similarly, in *Dis-Chem*, the Tribunal reasoned:

> *"It must be emphasised that we are concerned with an enquiry in the context of the Covid-19 outbreak, a health disaster of global proportions. In this regard there is ample authority for employing a simpler test namely that of pre- and post- disaster comparison of the firm's own pricing."*[71]

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[68] Tribunal Reasons, para 45, p569.

[69] Tribunal Reasons, para 99, p582.

[70] Tribunal Reasons, para 101.

[71] The Competition Commission v Dis-Chem Pharmacies Limited CR008Apr20 (7 July 2020) para 150.

71 In 2018, the Act was amended to provide for relevant factors to be taken into account because the "*determination of excessive prices is complex and often case specific.*"[72]

72 Section 8(3) provides:

> *"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."*

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

73 The Tribunal found that the list of factors in subsections (a) to (f) are non-exhaustive. The Tribunal has a discretion in relation to: relevance; the weight to be attached to a particular factor; and the extent to which a factor affects the eventual determination of the issue. How the Tribunal exercises this discretion will depend on the nature of the facts of each case and therefore it must be determined on a case by case basis.[73]

74 The Tribunal found that, using the "simple yet instructive economic test" for times of crisis, the following factors are relevant to determine whether the prices should be regarded as excessive:[74]

74.1 The price of masks in the Complaint period compared to the price of marks prior to that;

74.2 The number and size of the price hikes;

74.3 The length of time the prices have been charged at that level and how the price increases relate to certain Covid-19 events;

74.4 Babelegi's mark ups on masks sold during the complaint period vs prior mark up;

74.5 Cost increases faced by Babelegi during the relevant period;

74.6 Whether or not any potential advantage by Babelegi in the sale of the product is due to its own commercial efficiency or investment.

[73] Tribunal Reasons, para 46.1 – 46.3, p570.

[74] Tribunal Reasons, para 107, p585.

75 The amici support approach adopted by the Tribunal in the interpretation and the application of section 8 of the Competition Act.

76 The amici submit that an additional basis to support this approach arises from the broader constitutional implications of the conduct. The potential of the price increase to infringe constitutional rights must be included in the section 8(3) assessment.

Reasonableness

77 Section 8 provides that if the Commission is able to make out a *prima facie* case of excessive pricing, then the respondent may rebut that prima facie case by showing that the price was reasonable.

78 It is common cause that Babelegi faced no actual increase in its costs to procure masks prior to 18 March 2020.[75] Babelegi's defence for its price increase was that it anticipated higher purchase prices for face masks from its suppliers as demand started to outstrip supply.[76]

79 The Tribunal rightly found that the allegation that it was standard practice to increase prices in anticipation of supply disruptions and cost increases "*was not a proper defence when viewed through the lens of Covid-19's impact on South African consumers and the economy, as well as the number and quantum of Babelegi's price increases*."[77] It concluded that Babelegi had not put up a rational and valid explanation for its successive and massive price increases.

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[75] Tribunal Reasons, para 130, p593.

[76] Tribunal Reasons, para 16, p562.

[77] Tribunal Reasons, para 140, p595.

80 The Commission submitted that a low threshold is appropriate for the difference between the price charged by the firm and the competitive price. It suggested a 10% threshold.[78] The Commission's economist suggested that precedent and economic logic suggest a low threshold is appropriate.[79]

81 The question of the justification reasonableness of the price difference must be considered in light of private companies' negative obligation not to infringe rights.

82 In South Africa, a relatively modest increase in price may place certain items out of reach for a large proportion of the population. Once a court concludes that the conduct has the potential to limit constitutional rights, a strict threshold on the actual difference should be adopted.

Detriment

83 On a basic level, the detriment to consumers is being unable to source face masks and other essential goods. The amici submit that the consideration of detriment must include the constitutional rights implicated by the conduct.

84 The Tribunal noted that in M*ittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another* (70/CAC/Apr07) [2009] ZACAC 1 this Court confirmed that the assessment of detriment requires a value judgment and that ordinarily if the prices complained of are held to be excessive, detriment to consumers will have resulted.[80] The Tribunal added that this conclusion is unsurprising since excessive pricing is "*an exploitative*

[78] Tribunal Reasons, para 157, p600.

[79] Commission's Supporting Affidavit, para 32, p103.

[80] Tribunal Reasons, para 167, p602.

type of abuse" and will generally be at the expense of consumers or customers in the economy.[81]

85 The amici agree with the Tribunal's approach and emphasise that the conduct of Babelegi during a crisis must be considered in the context of the transformative purpose of the Act, and Babelegi's constitutional obligations towards the public during times of crisis.

