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U R G E N T

Your reference

Our reference

Date

D Milo
3042837

11 August 2020

Dear Sirs

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

1. We act for the Health Justice Initiative ("**HJI**") and Open Secrets NPC ("**Open Secrets**") (together, "**our clients**").
2. Our clients seek written consent from the parties to be admitted as *amici curiae* in the appeal involving Dis-Chem Pharmacies Limited, as appellant, and the Competition Commission,

Letter Re Amici Consent [2020 08 11]

Senior Partner: JC Els **Managing Partner:** SJ Hutton **Partners:** BW Abraham RB Africa NG Alp RL Appelbaum DC Bayman KL Beillings AE Bennett T Blackbeard AP Blair DHL Booyens AR Bowley J Braum MS Burger M Bux RI Carrim T Cassim SJ Chong C Collett KL Collier KM Colman KE Coster K Couzyn DB Cron PA Crosland R Cruywagen JH Davies PM Daya L de Bruyn PU Dela M Denenga DW de Villiers BEC Dickinson MA Diemont DA Dingley G Driver W Drue HJ du Preez CP du Toit SK Edmundson LF Egypt KH Eiser AE Esterhuizen MJR Evans K Fazel AA Felekis G Fitzmaurice JB Forman KL Gawith OH Geldenhuys MM Gibson CI Gouws PD Grealay S Haroun JM Harvey JS Henning KR Hillis Z Hlopho CM Holfeld PM Holloway AV Ismail ME Jarvis CA Jennings JC Jones CM Jonker S Jooste LA Kahn ACR Katzke M Kennedy A Keyser MD Kota JC Kraamwinkel M Kyle J Lamb E Louw M Mahlangu V Mannar L Marais MC McIntosh SJ McKenzie CS Meyer AJ Mills D Milo NP Mngomezulu M Moloi LE Mostert VM Movshovich RA Nelson G Niven ZN Ntshona M Nxumalo AN Nyatumba A October L Odendaal GJP Olivier N Paige AMT Pardini AS Parry S Patel GR Penfold SE Phajane M Philippides BA Phillips MA Phillips D Ramjettan GI Rapson K Rew SA Ritchie NJA Robb G Sader M Sader H Samsodien JW Scholtz KE Shepherd AJ Simpson N Singh N Singh-Nogueira P Singh S Sithole J Smit RS Smith MP Spalding PS Stein MW Straeuli LJ Swaine Z Swanepoel A Thakor T Theessen TK Thekiso C Theodosiou R Tlhavani G Truter PZ Vanda SE van der Meulen JP van der Poel CS Vanmali JE Veeran B Versfeld MG Versfeld TA Versfeld DM Visagie EME Warmington J Watson AWR Westwood RH Wilson M Yudaken **Chief Operating Officer:** SA Boyd

as respondent (the "**appeal**") in the Competition Appeal Court (the "**CAC**"), in accordance with Rule 16 of the Rules regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa, promulgated pursuant to the Supreme Court Act, 1959 (the "**SCA Rules**"), read with Rule 28 of the Rules for the Conduct of Proceedings in the Competition Appeal Court ("**CAC Rules**"), published pursuant to the Competition Act, 1998 ("**Competition Act**").

3. Our clients will also seek leave to adduce further evidence (including expert evidence), file written submissions and to advance oral argument at the hearing of the matter on 4 September 2020 or any future date that may be directed by the CAC.
4. HJI is a dedicated public health and law initiative, founded in 2020 by a human rights lawyer and social justice activist, and established specifically to address the intersection between racial and gender inequality and the COVID-19 pandemic. Its distinct focus is on access to, *inter alia*, lifesaving diagnostics, treatment and vaccines. HJI draws on the expertise of researchers in law, public policy, economics, and public health, as well as on universities and scientific experts universally.
5. Open Secrets is a non-profit organisation which exposes and builds accountability for private sector economic crimes and related human rights abuses in Southern Africa through investigative research, advocacy, and the law. Open Secrets was established in 2017 and has since undertaken a number of major investigations, all within the public interest, into the role of the private sector in economic crime. Open Secrets has developed a track record of producing evidence-based investigations which focus on the link between economic crime, private profit and human rights abuse. Examples include exposures of: (i) criminal networks which profited from apartheid economic crime; (ii) corporations which have enabled contemporary state capture; and (iii) large pension funds which engaged in the

unlawful cancellation of pension funds, to the detriment of hundreds of thousands of vulnerable people in Southern Africa.

