



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CR008Apr20

In the matter between:

**COMPETITION COMMISSION OF SOUTH
AFRICA**

Applicant

and

DIS-CHEM PHARMACIES LIMITED

Respondent

Panel:	Yasmin Carrim (Presiding Member) Fiona Tregenna (Tribunal Member) Imraan Valodia (Tribunal Member)
Heard on:	4; 6 May 2020
Order issued on:	7 July 2020
Reasons issued on:	7 July 2020

REASONS FOR DECISION

Introduction

[1] On 23 April, the Competition Commission ('Commission') referred a complaint against Dis-Chem Pharmacies Limited ('Dis-Chem') in terms of section 50(2)(a) of the Competition Act, as amended ('Act')¹ to the Tribunal. The Complaint alleged that Dis-Chem had contravened section 8(1)(a) of the Act, read with regulation 4 of the Consumer and Customer Protection and National Disaster Management Regulations and Directions² ('consumer protection regulations') by charging excessive prices for surgical face masks during the period March 2020.

¹ Act No. 89 of 1998.

² The Consumer and Customer Protection and National Disaster Management Regulations and Directions GN R350 GG 43116, 19 March 2020 (consumer protection regulations).

- [2] In its founding affidavit, the Commission indicated that from at least 28 March 2020, the Commission received several complaints from individual members of the public against several retail stores owned by Dis-Chem for engaging in excessive pricing in the retail sale of face masks.
- [3] The Commission consolidated the surgical face mask complaints lodged against individual retail stores and used the information received to initiate a complaint against Dis-Chem.
- [4] On 14 April 2020, the Commission emailed Dis-Chem querying its material price increase and requesting cost justification and information in respect thereof. Dis-Chem responded through Mr Ronald Govender the Executive responsible for Fast Moving Consumer Goods ('FMCG') at Dis-Chem.
- [5] On 23 April, the Commission filed its notice of motion, seeking an order declaring that Dis-Chem's conduct had contravened the provisions of section 8(1)(a) of the Act, read with regulation 4 of the consumer protection regulations. The Commission alleged that Dis-Chem engaged in excessive pricing for surgical face masks which are essential items in the fight against Covid-19. It sought an administrative penalty of 10% of Dis-Chem's turnover but in the hearing asked for an amount of three times the alleged overcharge Dis-Chem implemented on surgical masks during March 2020.
- [6] The conduct specifically relied upon by the Commission are the price increases implemented by Dis-Chem in March 2020³ in respect of three products of surgical face masks called Surgical Face mask Blue 50pc (SFM50); Surgical Face mask Blue 5pc (SFM5); and Surgical Face mask Foliadress Blue 50pc (Folio50).
- [7] The Commission alleges that Dis-Chem increased its prices of SFM50 by 261%, SFM5 by 43% and Folio50 by 25% during March without a corresponding increase in costs, and this amounted to charging excessive prices to the detriment of consumers.

³ We assume therefore that the complaint period is 1-31 March 2020.

[8] Dis-Chem does not dispute the price increases in March 2020 as alleged by the Commission. It however disputes that regulation 4 applies to its conduct, arguing that its price increases for surgical masks were implemented on 9 March 2020, prior to the promulgation of the consumer protection regulations on 19 March 2020. It also raised a legal challenge to the provisions of regulation 4. Accordingly, it argued the Tribunal could not have regard to the relevant factors set out in regulation 4 as a short-cut in its evaluation (as was relied upon by the Commission) but was required to assess Dis-Chem's pricing conduct only through a full evaluation under section 8(1)(a), by having regard to *all* relevant factors set out in section 8(3). In this, it argued that section 8 did not apply to it because it was not dominant in the supply of surgical masks and, as a matter of policy, section 8 should not be applied to short term pricing effects in a market.

Procedural issues and urgency

[9] The referral was initially managed in terms of the Regulations on Competition Tribunal Rules for Covid-19 Excessive Pricing Complaint Referrals⁴ (Covid rules) which, when read in conjunction with the Competition Tribunal's Directive for Covid-19 Excessive Pricing Complaint Referrals⁵ (CT directive), established an expedited hearing process for such complaints.

[10] The Covid rules promulgated by the Minister apply to complaint referrals for an alleged contravention of section 8(1)(a) of the Act read with regulation 4 of the consumer protection regulations. The Covid rules make provision for a truncated filing and hearing process for complaints brought under the consumer protection regulations (expedited regime). These rules were supplemented by general directions issued by the Tribunal for the handling of matters related to referrals brought in terms of regulation 4 (CT directive).

[11] The expedited regime enables the Tribunal to hear evidence in a complaint by affidavit and to convene hearings virtually. Only if it is evident from the affidavits

⁴ Competition Tribunal Rules for Covid-19 Excessive Pricing Complaint Referrals GN 448 GG 43205, 3 April 2020.

⁵ Issued on 6 April.

that there is a substantial dispute of fact that cannot be resolved on the papers, can the Tribunal establish an expedited procedure for the resolution of this question. It bears recognising that in the matter before us, no such dispute of fact arose.

[12] Dis-Chem disputed the applicability of the expedited regime on the basis that these flowed from the consumer protection regulations which were not applicable to its price increases.

[13] A prehearing was convened on Sunday 26 April 2020, the date on which Dis-Chem's answer was due in terms of the expedited regime. At that prehearing, a timeline for the further filing of papers was established. Dis-Chem was to file its answer by Wednesday 29 April 2020, together with its expert report, the Commission to file its reply, together with a rebuttal report if needs be, on Friday 1 May 2020, and the hearing was to be held on Monday 4 May 2020. The hearing was limited to legal argument and expert testimony and no factual witnesses would be heard.

[14] The Tribunal's decision to hear the matter on an urgent and truncated basis, was made in terms of its wide discretion contained in section 55 of the Act, read with Competition Tribunal Rule (CTR)⁶ 55 and on the basis that the matter involved pricing of surgical face masks, an item considered to be essential protective equipment in the Covid-19 pandemic, a matter of grave public concern. As explained to the parties in that prehearing, practical considerations of availability of panel members to hear the matter was also a factor that was taken into account when determining the timelines.

[15] While Dis-Chem reserved its rights in respect of the expedited timeframes, it abided by the filing deadlines and is to be commended on its comprehensive submissions under such time pressure.

⁶ Rules for the conduct of Proceedings in the Competition Tribunal GN 2 GG 22025, 1 February 2001.

- [16] Legal argument and expert testimony were heard on Monday 4 May and Wednesday 6 May 2020.
- [17] Mr James Hodge, Chief Economist for the Commission, appeared as the expert on behalf of the Commission. Mr Patrick Smith from RBB appeared as the expert for Dis-Chem. Dis-Chem objected to Mr Hodge's participation in the hearing because Mr Aproskie, had submitted a report on behalf of the Commission.⁷ The Commission argued that Mr Hodge could participate in the hearing in terms of section 53 of the Act.⁸ Dis-Chem's objection was noted but the proceedings continued unhindered. In our view nothing turns on Mr Hodge's participation for two reasons – first the matter was heard on the papers and Mr Hodge, in fairness, could not go beyond these. Second the underlying calculations done by Mr Aproskie in the founding affidavit and by the Commission in the replying affidavit were not disputed by Dis-Chem.⁹
- [18] During the hearing on 4 May, the panel requested that a joint minute be submitted detailing an agreed factual timeline in the matter. This document was submitted on 5 May 2020.
- [19] For the reader's convenience we set out the schematic framework of our decision here. We deal first with a description of Dis-Chem's business and background to the Covid-19 pandemic as the economic context in which Dis-Chem's conduct occurred. We then deal with the applicability of the consumer protection regulations and the framework of section 8. We then consider the relevant legal and economic principles applicable to issues of market power, and the applicable economic tests in the context of a global pandemic and health crisis such as Covid-19. Thereafter we evaluate Dis-Chem's pricing conduct and set out our conclusions. Finally, we deal with, reasonableness, detriment to consumers and the issue of remedies.