86 As this Court held in *Mittal* an "*excessive price may be charged to a single customer*". Such conduct would implicate the constitutional rights of that individual and, as the Tribunal right held, constitutes sufficient grounds on which to find that Babelegi has charged an excessive price in breach of section 8(1)(a) of the Act.

87 The Tribunal concluded, that "[i]n the relevant context, Babelegi's conduct is reprehensive because its customers are exploited amidst a crisis when these customers are at their most vulnerable and their choices limited."[82]

88 This means that one must have regard to context, including the nature of the conduct, or the theory of harm, as well as the economic and other circumstances, in this case the substantial hiking up of prices in the time of a health crisis. Such conduct by a firm at such time should from a public interest perspective be regarded as offensive.[83]

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81 Tribunal Reasons, para 167, p602.

82 Tribunal Reasons, para 174, p603.

83 Tribunal Reasons, para 169, p602.

Penalty

89 The Tribunal noted that the Commission and Babelegi had widely divergent views on the appropriate administrative penalty to be paid by Babelegi.[84]

90 The amici submit that the proportionality assessment required in determining appropriate administrative penalty must include the impact of the excessive pricing behaviour on the constitutional rights of the public.

91 The Tribunal partially reached this conclusion by finding that the fact that the price increases took place amidst the Covid-19 health crisis – a time when South African consumers and customers are specifically vulnerable – was an aggravating factor.[85] So, too, must the constitutional implications of such conduct be placed on the scales in the consideration of a proportionate penalty.

92 While the amici support stringent penalties for corporate infringements of constitutional rights, it also accepts that in the present case Babelegi is a small business, and submits that this should also be taken into account.

CONCLUSION

93 For all the reasons set out above, the amici urge this Court to confirm the decision of the Tribunal, and to recognise the constitutional implications of excessive pricing in the context of a pandemic.

Phumlani Ngcongo

[84] Tribunal Reasons, para 182, p605.

[85] Tribunal Reason, para 187, p610.

Frances Hobden

Cingashe Tabata

Counsel for the first and second amici

Chambers, Sandton

27 August 2020

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APPENDIX TO AMICI'S SUBMISSIONS: PRICE GOUGING IN THE UNITED STATES

1 The United States recognises two forms of price gouging:

1.1 a "percentage increase cap" limit, which fixes post-disaster prices based on pre-disaster prices. An example of a state with this type of price gouging law is California. California's Penal Code § 396 provides that it is unlawful for a person to sell any products for a price more than 10% above the price charged immediately prior to the declaration of a state of emergency. A price increase will not be unlawful if the supplier can prove that the increase in price was directly attributable to (i) additional costs imposed on the supplier of the goods; or (ii) labour costs; or (iii) the increase in the price of the materials used to provide/produce the product. As the California Penal Code only allows enforcement of price gouging restrictions when a state of emergency has been declared, there have only been a few instances in which such restrictions have been invoked.

1.2 a ban on "unconscionable" price increases. An example of a State with this type of price gouging law is New York. New York's General Business Law GBS § 396-r prohibits the sale of essential consumer goods and services at an unconscionably excessive price during periods of abnormal disruption of the market. In determining whether a price is unconscionably excessive, a court should have regard to the

following factors:: (i) whether the amount of the excess price is unconscionably extreme; or (ii) whether there was an exercise of unfair leverage or unconscionable means; or (iii) a combination of both (i) and (ii).

2 Since the Covid-19 outbreak, there has been a significant increase in price gouging allegations in the US. On 23 March 2020, the US President issued an executive order aimed at preventing price gouging and hoarding of medical supplies required for the prevention of contraction and/or treatment of Covid-19. In terms of this executive order, it is regarded as a misdemeanour to engage in price gouging or hoarding of essential products, the sanctions for such imprisonment including imprisonment not exceeding a year and a in prison and a fine of up to USD 10 000.

3 The Department of Justice has also announced that it will prioritise fraudulent activity and price gouging involving, amongst others, PPE, and has created a "Covid-19 Hoarding and Price Gouging Task Force".[1]

4 Notably, no federal law prohibits price gouging[2] and exploitative excessive pricing. Exploitative pricing abuses do not fall under the scope of US anti-trust law. However, section 102 of the Defense Production Act ("**DPA**") does criminalise the accumulation of scarce goods when:

4.1 accumulation is in excess of the reasonable demands of business, personal, or home consumption; or

[1] Op cit note 1, p. 11

[2] Ibid, p. 304.