6. The appeal concerns the proper interpretation of section 8 of the Competition Act and the the Customer Protection and National Disaster Management Regulations¹ and Directions in the context of a pandemic, and in light of the social and economic inequality in South Africa. The decision of the CAC in this appeal will be of great and widespread significance. It will have ramifications not only for the pricing of masks, but for the pricing of essential medical supplies, including treatment and vaccines in the future.
7. It is essential that the CAC has the necessary evidence, and the diversity of perspectives, to provide sound, clear, evidenced-based and constitutionally-aligned jurisprudence regulating *inter alia* potential profiteering, gouging and anti-competitive behaviour in the context of a pandemic.
8. Our clients' instructions are that the current global pandemic and public health crisis disproportionately affects poor and vulnerable members of society. Unfair and unreasonable pricing by companies in the context of a pandemic will further entrench the social and economic disparity and inequality which prevails in South Africa.
9. Given the gravity of the issues raised by this appeal, particularly in the context of a country such as South Africa, our clients' view is that the country is in need of a section 8 jurisprudence and a framework for legal standards which:

¹ In terms of and under section 78 read with section 8(3)(f) of the Competition Act; section 120(1)(d) read with sections 40 and 48 of the Consumer Protection Act, 2008; and the regulations issued by the Minister of Co-operative Governances and Traditional Affairs in terms of section 27(2) of the Disaster Management Act, 2002 pursuant to the national disaster declared in Government Notice No. 313 of Government Gazette No. 430096 on 15 March 2020.

- 9.1 is appropriately cognisant to a pandemic, such as that our country and the world presently find ourselves in;
- 9.2 effectively reconciles the principles enshrined in the Constitution, section 8 of the Competition Act and the Regulations; and
- 9.3 promotes the protection of the most vulnerable members of society – the poor and the sick – and does not prioritise the interests of private-sector companies at the expense of the public.
10. Against this background, our clients therefore wish to assist the CAC by participating as *amici curiae* in order to advance the following arguments and/or adduce evidence on the following issues:
- 10.1 The pandemic is a global phenomenon and jurisdictions universally are regulating price gouging and anti-competitive conduct. Our clients will provide case studies from the United States, as well as the United Kingdom and other European countries, and advance legal argument on the value and application of this comparative jurisprudence in the South African context;
- 10.2 In the context of a pandemic, access to preventative measures (such as masks, as dealt with in the appeal), as well as testing, treatment and vaccination advances, forms an integral part of the constitutional rights to healthcare, life and dignity;
- 10.3 The interpretation of section 8 of the Competition Act and the Regulations must take into account the values and principles embedded in the Constitution, in the context of a local and global crisis;

- 10.4 The CAC should either confirm the binding effect of the Regulations on pandemic pricing or develop a test that establishes a pandemic pricing accountability framework, rooted in the Constitution;
- 10.5 This framework must take into account that: (a) limited supply in a pandemic leads to price gouging, profiteering and monopolies; (b) patents cause exclusivity; (c) excessive pricing and price gouging, specifically in a society in which inequality and poverty are rife, has a profound impact on patients in both the private and public sector; and (d) currently, only anti-competitive practice laws can regulate pricing behaviour; and
- 10.6 The CAC must ensure appropriate penalties for profiteering, gouging and anti-competitive behaviour.
11. Our clients will apply for an order from the CAC that they be permitted to adduce expert evidence in the proceedings on these issues. We note that in *Nova Property Group Holdings v Cobbett*,² the SCA held that *amici curiae* may be permitted to adduce evidence, if the rationale for their admission is to promote the interests of justice and the spirit, purport and objects of the Bill of Rights. If our clients are admitted as *amici curiae* in the appeal, they will argue that they satisfy these requirements.
12. We are cognisant that the appeal has been expedited. In light of the restricted time periods, we would be grateful for your response by no later than close of business on Thursday, 13 August 2020.
13. We look forward to hearing from you.

² (20815/2014) [2016] ZASCA 63 (12 May 2016) paras 13 -14.

Yours faithfully

WEBBER WENTZEL

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Partner

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