⁷ Transcript of proceedings *CR008Apr20* 4; 6 May 2020 (Transcript) p4.

⁸ Transcript p17-18.

⁹ Transcript p181; 182.

Dis-Chem

- [20] Dis-Chem is a large pharmaceutical retailer listed on the Johannesburg Stock Exchange. Dis-Chem's retail activities are focused on five market segments, being: pharmacy; personal care; healthcare and nutrition; baby care; and other FMCG.¹⁰ Across these five market segments, Dis-Chem stocks a very large range of products. The sale of surgical face masks falls within the personal care segment.
- [21] Dis-Chem's business operations also include wholesale activities, such as logistics, warehousing, distribution, and supply chain management for its stores, which contributes R1.78 billion to its total revenue.
- [22] Through its 165¹¹ stores located across South Africa, the Dis-Chem Group generated a total revenue of R21.4 billion in the 2019 financial year, of which R19,64 billion is from its retail business.
- [23] Dis-Chem deploys a national pricing strategy across its national store footprint, with all stores charging the same price for all products.
- [24] Surgical (or procedural) masks are a broad term for a set of masks which are, according to the World Health Organisation ('WHO'):
- “flat or pleated, with some being shaped like cups, which are affixed to the head with straps. They are tested according to a set of standardized test methods (ASTM F2100, EN 14683, or equivalent) that aim to balance high filtration, adequate breathability and optionally, fluid penetration resistance.”¹²*
- [25] Dis-Chem's surgical face mask offering of relevance in this matter are the products sold under three stock keeping units ('SKUs'), namely SFM50, SFM5 and Folio50.

¹⁰ Pharmacy accounts for 35% of retail revenue, personal care for 28,2%, healthcare and nutrition for 20.3%, baby care for 5.8, and other FMCG for 10,1%.

¹¹ Answering affidavit deposited to by Ronald Govender (29 April 2020) (answering affidavit) para 8 Trial Bundle (TB) p 68.

¹² World Health Organisation *Advice on the use of masks in the context of COVID-19: interim guidance* (6 April 2020) available at <https://apps.who.int/iris/handle/10665/331693> (WHO interim guidance) p1.

[26] At the time of the March price increases, Dis-Chem sourced its masks from just two South African based suppliers, namely [...], which imported masks for onward supply to Dis-Chem, and [...], a South African manufacturer of surgical masks.

The Covid-19 outbreak

[27] The events leading up to the outbreak of Covid-19 are well recorded to date. However, we find it necessary to recap salient events to sketch out the market circumstances or the economic context in which Dis-Chem's pricing conduct occurred.

[28] The first cases of Covid-19 were identified in Wuhan, China in December 2019, although at this stage the illness was simply being reported to the WHO as a pneumonia of unknown cause.

[29] By mid-January 2020, Covid-19 had started to spread beyond the borders of China. The causative pathogen of the disease, SARS-CoV-2, was identified on 7 January 2020. On 30 January 2020, having now spread to many other countries around the world, the WHO declared the Covid-19 outbreak a Public Health Emergency of International Concern ('PHEIC').¹³ Although no cases had been reported in South Africa at this stage, general news coverage around Covid-19 began to increase in January 2020.

[30] Prior to the WHO declaration, Wuhan was placed in lockdown¹⁴ and news coverage showed footage of large-scale desanitising initiatives with health workers and the public wearing protective equipment. By this time surgical face masks were already being worn by Chinese citizens and international travellers.

[31] During January and early February 2020 news reports of the outbreak in Europe began to emerge. In January (Italy, South Korea, US) and February (Russia,

¹³ World Health Organisation *WHO Timeline-COVID-19* (27 April 2020) available at <https://www.who.int/news-room/detail/27-04-2020-who-timeline---Covid-19>.

¹⁴ Kuo L "Coronavirus: panic and anger in Wuhan as China orders city into lockdown" *The Guardian* (23 January 2020) available at <https://www.theguardian.com/world/2020/jan/23/coronavirus-panic-and-anger-in-wuhan-as-china-orders-city-into-lockdown>.

Brazil, UK, Spain). In February Italy became the epicentre of the disease, its health system overrun, reporting large numbers of Covid-19 related deaths.¹⁵

[32] By then several countries had imposed restrictions on travel, and eventually imposed export bans on essential medical and protective supplies such as ventilators and personal protective equipment (PPE).¹⁶

[33] The lockdown in Wuhan, together with travel restrictions triggered concerns about the global supply for a range of products from China but especially PPE, and surgical face masks.¹⁷ China is the world's largest surgical face mask producer. It made half the world's face masks before the outbreak in its own country. While it has increased production nearly 12-fold since then it had stopped exporting to other countries.¹⁸

[34] Shortages of surgical face masks in China and every else were already being reported in January 2020.¹⁹ Hence there were already concerns about the supply of surgical face masks in South Africa prior to the Complaint Period.

[35] South Africa reported its first case of Covid-19 on 5 March 2020.

[36] On 11 March 2020, the WHO declared Covid-19 a pandemic for which there is no cure.

¹⁵ Parodi E & Amante A *As Coronavirus slams Italy, paralysis and Anxiety Spread* Reuters (28 February 2020) available at <https://www.reuters.com/article/us-china-health-italy-paralysis-insight/as-coronavirus-slams-italy-paralysis-and-anxiety-spread-idUSKCN20M2WB>.

¹⁶ The International Trade Centre indicates the following dates for the implementation of export bans on face masks/other protective equipment in the respective countries: Islamic Republic of Iran, 03 February 2020; Thailand, 05 February 2020; Kazakhstan, 20 February 2020; Oman, 26 February 2020; Saudi Arabia, 02 March 2020; Kenya, 03 March 2020; Republic of Korea, 09 March 2020. Source: International Trade Centre *COVID-19 Temporary Trade Measures* (2020) available at <https://www.macmap.org/Covid19>.

¹⁷ Boykoff P *With no shipments from China, medical mask suppliers have to choose whom to supply* CNN Business (6 March 2020) available at <https://edition.cnn.com/2020/03/06/business/medical-masks-china-shortage-suppliers/index.html>.

¹⁸ Bradsher K *The World Needs Masks. China Makes them but has been hoarding them* New York Times (13 March 2020) available at <https://www.nytimes.com/2020/03/13/business/masks-china-coronavirus.html>.

¹⁹ BBC News *Shanghai face mask shortage* (23 January 2020) available at: <https://www.bbc.com/news/av/world-asia-china-51219367/shanghai-face-mask-shortage> and NG K *Panic Buying of face masks is unwarranted and could pose risks for health workers experts say* CNBC (31 January 2020) available at <https://www.cnbc.com/2020/01/31/china-coronavirus-shortage-of-face-masks-could-pose-risks-for-healthcare-workers.html>.

[37] On 15 March 2020, the South African government declared a State of National Disaster (National Disaster).

[38] A further significant development in South Africa's fight against the Covid-19 outbreak was the implementation of the lockdown measures with effect from 23:59 on 26 March 2020.

[39] The essential relevant facts to emphasise are:

39.1. The outbreak and rampant spread of Covid-19 sent seismic shocks to the health systems of several countries in an extremely short space of time.

39.2. The normal functioning of markets and supply and demand goods and services, especially medical and protective equipment, were seriously disrupted.

39.3. The economic impact of the lockdown in China, travel restrictions and export bans of medical and hygiene products essential in the fight against Covid-19, were already a concern for many South Africans, including businesses and government as early as January and in February.