4.2 accumulation is for the purpose of resale at prices in excess of market prices.

5 Despite the lack of federal laws regulating price gouging, 29 States and the District of Columbia[3] prohibit price gouging and excessive prices of certain commodities during periods of unusual supply disruption.[4] Such periods are normally triggered by a declaration of emergency by the President, the governor or local officials.[5]

6 The content and scope of these federal laws are by no means homogenous as they vary significantly between States:

6.1 some states have specifically defined what price increases or price ranges will qualify as price gouging,[6] whereas other states have adopted a more generalised approach. These states rather prohibit "unconscionable," "unreasonable," and/or "excessive" price increases;[7]

6.2 while the majority of states have identified certain products and/or services to be covered by the price gouging restrictions, some states

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[3] Ibid.

[4] OECD *Exploitative pricing in the time of Covid 19* (26 May 2020) available at http://www.oecd.org/competition/Exploitative-pricing-in-the-time-of-COVID-19.pdf, p. 3.

[5] Op cit note 1, p. 304.

[6] See for example Alabama, AL ST §81-31-4 (equal or more than 25 percent of the average price during last 30 days prior to declared state of emergency); California, PEN §396 (more than 10 percent over the cost of items immediately preceding declared state of emergency); and District of Columbia, D.C. Code. Ann. §28-4101-4103 (more than 10 percent over price or products during 90-days preceding declared state of emergency).

[7] See for example Florida, Fla. Stat. § 501.160; Maine, Me. Rev. Stat. Ann. tit. 10, §1105; and New York, GBS § 396-r.

have not limited their anti-price gouging laws to a set range of products and/or services.[8]

7 The majority of the state anti-price gouging laws impose civil liability on those who engage in price gouging. The civil penalties imposed may range from USD 1 000 USD 250 000. However, some states also provide for injunctions and/or criminal penalties.

US Case Law

United States of America v Amardeep Singh

8 On 24 April, the US Attorney's Office for the Eastern District of New York stated that they had brought the first Covid-19 related criminal case invoking the DPA. In the case of the *United States of America v Amardeep Singh*, Singh was accused of stockpiling PPE at his sneaker and apparel store and selling the goods at an excessive mark-up. Records obtained in a judicially-authorised search indicate that three-ply disposable face masks which Singh had purchased for a per-unit price of $ 0.07 were resold for a per-unit price of $ 1.00 - a mark-up of 1328 percent. Singh has only been charged for one count thus far.

9 People of the State of New York against Quality King Distributors, Inc., and Glenn Nussdorf

10 General Business Law GBS § 396-r prohibits the sale of essential consumer goods and services at an unconscionably excessive price during periods of abnormal disruption of the market. "Abnormal disruption of the market" is defined

[8] See for example Louisiana, La. Rev. Stat. Ann. §29:732.

under the section as any change in the market, whether actual or imminently threatened, resulting from, amongst others, national or local emergency, or other cause of an abnormal disruption of the market which results in the declaration of a state of emergency by the governor.

11 Whether or not a price is considered to be unconscionably excessive is a determination to be made by the court. A court in making its determination will consider the following factors (i) whether the amount of the excess price is unconscionably extreme or (ii) whether there was an exercise of unfair leverage or unconscionable means or (iii) a combination of both (i) and (ii).

12 Where a violation of this section is alleged, the attorney general may apply in the name of the People of the State of New York to the supreme court of the State of New York on notice of five days for an order enjoining (interdicting) the alleged violation. The court can impose a civil penalty not exceeding USD 25 000 or order restitution to the aggrieved consumers.

13 In the case of *People of the State of New York against Quality King Distributors Inc*, the Attorney General of the State of New York ("**Attorney General**") filed a petition under General Business Law § 396-r and Executive Law § 63(12) against Quality King Distributors Inc. ("**Quality King**")[9], alleging that Quality King had engaged in price-gouging during the Covid-19 pandemic by increasing its wholesale prices on sales of Lysol disinfectant products.[10]

[9] *People of the State of New York against Quality King Distributors, Inc., and Glenn Nussdorf,* para 1.

[10] Ibid, para 2.