39.4. Consumers in South Africa were extremely concerned about the prospect of a Covid-19 outbreak on our shores, with good reason. The virus was spreading across the globe at an alarming rate with fatal consequences for many.

39.5. Although the first case of Covid-19 in South Africa was only reported on 5 March and the National Disaster proclaimed on 15 March 2020, South Africans were already affected by the rampant spread of Covid-19 from January, with global supply chains being disrupted, international travel and events being cancelled. Fears of infection already started to influence consumer behaviour in January and February.

39.6. It is common knowledge that the Covid-19 outbreak has led to an increase in global demand for PPE of which surgical masks constitute an essential component. This increase in demand is reflected in the massive increases in Dis-Chem's own sales volumes from January onward.

[40] Against this background Dis-Chem increased its prices on three occasions:

- 40.1. On 14 February 2020, Dis-Chem adjusted its price upwards (excl. VAT) on two of its product lines SFM50 and SFM5;
- 40.2. A second round of price increases (excl. VAT) was instituted on 26 February 2020, this time in respect of all available mask SKUs; and
- 40.3. A third round of price increases (excl. VAT) was instituted on 2 March 2020 (Folio50), 2 March (SFM5) and on 9 March (SFM 50).

Applicability of consumer protection regulations

[41] On 19 March 2020 the Minister of Trade, Industry and Competition (the Minister) published the consumer protection regulations which aim to “*protect consumers and customers from unconscionable, unfair, unreasonable, unjust or improper commercial practices during the national disaster*”.²⁰

[42] Regulation 4 deals with “excessive pricing” and regulation 5 with “unconscionable, unfair, unreasonable and unjust prices”. This distinguishes pricing practices between dominant and non-dominant firms. In this way it also separates the competition cases from the consumer protection cases.

[43] Dominant firms are regulated by regulation 4 which states:

4. “*Excessive Pricing*”

4.1. *In terms of section 8(1) of the Competition Act a dominant firm may not charge and excessive price to the detriment of consumers or customers.*

4.2. *In terms of section 8(3)(f) of the Competition Act during any period of the national disaster, a material price increase of a good or service contemplated in Annexure A which—*

4.2.1.1. *Does not correspond to or is not equivalent to the increase in the cost of providing that good or service; or*

4.2.1.2. *Increases the net margin or mark-up on that good or service above the average margin or mark-up for that good or service in the three-month period prior to 1 March 2020,*

²⁰ Consumer protection regulations at 3.1.

*is a relevant and critical factor for determining whether the price is excessive or unfair and indicates prima facie that the price is excessive or unfair.*²¹

[44] The consumer protection regulations also proffer a definition of “price increase” meaning:

*“a direct increase or an increase as a result of unfair conduct such as, amongst others, false or misleading pricing practices, covert manipulation of prices, manipulation through raising or reducing grade levels of goods and services”.*²²

[45] Regulation 2 sets out that the consumer protection regulations and directions come into effect on the date of their publication in the Government Gazette and will be of no force and effect when the Covid-19 outbreak is no longer declared a National Disaster.

[46] Dis-Chem argued that there was no basis for the retrospective application of the regulation because its last price increases were implemented on 9 March 2020, prior to the promulgation of the consumer protection regulations. In support of its argument Dis-chem relied on (i) the general presumption against the retrospective application of laws; (ii) that the consumer protection regulations themselves do not provide for retrospective application; and (iii) that the wording of regulation 4 does not allow for the regulation of price increases prior to the promulgation of the regulation itself. If the Tribunal were to evaluate Dis-Chem’s prices it could only do so under section 8(1)(a) for the price *charged* after 19 March 2020. A further, and perhaps equally significant challenge, was to the presumption in regulation 4 itself. Dis-Chem pointed out that while regulation 4 sets out two relevant and critical factors for determining whether a price is excessive, it is the presumption (assuming rebuttable) contained in the words “*indicates prima facie that the price is excessive or unfair*” which would raise serious rule of law questions if it was applied retrospectively. This is because in Dis-Chem’s view, a regulation which is subordinate legislation, cannot do what can only be done through an act of Parliament and in this instance the regulation was *ultra vires*.

²¹ Consumer protection regulations at 4.

²² Consumer protection regulations at 1.5.

- [47] The Commission submitted that the consumer protection regulations were applicable. The Commission argued that because Dis-Chem increased its prices prior to the declaration of the National Disaster and continued to charge such after the promulgation of the regulations, the regulations should apply because the price increase was “ongoing conduct”. In other words, because the price increases were still felt after the promulgation of the regulations, the regulations should find application. The Commission also argued for a purposive approach to the regulations and suggested that it would appropriate for this Tribunal to dispense with the presumption against retrospectivity by having regard to the conduct that the regulation seeks to address, namely excessive pricing of essential items such as surgical face masks in the context of a global health crisis.
- [48] The Commission also argued that because Dis-Chem had not legally challenged the consumer protection regulations in a court of law, as a statutory body we are obliged to assume validity of the regulations and apply them accordingly. While this may be true, as a statutory body we are still required to act in accordance with the rule of law and the Constitution.
- [49] For us, the relevant enquiry is not the validity or otherwise of the consumer protection regulations, but whether as a matter of law the regulations apply to Dis-Chem’s conduct simply because they were promulgated *after* Dis-Chem had implemented its price increases. It is a fundamental principle of the rule of law that legislation, whether subordinate or not, cannot apply retrospectively.²³ The cornerstone of the rule of law is the principle of fairness. It is for this reason that

²³S v *Mhlungu and others* 1995 (3) SA 867 (CC) [65]-[67]:

“First, there is a strong presumption that new legislation is not intended to be retroactive. By retroactive legislation is meant legislation which invalidates what was previously valid, or vice versa, i.e. which affects transactions completed before the new statute came into operation It is legislation which enacts that “as at a past date the law shall be taken to have been that which it was not”. See Shewan Tomes & Co Ltd v Commissioner of Customs and Excise 1955 (4) SA 305 (A) at 311H, per Schreiner ACJ. There is also a presumption against reading legislation as being retrospective in the sense that, while it takes effect only from its date of commencement, it impairs existing rights and obligations, eg by invalidating current contracts or impairing existing property rights. See Cape Town Municipality v F Robb & Co Ltd 1966 (4) SA 345 (C) at 351, per Corbett J. “The general rule therefore is that a statute is as far as possible to be construed as operating only on facts which come into existence after its passing.”

courts will not lightly dispense with the presumption against retrospectivity especially so in the context of a Constitutional democracy.²⁴

[50] The National Disaster was proclaimed on 15 March 2020 and thus a price *increase* implemented prior to that cannot fall within the ambit of the consumer protection regulations. Furthermore, the regulations themselves were only proclaimed on 19 March 2020 and any price increase that took place between 15 and 19 March would not be caught within its ambit.

[51] Thus, as a matter of law, the consumer protection regulations cannot apply to Dis-Chem's price increases in early March 2020.

[52] What then is the consequence of this finding?

[53] The first is that the rebuttable presumption "*indicates prima facie that the price is excessive or unfair*" in regulation 4.2 cannot apply, putting aside for the moment the *ultra vires* argument made by Dis-Chem. In the second instance, our finding does not mean that the economic tests contained in regulation 4 are irrelevant to an excessive pricing enquiry in the ordinary course which would be concerned with comparisons of prices and price-cost tests.²⁵ In other words, assuming for argument's sake, that the consumer protection regulations had never been promulgated, the types of economic tests which involve comparing prices and price-costs are still relevant to an excessive pricing enquiry. Third, the comparison of a firm's own pricing before and after an identified occurrence, is permissible in Competition Law under certain economic conditions.

²⁴ *Veldman v Director of Public Prosecutions*, Witwatersrand Local Division 2007 (3) SA 210 (CC) [26] *That legislation will affect only future matters and not take away existing rights is basic to notions of fairness and justice which are integral to the rule of law, a foundational principle of our Constitution. Also central to the rule of law is the principle of legality which requires that law must be certain, clear and stable.*³² *Legislative enactments are intended to "give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed"*

²⁵ See in this regard the Competition Appeal Court's judgements in *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Ltd* 70/CAC/Apr07 (29 May 2009) ('Mittal'); and *Sasol Chemical Industries Ltd v Competition Commission* [2015] 1 CPLR 58 (CAC) ('Sasol'); as well as the European Court of Justice's judgements in *United Brands Company and United Brands Continental BV v EC Commission* [ECLI:EU:C:1978:22] para 251; and *Comité des industries cinématographiques des Communautés européennes (CICCE) v Commission of the European Communities* [ECLI:EU:C:1985:150] paras 24-25.

- [54] Furthermore, even if we find that the consumer protection regulations are not applicable to Dis-Chem's conduct, we are still required, in an excessive pricing enquiry as contemplated in section 8(3), to have regard to the economic conditions that existed at the time of Dis-Chem's conduct.
- [55] Both the Commission and Dis-Chem accepted that if we were to find that the regulations did not apply we could nevertheless still evaluate Dis-chem's price increases and the prices charged during March 2020 under section 8(1)(a) of the Act.²⁶ The parties however differ on the approach we should adopt in this evaluation.
- [56] In the Commission's view, there is still a simple yet instructive economic test approach, available to us to decide if a price was excessive. In its view, all that we are required to do is to compare Dis-Chem's prices or margins before and after the March increases to find a *prima facie* case of excessive pricing. In other words, even if we were to find that the consumer protection regulations were not applicable to Dis-Chem's conduct, we should still engage in a comparative exercise of Dis-Chem's prices and margins *before and after* the March increases and conclude that there was a *prima facie* case of excessive pricing to be answered by Dis-Chem, as provided in section 8(2) to prove that its prices were not unreasonable.
- [57] Dis-Chem however argues that we must have regard to *all* relevant factors set out in 8(3), not just the size of the increase in the price or the margins, before and after March. In this exercise, we should have regard to *inter alia* structural characteristics of the relevant market; the definition of the relevant market; Dis-

²⁶ Dis-Chem Heads of Argument Para 163.

"despite COVID-19, the only relevant question remains whether Dis-Chem has contravened section 8(1)(a) of the Act".

In oral argument the Commission submitted:

"MR MAJENGE: one can still sensibly advance an excessive pricing 5 case, for as long as that case conforms with the requirements for excessive pricing in the Act and the requirements for excessive pricing in the Act have been set out in our Heads as well as by counsel and they really involve dominance, whether a price is excessive as well as detriment to consumers. So, if a price gouging case coincides or meets those requirements, then an excessive pricing case would have been established, even outside the context of the regulations." Transcript p20.

Chem's market shares and the presence of competitors in the relevant market; Dis-Chem's prices for face masks (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; comparator firms' prices and profit levels in a competitive market; as well as the length of time the prices have been charged at that level.

[58] It argued further that this exercise ought to have been done by the Commission, which it has neglected to do, and a *prima facie* case has therefore not been established.

[59] We turn to consider the framework of section 8 as amended by the recent 2018 amendments to the Act.

Section 8 framework

[60] Sections 8(1)(a), 8(2) and 8(3) of the amended Act read as 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."*

[61] The 2018 amendments brought about several changes to section 8 of the Act. The most important of these are that: (i) the definition of an "excessive price" previously contained in section 1(1)(ix) of the Act²⁷ was removed. That provision had defined an excessive price as having "*no reasonable relation to the economic value of the product*". The 2018 amendment effectively replaced the benchmark of "economic value" with the notion of a "competitive price" in 8(3).

[62] Section 8(3) provides for a non-exhaustive list of factors to be considered in the enquiry of whether a price is higher than a competitive price and whether that difference is reasonable. The factors are listed without any ranking of importance or criticality. The reason for this is obvious because not all factors listed in 8(3) would be present in every case. The relevant factors that are to be considered will depend on the facts of each case. For example, the firm in question may not sell the relevant good / service to customers in other geographic markets other than in South Africa or may not sell any "*similar products in other markets*". Thus, the Tribunal enjoys a discretion as to which factors it would consider to be relevant in a case and the weight to be attached to the different factors on a case by case basis.²⁸

²⁷ "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)".

²⁸ *MEC for Environmental Affairs and Development Planning v Clairison's CC* (408/2012) [2013] ZASCA 82 para 20-22.

- [63] Section 8(3) does however require us to have regard to the characteristics of the market in which Dis-Chem's conduct is to be assessed.
- [64] Section 8(2) has created a novel framework in that it provides for a reverse onus in terms of which the evidential burden to show reasonableness shifts to the dominant firm if a *prima facie* case of an excessive price has been shown.
- [65] The two sections – 8(2) and 8(3) – read together must be understood to create a framework that envisages two legs of an enquiry. In the first leg, the onus would be on the Commission to show a *prima facie* case of an excessive price. If it is successful in this, then the evidential burden shifts to the respondent firm to show that the price was reasonable.
- [66] A question that immediately comes to mind is what evidence the Commission needs to lead in order to establish a *prima facie* case. Does a showing of a material price increase without cost justification establish a case to be answered by a respondent firm?
- [67] A follow-on question then would be what evidence a respondent firm would need to lead in order to show that the excessive price was reasonable. One can envisage that this evidence would take the form of some or other justification which would not have been considered in the first leg.
- [68] At the level of substance, it ought not to matter at which point of the enquiry these justifications or defences are considered, provided due regard is given to them. Because in that enquiry we are concerned with an overall economic assessment.
- [69] As a matter of legal onus however it does make a difference to have certainty about what is required to be shown by the Commission in order to establish its *prima facie* case.
- [70] Section 8(3) only requires that the “*price is higher than a competitive price and whether such difference is unreasonable*”. Thus, the legal test in section 8(3) is

that the price must be higher than a competitive price, without qualifying the size of that difference.

[71] Some guidance is provided by the Competition Appeal Court (CAC) on this issue in *Mittal* where the court set out the requirements for establishing a *prima facie* case:

Within the context of adjudication, which deals with probabilities, these concepts cannot be employed with scientific precision. For example, where the actual price is shown, as in the British Leyland case, 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 a firm in appellant's position to adduce evidence to the contrary, if it is to avoid the case against it becoming conclusive. (Our emphasis.)²⁹

[72] It seem to us that in the context of this case, in order to establish a *prima facie* case all that the Commission has to show is that, there was a material price increase which on the face of it was 'utterly exorbitant'. The onus would then shift to the Dis-Chem to show that the increase was reasonable. The Commission is of course still required to prove the other essential elements of the section for example that the firm is dominant, which has been the point of departure between Dis-Chem and the Commission, and that there was detriment to consumers.

[73] However the facts of this case are unique in that the Commission adopts an inferential approach to the issue of market power and the same facts that serve to infer market power namely Dis-Chem's *price increases* are also relied upon to establish the excessiveness of the prices. We have therefore not adopted the approach advanced by the Commission *i.e.* to infer a *prima facie* case only from the magnitude of Dis-Chem's March price increases but instead have decided to deal with pricing and justifications in the first leg of the enquiry. In this first leg we consider Dis-Chem's price increases against a relevant benchmark, namely

²⁹ *Mittal* above n 25 at paras 49-50.

the competitive price. In this enquiry we have regard to the nature and size of the price increases, Dis-Chem's actual costs and any other 'justifications' it has for its price increases. We also consider the Commission's gross margin test before concluding whether a *prima facie* case has been established. We then, in the second leg of the enquiry, consider under the rubric of reasonableness a comparison of the magnitude of the price differences in the context of the Covid-19 health threat.