14 Quality King is a major wholesale distributor of retail products, specifically Lysol disinfectant products (including Lysol Disinfectant Spray ("**Lysol Spray**") and Lysol Disinfectant Wipes).[11]

15 The Attorney General seeks an order (i) permanently interdicting Quality King from engaging in the alleged illegal price gouging and (ii) ordering Quality King to pay restitution to aggrieved consumers, a civil penalty and costs.[12]

16 Prior to the Covid-19 crisis, Quality King had sold Lysol Spray to retail stores at a price of USD 51 for a 12-pack of this product (roughly USD 4.25 per can of product).[13] Following the onset of the Covid-19 pandemic, the New York Governor declaring a State of disaster, and a report that Lysol Spray had been shown to be effective against fighting viruses similar to Covid-19, Quality King repeatedly increased the price of Lysol Spray. By 30 March 2020, Quality King had increased the price of Lysol Spray to USD 109.77 for a 12-pack, roughly USD 9.15 per can.[14]

17 In the Attorney General's petition, it argues that there was no reason or justification for Quality King's price increases. In particular, Quality King's costs to acquire Lysol Spray from its wholesale suppliers had remained the same.[15]

18 Quality King attempted to justify its increase in prices by stating that it had experienced increased costs related to Covid-19. The Attorney General

[11] Supra note 10, para 2.

[12] Ibid, para 5.

[13] Ibid, para 10.

[14] Ibid, para 29.

[15] Ibid, para 37.

dismissed this justification, asserting that these purported costs did not account for Quality King's increases in the price of Lysol. In short, Quality King had increased its sale prices during Covid-19 without being compelled to do so by cost increases.[16] Accordingly, the Attorney General alleged that Quality King has engaged in price gouging in violation of General Business Law GBS § 396-r.

19 At the time of writing, no court judgement had been handed down.

United States of America v Kevin Jay Lipsitz

20 Kevin Jay Lipsitz ("**Lipsitz**") is the Chief Executive Officer and apparent sole owner of SuperGoodDeals.com ("**SBD**") Inc, a New York domestic corporation. On 8 July 2020, Lipsitz was arrested and has been charged with violating the DPA and committing wire fraud. He allegedly, *inter alia*, engaged in price gouging by selling PPE and other health and medical resources, some of which were designated as scarce due to the Covid-19 pandemic, at prices far exceeding prevailing market prices.

21 The court filings indicate that prior to February 2020, Lipsitz and SBD did not appear to have acquired, marketed or sold PPE within the normal course of business. However, approximately between 1 February 2020 and 31 May 2020, Lipsitz and SBD stockpiled PPE and other medical resources. Some of these included medical resources that had been designated as scarce materials.

22 Between approximately 1 March 2020 and 31 May 2020, Lipsitz and SBD sold the stockpiled PPE and medical resources at prices that exceeded prevailing

[16] Ibid, para 39.

market prices. Based on records acquired from the E-commerce website that Lipsitz used:

22.1 3M-branded Model 8210 and Model 8210 Plus N-95 filtering facepiece respirators were acquired for an average per-unit cost of USD 7.82. However, Lipsitz then typically sold these products on SBD for a per-unit price of between USD 19.95 and 21.95. This constituted a mark-up of approximately 155 to 180 per cent;

22.2 KN-95 filtering facepiece respirators were acquired for an average per-unit price of USD 2.00. These were then typically sold by Lipsitz on SBD for a per-unit price of USD 12.95. This amounted to an approximate 547 per cent mark-up; and

22.3 disposable surgical facemasks were acquired for an average per-unit cost between USD 0.27 and 0.38. Lipsitz subsequently resold these products on SBD typically at an average per-unit cost of USD 0.76. This constituted an approximate mark-up of 100 to 180 per cent.

23 The criminal proceedings against Lipsitz are still ongoing as well as the civil proceedings that were instituted by the Federal Trade Commission. The civil charges against Lipsitz however concern falsely promising consumers next-day shipping of facemasks and other PPE and falsely advertising other products through SBD as "authentic" or "certified".

Mary Mcqueen and Victoria Ballinger v Amazon.Com Inc. Case 4:20-cv-02782 [Class Action Complaint]

24 Under the California Penal Code § 396, retailers may be found guilty of price gouging if they increase the price of their goods by more than 10% of their ordinary cost during a state emergency. Price increases are only permitted under California Penal Code § 396(b) if they are "*directly attributable to additional costs*" imposed on the retailer by an upstream supplier or due to "*additional costs for labour or materials used to provide the services during the state of emergency or local emergency*."

25 An additional executive order by the Governor of California was issued to supplement the California Penal Code § 396. It prohibits the sale of protected goods, such as PPE, at a price that is greater than 50% of what the seller originally paid for the goods, or 50% more than the cost of producing and selling the goods.

26 In *Mary Mcqueen and Victoria Ballinger v Amazon.Com Inc.* the plaintiffs seek to hold Amazon accountable for its unlawful price increases during the Covid-19 pandemic.