[74] We now turn to consider the issue of dominance and relevant market. In this discussion we also address the policy debates raised by Dis-Chem in the hearings urging us not to intervene in this matter. We also address the definition of the relevant market.

[75] Recall that section 8(3) requires us to have regard to *inter alia* the structural characteristics of the market or the economic conditions in which the conduct occurred. In both these enquiries, the economic context in which we assess Dis-Chem's conduct are those that prevailed at the time the conduct occurred, being triggered by the outbreak of Covid-19.

[76] We make the observation here that a few weeks before this matter was argued, the Tribunal had also heard the *Babelegi* matter³⁰ in which similar arguments were raised by the Commission and the respondent in relation to the applicability of the consumer protection regulations and the relevant approach to section 8. At the time of hearing the Tribunal's decision in *Babelegi* had not been issued. It has since been released. Both these matters however bring into sharp focus the approach that we have adopted in assessing the pricing conduct of firms in the context, where normal market functions have been impacted by seismic shocks brought upon by Covid-19 causing health and economic crises in almost every country in the world.

³⁰ *Competition Commission v Babelegi Workwear and Industrial Supplies CC*, unreported judgement of the Competition Tribunal, CR003Apr20 (1 June 2020) (*Babelegi*).

Dominance and Relevant Market

[77] In this section we first set out the relevant competition law principles that would apply to issue of dominance in general, then consider the notion of market power in the context of the Covid-19 outbreak. We also discuss the approach to defining the relevant market in this context.

[78] Section 8 of the Act seeks to regulate the conduct of dominant firms. For a firm to be considered dominant it, its annual turnover or assets in the Republic must be valued at or exceed R5 million and it must meet the threshold set out in section 7 of the Act.

[79] Section 7 reads as follows:

Dominant firms.—

A firm is dominant in a market if—

- a. it has at least 45% of that market;*
- b. it has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or*
- c. it has less than 35% of that market but has market power.*

[80] The Act defines 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”.*³¹

[81] As we indicated earlier, the Commission did not undertake a relevant market definition or market share analysis because its approach to dominance or market power has been an inferential one, *i.e.* inferred from Dis-Chem’s conduct itself.

[82] The Commission argued that while market definition is frequently undertaken in order to determine the firm’s market share and whether that share exceeds the thresholds for the presumption of market power, in the context of abuse cases

³¹ The Act section 1.

market power may also be inferred from the economic behaviour of the firm.³² The Commission alleges that because Dis-Chem was able to increase its prices, and its margins to the level that it did, without a corresponding increase in costs, this was evidence of an exercise of market power. The Commission argues that states of disaster or civil emergencies often provide the conditions for market power to be held by market participants that may not normally have such power as a disaster may remove competitive constraints on a firm's normal pricing. This could occur in several ways.

[83] The first is that a national crisis may result in supply shortages coupled with demand spikes. Both these events singularly or considered together raise barriers to entry significantly and result in holders of stock and those with existent supply chains being free from factoring in potential entrants in their prices.

[84] In the context of Covid-19, the simultaneous outbreak of the virus across the globe has resulted in the disruption of markets. Demand for essential items such as face masks and hand sanitisers has increased exponentially.

[85] As an example of this Dis-Chem's own figures show that in January, February and March, the demand for its masks increased and its suppliers were inundated with requests for stock and suffered extreme and unprecedented shortages.³³

[86] The second way in which such crises may provide conditions in which market power is granted to firms is they may limit the movement of consumers and thus remove or dampen the constraints imposed from even close geographic competitors.

[87] The Commission argued that in the context of Covid-19, and even *prior* to lockdown, there was sufficient evidence to indicate that consumers were limiting

³² See Applicants Supporting Affidavit deposed to by Jason Barry Aproskie (23 April 2020) (Aproskie affidavit) para 15, TB p38.

³³ Answering Affidavit para 33 TB p80:

"The demand for masks did not only increase in Dis-Chem's outlets. Dis-Chem suppliers were inundated with requests for stock and suffered extreme and unprecedented shortages, such that they could not supply stock to Dis-Chem without a lead time of 8-10 weeks and at price levels more than 10 times the pre-COVID-19 prices."

the range of shops they may use for finding better prices owing to the social distancing measures and the fear of contracting Covid-19. Reference was made to a study conducted by an organisation called Pietermaritzburg Economic Justice and Dignity which found that women were limiting the number of shops visited to buy food owing to the nature of the pandemic.³⁴

[88] In short, the Commission contends that Dis-Chem is a dominant firm because it exerted *market power* by increasing its prices materially in the context of an international health crisis in which consumers were particularly vulnerable, independently of its competitors, customers or suppliers as contemplated in section 7(c).

[89] Dis-Chem launched several attacks at the Commission's case. The first is that it is a requirement of section 8 to define the relevant market in which it alleges that Dis-Chem exerted market power. In its view defining a relevant market is essential to assessing whether a firm is dominant as contemplated in section 7, and this is also a relevant factor for purposes of section 8(3). Here, Dis-Chem indicates that the importance of the market definition exercise cannot be overstated, asserting that both Professor Whish and the European Commission consider the exercise of the utmost importance as well as several Tribunal cases that have dealt with abuse of dominance.

[90] In the course of closing argument, Dis-Chem conceded that, in principle, whilst it is correct that market power can be inferred from a firm's economic behaviour, this must still be assessed in the context of a relevant market which the Commission has failed to identify.³⁵

³⁴ Pietermaritzburg Economic Justice & Dignity *Food prices and public health message in a time of COVID-19* (31 March 2020) available at https://pmbejd.org.za/wp-content/uploads/2020/03/Food-Prices-Covid-19_PMBEJD-Media-Statement-31032020.pdf.

³⁵ Dis-Chem Heads of Argument para 181:

"The Commission is correct that market power can be inferred from a firm's economic behaviour. But what the Commission fails to appreciate is that economic conduct does not occur in a vacuum, it occurs in a relevant market and so to be properly analysed requires that a market be defined."

[91] It was however submitted by Dis-Chem that during the relevant period, Dis-Chem's price increases and surge in demand occurred prior to the lockdown when consumers still enjoyed a greater ability to shop around. Its stores are usually found in or near shopping centres which have several competitors to its product offering. In the health and hygiene and surgical face masks it faces competition from Clicks, other retail pharmacy chains and independents. In his submissions, Mr Smith provided extracts of Google Maps that showed several retail chains and pharmacies within a 5km radius of Dis-Chem's top 10 stores (by sales of face masks) which also sold surgical face masks.³⁶ Thus, it was argued because the lockdown only started on 27 March 2020, so customers were not as limited, as suggested by the Motta article (discussed below), from going to more than one store.

[92] In support of this it was submitted that Dis-Chem would set its price for surgical face masks purposefully lower than the price of its closest competitor (Clicks).

[93] The second was that, even though the outbreak may have limited the movement of consumers, Dis-Chem was primarily located in malls wherein there were other competitors. Thus, most customers of a Dis-Chem store would be able to easily access a competitor despite the general limitation on movement.

[94] Furthermore, Dis-Chem argued that cloth face masks and surgical face masks, from a demand side are perfectly substitutable for one another. From a supply side, new avenues of supply of both types of masks were constantly opening up in response to increased demand. Numerous retailers and manufacturers were putting their resources to work in the manufacture of cloth masks. Added to this, many members of the public were making cloth face masks, both for their own use and, in many cases, for sale to others. Dis-Chem argued that the potential sources of supply for face masks is therefore almost limitless and accordingly, from a supply side perspective, it is clear that cloth and surgical masks are substitutes and barriers to entry were low.

³⁶ Transcript p145.

[95] The RBB report and presentation did not deal with the notion of market power under economic conditions associated with Covid-19 at all. Mr Smith instead argued that as a matter of economic principle competition regulators should be reluctant to intervene in matters of pricing in general but more so in short term pricing effects. In his view, prices present important signals and incentives and markets should be left to address variations in supply and demand to ensure that they deliver the benefits to consumers in the long run. Thus, a firm might, in the short run, experience market power due to the peculiar market conditions in each moment, but higher prices and margins are likely to encourage entry, and prices will ultimately reach the long-term equilibrium. Hence intervention under section 8 by the Tribunal in general should *only* be considered in markets where firms have durable market power and barriers to entry are high.

[96] In further support of non-intervention, he submitted that even in the context of a natural disaster or emergency which would send supply and demand chains into shocks, where firms might enjoy market power in the *short run*, regulators ought to still exercise forbearance because the market would ultimately tend towards equilibrium.³⁷ Prices might go up in the short run, but that would attract new entrants, supply would increase, and prices would fall again. Hence, we should leave the market to sort itself out because it worked.

[97] However, Mr Smith did concede, in response to questions put to him by Tribunal panel members, that however long or short the “*long run*” is depends on the nature of the disaster and the surrounding economic context. And that this might be a matter to be decided by the Tribunal—

“So, I think the benchmark of what dominance means, the principles are the same, but I accept that context matters here and I think what is dominance in a shorter term, I think this is not as short-term like hurricane Katrina, which sadly will probably last for many months, but I think what is an appropriate supplier response, what are acceptable market frictions may well change and I certainly leave that to you.”³⁸

³⁷ Transcript p192.

³⁸ Transcript p196.

Assessment

[98] We have previously set out the approach to section 7 in several abuse cases. Section 7(a) creates an irrebuttable presumption of dominance based on market shares. Section 7(b) creates a rebuttable presumption of dominance based on market shares on the basis that a firm can show it does not enjoy market power. Thus, a firm may have a large percentage of the market in relation to its competitors but might not enjoy market power. Section 7(c) contemplates that a firm may notwithstanding market shares below 35% still have *market power*.³⁹

[99] While our Act has a presumptive threshold for dominance, many jurisdictions in other parts of the world do not have legislatively enshrined presumptive thresholds of dominance or, put another way, do not utilise a percentage of market share as a proxy for market power on the part of a firm.⁴⁰ Some

³⁹ *Nationwide Airlines (Pty) Ltd and another v South African Airways (Pty) Ltd* [2009] 2 CPLR 509 (CT) (Nationwide) para 137:

“we point out that the provisions of section 7 are abundantly clear. Section 7(a) provides that a firm is dominant when its market share is 45% or more. Section 7(b) creates a rebuttable presumption of dominance in the event that the firm’s market share is between 35% and 45%. In that case the firm must show that it does not have market power. Section 7(c) creates a presumption of dominance if a firm has less than 35% but enjoys market power. An inquiry into market power is only necessary when a firm’s market shares are less than 45%.”

⁴⁰ On the European position of dominance, Whish and Baily write in *Whish R & Baily D Competition Law* 9th ed. (OUP 2018) (Whish) at p187:

“The expression ‘dominant position’ is not one that will be found in the economics literature; rather it is a term of art that determines the point at which the unilateral behaviour of an undertaking becomes subject to scrutiny under Article 102”

The European Court of Justice, in *Case 27/76 United Brands Company and United Brands Continental BV v. Commission of the European Communities* [1978] ECR 207 defined a dominant position as:

“The dominant position thus referred to by Article [82] relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers”

The ECJ has also established a (rebuttable) market share presumption for dominance pursuant to which a company is assumed to be dominant, if it holds a market share of 50 per cent or more in the relevant market (*Case C-62/86 AKZO Chemie v Commission* EU:C:1991:286, paragraph 60. See also *Case T-321/05 AstraZeneca v Commission* EU:T:2010:266, para 288).

Whish and Baily write further that for an article 102 case in European law, the determination of dominance cannot be determined:

“purely by reference to an undertaking’s market share. A finding of a dominant position derives from a combination of several factors which, taken separately are not necessarily determinative it is necessary to examine (at least) three issues” these three issues are constraints exercised by actual competitors, those imposed by potential competitors and any countervailing buyer power.” Whish p188.

India, Canada and Australia are all countries which do not have legislatively enshrined presumptions.

jurisdictions on the other hand may have lower thresholds to infer market power.⁴¹

[100] It is important to emphasise here that competition law enforcement is not concerned with the actual size of the firm but instead with the *ability of that firm to exercise market power*. In other words, we are concerned with the extent of that firm's ability to influence a market or as defined in section 1 of the Act "*the power of the firm to control prices, to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers*". Thus, the notion of dominance is inextricably bound to the notion of market power.

Inferential Market Power

[101] It cannot be disputed that market definition is one of the basic analytic tools utilised by competition regulators throughout the world.

[102] While market shares and defining the relevant market are usually the analytic 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 imposition of terms and conditions could also be relied upon in assessing whether the firm enjoys market power.

[103] Indeed, the OECD seems to indicate: "*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.*"⁴²

⁴¹ Article 36(2) of Law 12.529/11 in Brazil establishes that a dominant position is presumed when a company or a group of companies is able to individually or jointly change market conditions or when it controls **20% or more** of the relevant market. [OECD peer reviews of Competition law and Policy \(2019\)](#) p74.

⁴² 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.

[104] In the context of exploitative abuses, such as excessive pricing, the enquiry usually revolves around the ability of the firm to impose prices or terms and conditions on its customers (which may be intermediaries or final consumers) or its suppliers. An exploitative abuse mainly harms parties with whom the dominant firm deals, i.e. its customers or suppliers and not its competitors. Here the enquiry would be focused on the behaviour of that firm (what it does) and the economic environment or conditions which enable that firm to act in an exploitative matter.

[105] Luis Kaplow, in an article published in the Harvard Law Review in arguing against having to define markets generally, argues that:

*“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 place. Even worse, the inferences drawn from market shares in relevant markets”.*⁴³

[106] We will return to the factual assessment of whether Dis-Chem exercised market power, but at the level of principle, it cannot be refuted that market power can be inferred from a firm’s economic behaviour.

[107] The Commission’s case however is that Dis-Chem possesses *temporary market power* during the complaint period *in the context of Covid-19*.

[108] 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. It is typically considered in the context of price gouging conduct. The term price gouging refers to exploitative

⁴³ [Kaplow L Why \(Ever\) define Markets? 124 Harv. L. Rev. 437.](#)

pricing abuses (which may include other conduct such as trading terms) which take place in a situation where firms take advantage of a crisis situation in the form of a civil emergency, disaster, or impending disaster by charging excessive prices for products used for the health, safety and welfare of citizens in that situation.

[109] Such a concept of market power in the context of a natural disaster or emergency is not alien to competition law jurisprudence.⁴⁴

[110] The Competition and Markets Authority (CMA) in the UK (previously the OFT) expressly recognises that the current crisis may confer dominance on a firm, allowing it to price excessively. In discussing business conduct that may harm consumers in the midst of the Covid-19 crisis, the CMA includes the following:

*“a business abusing its dominant position in a market (which might be a dominant position conferred by the particular circumstances of this crisis) to raise prices significantly above normal competitive levels”.*⁴⁵

[111] This tracks with Motta’s views⁴⁶ that:

“[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

⁴⁴See *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.

⁴⁵ Competition and Markets Authority *Approach to business cooperation in response to COVID-19* (25 March 2020) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875468/COVID-19_guidance_-_pdf_p7

⁴⁶ Motta M *Price regulation in times of crisis can be tricky* (22 April 2020) Daily Maverick, available at <https://www.dailymaverick.co.za/opinionista/2020-04-22-price-regulation-in-times-of-crisis-can-be-tricky/#gsc.tab=0> (Motta).