27 Like every seller, Amazon has an obligation under the California Penal Code § 396 to ensure that its pricing does not exploit consumers facing emergency conditions. Amazon has not abided by that obligation. As the Covid-19 crisis has escalated, so too have Amazon's prices for essential goods. After Covid-19 was declared a public health emergency by California officials, Amazon prices for pain reliever, cold remedies and disinfectants increased by more than 600%. The plaintiffs argue that Amazon is (i) accountable for unlawfully increasing prices on essential goods and (ii) is legally responsible for price gouging on the

third-party products it sells. At the time of writing, the matter had not been heard by the court.

Jeanette Mercado v. EBay, Inc., Case No. 5:20-cv-35053 [Class Action Compliant]

28 Plaintiff Jeanette Mercado, on behalf of herself and other similarly situated consumers, brought an action against eBay Inc. for price gouging under the California Penal Code § 396.

29 eBay charged increased prices for essential products offered and sold on the eBay platform, which were not directly attributable to additional costs imposed on eBay by the suppliers of the essential products.

30 The plaintiffs argue that eBay has exploited vulnerable consumers by selling, and offering for sale, products at excessive prices during Covid-19 pandemic. The California Penal Code § 396, and basic principles of equity and fair dealing, prohibit sellers from capitalizing on such exigencies to charge consumers excessive prices. By selling emergency supplies, medical equipment and other essential products at excessive and inflated prices during the Covid-19 pandemic, eBay was unjustly enriched. At the time of writing, the matter had not been heard by the court.

State of Ohio ex rel Dave Yost v Mario F Salwan [Complaint]

31 The State of Ohio, acting on the relation of its Attorney General Dave Yost, brought a civil action in the public interest to obtain equitable and injunctive relief, including a temporary restraining order and preliminary injunction, disgorgement

of unlawful proceeds, civil penalties, and statutory forfeiture against the defendants.

32 The defendants operate an online commercial business in which they acquire a variety of products and resell those products to the public through the e-commerce platform e-Bay. With the increasing demand for Covid-19 related essential products, the defendants began to acquire a significant volume of essential products such as the N95 respirator masks. The defendants' bulk acquisitions exacerbated the growing shortage of N95 masks available in the marketplace for purchase by Ohio citizens and by Ohio health care workers. The defendants subsequently increased the prices of the N95 masks over the pre-emergency retail price by an average of 1,700%.

33 The purpose of the action is to (i) prevent the defendants from continuing to deny access to essential PPE to Ohio healthcare workers, who are at extreme risk of exposure to the Covid-19 virus; and (ii) redress the harm that the defendants have caused to consumers.

34 The State of Ohio *inter alia* seek an order declaring (i) that the act of offering the N95 masks for sale at substantially increased prices in light of a national emergency constitutes unfair or deceptive acts or practices in violation of the Consumer Sales Practices Act, R.C. 1345.02(A) and (ii) that the defendants' actions in requiring consumers to enter into consumer transactions on terms that the defendants knew were substantially one-sided constitutes unconscionable acts or practices in violations of the Consumer Sales Practices Act, R.C.

1345.03(A), as set forth in 1345.03 (B)(5). At the time of writing, the matter had not been heard by the court.

Conclusion

35 Despite the fact that there is no federal law prohibiting price gouging, it is clear that the US has adopted a firm stance against price gouging especially with respect to PPE and other medical products during the Covid-19 pandemic.

36 This is evident from the response of federal and state authorities as well as the state anti-price gouging statutory framework. The effect of this has seen several complaints raised against those engaging in price gouging activities involving PPE and other medical products as well as several arrests being made.

37 While *People of the State of New York against Quality King Distributors, Inc., and Glenn Nussdorf* may provide insight into the arguments that may be raised against or in support of price gouging activities, the fact is that not enough time has elapsed for many other cases to proceed and for substantive points of law will emerge from them.

List of Authorities:

Florida, Fla. Stat. § 501.160; Maine, Me. Rev. Stat. Ann. tit. 10, §1105; and New York, GBS § 396-r.

Jeanette Mercado v. EBay, Inc., Case No. 5:20-cv-35053 [Class Action Compliant

Louisiana, La. Rev. Stat. Ann. §29:732.

Mary Mcqueen and Victoria Ballinger v Amazon.Com Inc. Case 4:20-cv-02782 [Class Action Complaint]

People of the State of New York against Quality King Distributors, Inc., and Glenn Nussdorf, para 1.

State of Ohio ex rel Dave Yost v Mario F Salwan [Complaint]

United States of America v Amardeep Singh

United States of America v Kevin Jay Lipsitz