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.

[112] In South Africa, the ability of a firm to exert market power in the context of a disaster was recognised when David Lewis contemplating the ambit of the excessive pricing proscription in our Act said:

"A competition authority may conceivably be called upon to act as a price regulator in instances that may be characterised a "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."⁴⁷

[113] We must emphasise here that the notion of temporary market power is juxtaposed against that of durable market power in a temporal sense. The enquiry in both instances is always concerned with the ability of a firm to exploit customers by virtue of the prevailing market conditions. In the context of natural disasters, civil emergencies or the like, we would we ask the question, what advantages did that particular disaster or emergency confer on firms which they would otherwise not have enjoyed.

[114] In the context of the Covid-19 outbreak (often referred to as "Covid-land" in the hearing) we ask the question what advantages does this global health crisis

⁴⁷ Lewis D "Exploitative Abuses – a Note on the Harmony Gold v. Mittal Steel Excessive Pricing Case", Annual Proceedings of the Fordham Competition Law Institute: International Antitrust Law & Policy, Juris Publishing, Huntington (Footnote 4).

confer on Dis-Chem, advantages which it would otherwise not enjoy in the counterfactual world of normal market conditions?

[115] And in this enquiry, we also consider the relevant market in which such advantages are enjoyed.

Relevant product market

Cloth face masks vs surgical face masks

[116] Dis-Chem argued that cloth masks served as substitutes for surgical masks, thus customers always had access to cheaper alternatives. This submission was also relied upon to argue non-intervention because barriers to entry in the face masks were low as evidenced by the entry of a number of cloth face mask producers in April. But this entry of cloth face mask suppliers is outside the complaint period of March.

[117] During the Complaint Period, the public were not being advised to wear cloth face masks. At that stage only surgical face masks, were considered to be essential protective gear against the virus. This is reflected in the surge and excess demand for surgical face masks in Dis-Chem's own stores.

[118] The public were only advised to wear cloth masks in mid-April.⁴⁸

[119] PPE and surgical masks are still considered to be in short supply globally.⁴⁹ The fact that the public are still being asked not to purchase surgical face masks and leave those for use by health workers because of a global shortage and to don cloth face masks instead suggests that these products are not substitutes.⁵⁰

⁴⁸ South African Department of Health *Use of Cloth Face-Masks by Members of the General Public in South Africa During the Covid-19 Pandemic* (21 April 2020) available at <https://sacoronavirus.co.za/2020/04/21/use-of-cloth-face-masks-by-members-of-the-general-public-in-south-africa-during-the-Covid-19-pandemic/>.

⁴⁹ Van Rensburg *Where did all the Masks Go?* (22 May 2020) AmaBhungane <https://www.news24.com/news24/southafrica/news/where-did-all-the-masks-go-20200522>.

⁵⁰ DOH n 48 above.

[120] In any event, surgical face masks have elements that differentiate them from cloth face masks. They are significantly more effective than cloth face masks at filtering out Covid-19-like particles (89% versus 50%).⁵¹ The WHO, the ECDC and the South African Department of Health all draw a clear distinction between cloth face masks and surgical face masks indicating that surgical face masks are critical supplies that should be reserved for healthcare workers and other medical first responders. This confirms the superiority of surgical face masks over cloth face masks.

[121] Hence, we do not agree with Dis-Chem that cloth face masks are substitutes for surgical face masks.

Relevant geographic market

[122] We turn to consider the geographic component of the relevant market.

[123] We start by noting that The European Commission's Relevant Market Notice defines a relevant geographic market as the geographic area in which companies offer their products and in which the conditions of competition are sufficiently homogeneous. In an explanatory note, the European Commission has held that in terms of geographic market definition, the key question is whether competitors from other geographic areas will be able to exercise sufficient competitive pressure on the relevant companies. This question should be a consumer-focused exercise: it is all about finding out what alternative suppliers are available to customers in a given area. If customers cannot rely on suppliers located outside of this area, those other suppliers are not part of the relevant geographic market.

[124] Motta's view, in the context of discussing price gouging is that:

"[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

⁵¹ Walker *et al* *Testing the Efficacy of Homemade Masks: Would They Protect in an Influenza Pandemic?* Cambridge University Press Disaster Med Public Health Prep. 2013 Aug; 7(4): 413–418. Published online 2013 May 22. doi: 10.1017/dmp.2013.43. Table 1.

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)⁵²

[125] Motta thus highlights the limitation of consumer movement as one element which may cause competition authorities to more narrowly define the geographic markets.

[126] Not only is a limitation on consumer movement relevant, but consumer perception may also be considered. In the context of assessing responses to a hypothetical monopolist increasing its prices Sutherland & Kemp write that:

“Information concerning customer convenience and preference will affect the likely response to the hypothetical price increase. These matters may include the availability of servicing, the immediate availability of the product itself, and whether the product is a stationary product to which the customer must travel. Consumer preferences or loyalty (or inertia) regarding products from a certain region, or with a quality associated with a region, may be relevant to the geographic market where they mean that very few consumers will consider substitutes from outside the region in question, even in the face of increased prices.”⁵³

[127] Consumer behaviour may thus be considered in the context of a hypothetical monopolist test. In this regard, the belief that there is a scarcity of an essential product in the circumstances of a pandemic would also impact consumer responses to a question regarding a price increase.

[128] Applying the above principles to the present matter, our assessment of the relevant geographic market requires an answer to the following question: Would a firm, with a stock of surgical face masks, be able to increase its prices for face

⁵² Motta n 46 above.

⁵³ Sutherland P & Kemp K *Competition law of South Africa* P7-21

masks by 5% or more over the period February and March without facing competitive constraints from other firms even if said firms were in the same shopping centre or within a 5km radius? Put another way, how far would a consumer, wanting to purchase a surgical face mask, be willing and able to travel if a store increased its prices for such face masks price by 5% over the period February and March 2020?

[129] The first factor to consider in answering this question is that in late February and early March, the press was replete with reports of pharmacies selling out of essential items, face masks included. An article from late February maintains that:

“Retailers and pharmacies are battling to keep up with demand for hand sanitisers and surgical masks, as stock flies off the shelves amid increasing panic over the spread of the novel coronavirus.

News24 visited several pharmacies and retailers in the Cape Town CBD with some shelves already empty as a result of panic buying. Golden Acre Pharmacy owner Akbar Rawoot said his outlet ran out of masks after the first coronavirus case was confirmed in South Africa. He has been unable to replenish his stock as his suppliers reported a stock-out of masks.”⁵⁴

[130] Brian Epstein, the director of the operational division at Dis-Chem is quoted in one article in early March as saying:

There’s been a bit of a panic. So, we’re practically sold out [of face masks] and you can see that we are going to be running short and need to restock.”⁵⁵

[131] These reports of shortages are indicative of a widely held consumer belief that demand will outstrip supply, or that there will be dramatic price increases in a particular product. The mere presence of panic buying is indicative that purchase decisions of consumers were being influenced by fears of infection as early February. By late February / early March consumers had already started

⁵⁴ Author Unknown *Panic buying sets in after SA confirms 7 coronavirus cases* The Citizen Online (10 March 2020) available at: <https://citizen.co.za/news/south-africa/health/2252776/panic-buying-sets-in-after-sa-confirms-7-coronavirus-cases/>.

⁵⁵ Nyathi A *Dis-Chem Running out of Face masks as South Africans prep for Coronavirus* Eyewitness News <https://ewn.co.za/2020/01/31/surgical-face-masks-fly-off-shelves-at-dis-chem-stores-in-wake-of-coronavirus>.

to limit the number of trips they were making to stores and were reducing shopping around less prior to the lockdown as evidenced by the Pietermaritzburg Economic Justice and Dignity study referred to above.⁵⁶ They were also spending less time in stores as a fear of the pandemic swept across the country. This behaviour was motivated by concern for possible exposure to infection while shopping and in the context of a global pandemic was not irrational.

[132] Thus consumers were already limiting their movements voluntarily (in response to a fear of infection) in February and early March and not in response to the legal requirement of the declaration of the National Disaster and then ultimately the national lockdown in late March.

[133] In a recent study conducted by the National Bureau of Economic Research, consumer behaviour in the United States reflected similar patterns. That study found that consumers were altering their behaviour by limiting their movements and electing to shop at local stores rather than large supermarkets because of a fear of infection, and not in response to a legal regulation which required them to do so.⁵⁷

[134] Furthermore, with masks selling out very quickly from stores that did stock them, a consumer shopping around to compare prices would risk not finding them in stock on returning to a store, so not being able to purchase them at all; such a consideration would also have contributed to price inelasticity for consumers.

[135] In such circumstances consumers' bargaining positions *vis-à-vis* suppliers is weakened. Snyder, speaking about the economic implications of price gouging in relation to essential goods and services following or during a period of disaster says:

⁵⁶ See n 34 above. *see also* Pietermaritzburg Economic Justice and Dignity "Covid-19: Families living on low incomes may be spending 30% more on food than they did two months ago." Research Report (26 May 2020) available at <https://pmbejd.org.za/wp-content/uploads/2020/05/PMBEJD-Research-Report-26052020.pdf>.

⁵⁷ Goolsbee A & Syverson C *Fear, Lockdown, and Diversion: Comparing Drivers of Pandemic Economic Decline 2020* (June 2020) National Bureau of Economic Research Working Paper available at <https://www.nber.org/papers/w27432>.

“[T]he good being exchanged is likely to be something essential to the well-being of the customer (e.g., food, water, shelter), the exchange is actually likely to provide proportionally greater utility to the customer than the vendor even at the higher than usual price. While the vendor may stand to clear a larger than normal”⁵⁸

[136] If customers expected or experienced a shortage of masks, they would have bought them at whatever price charged by the firm who could supply them.

[137] This in fact is borne out by Dis-Chem’s own conduct. Dis-Chem submitted that it looked at the pricing of its nearest competitor, Clicks, before implementing its price increases. While the submission was made in support of Dis-Chem being cheaper than Clicks, to the contrary, it confirms that Dis-Chem was not constrained by Clicks when it decided to *increase* not decrease its prices.

[138] Thus, we have the co-occurrence of several factors in this case. Not only do we have the factors listed by Motta above but also have a situation where not only consumers were limiting their movements and frequency of shopping trips, the product that we are dealing with is considered to be essential in the fight against Covid-19 and which was already in short supply. In such circumstances a store that had surgical face masks in stock would certainly have the ability to exercise market power *vis-à-vis* its customers, an advantage which it did not enjoy prior to the outbreak of Covid-19.

[139] Although the National Disaster was only declared on 15 March 2020, the economic conditions which conferred market power to stores that stocked surgical masks (Covid-land) were already present *prior* to that date. Thus, the conditions already existed in January and February, prior to the March complaint period, for suppliers and retailers to increase prices and exploit consumers who were anxious about their vulnerability to a global health threat. 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 –

⁵⁸ Snyder J “What is the Matter with Price Gouging” (2009) Vol 19 no.2 *Business Ethics Quarterly* pp. 275-293 at pp 227-228.

could conceivably exercise market power in the supply of PPE *vis-à-vis* their customers.

[140] Dis-Chem is precisely such a store. It trades in medical and hygiene products. As suggested by its name and branding it holds itself out as a low-price destination store for consumers and professionals alike in these products.⁵⁹

[141] In conclusion, we find that the ability to exercise market power in the context of a health crisis such as Covid-19, and the economic circumstances that it has generated, with excess demand for protective equipment such as surgical face masks, and the global shortage of PPE is eminently possible on the part of suppliers and stores who trade in such goods.

[142] As to the cautionary note advanced by Mr Smith, that we should not easily intervene in pricing effects in the *short run*, we make the observation that it is equally recognised in competition law that special conditions exist when markets can fail and are not able to deliver the theoretical benefits associated with well-functioning market economies. This is why competition regulators are mandated to regulate markets either through merger control (*ex ante*) or the conduct of firms (*ex post*) to rectify such failures.

[143] As evidenced in section 8 of our Act, and in many other jurisdictions, we are expressly empowered to regulate the conduct of firms that abuse their market power. This conduct includes pricing conduct, such as predatory pricing, margin squeeze and excessive pricing. This also includes protecting vulnerable consumers from exploitative conduct on the part of firms who in the context of a natural disaster or health crisis such as Covid-19 seek to profiteer from the impact of such a disaster.

⁵⁹See Dis-Chem's website, online store and advertising materials *writ* large. All of which are encapsulated in Dis-Chem's Annual Integrated Report 2019 at p10 "*The group follows and everyday low price strategy . . . positioning itself as a discount brand*" https://thevault.exchange/?get_group_doc=6262/1563793063-FY2019IntegratedAnnualReportIAR.pdf

[144] Put another way, a competition authority might be in dereliction of its duty if it did not intervene in a timely manner in states of natural disasters or emergencies to protect vulnerable consumers against exploitative firms. Take for instance a natural disaster such as a severe drought in South Africa. How long should a competition authority wait until the market “settles” or reaches equilibrium before it intervenes to protect consumers against pricing abuses by the suppliers of fresh or bottled water?

[145] In our view material price increases of life essential items such as surgical masks, even in the short run, in a health disaster such as the Covid-19 outbreak, warrants our intervention.

[146] We turn now to consider the relevant economic test to apply in such a context.

Applicable Economic Test

[147] As we indicated earlier, the issues in this case are interwoven in that the same conduct, namely the material price increases by Dis-Chem during March are relied upon by the Commission to support findings of both market power and excessive pricing. Before turning to consider the facts, we set out the appropriate economic test for such assessment.

Competitive Benchmark

[148] Mr Smith from RBB correctly sets out the essence of the enquiry. A price that is being evaluated as being excessive must be compared to a competitive benchmark. This benchmark in the previous section 8 was the notion of “economic value”. As a result of the 2018 amendment, this benchmark is now a “competitive price”.

[149] Dis-Chem argued that the competitive price could only be one that is determined by having regard to all relevant factors as provided in section 8(3). In other words, we should engage in a benchmark exercise as we had done in previous cases such as *Mittal* and *SCI*, and as advised by the OECD.

[150] 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.

[151] An OECD document confirms that in a period of crisis or disaster the comparative or "normal" price for the product can be determined by having regard to the prices charged for the product in the period before the crisis or disaster. The OECD 2011 Excessive Pricing: Policy Roundtables⁶⁰ records the approach of various states of the USA⁶¹ to the economic test for price gouging as:

"The basic methodology employed is based on a comparison of a (fictitious) "normal" price with the potentially excessive price in periods of abnormal supply disruptions. In determining the "normal" supply price a variety of definitions are used. While some US States do not define the normal price at all, others use the average price over a specified period or the price immediately prior to the supply disruption or the emergency declaration".⁶²

[152] At the same roundtable, reference was made to David Lewis' previously quoted writing on this issue. In that article, he says that in the context of natural disasters that: –

"This would not only demand urgent action but it would be a relatively simple technical task – the excess would simply be determined by reference to the price that prevailed immediately prior to the disaster and the "non-excessive" price would be set accordingly."⁶³

[153] Massimo Motta also explains that in abnormal situations such as the Covid-19 pandemic:

⁶⁰OECD *Policy Roundtables: Excessive Prices* (2011) available at

<https://www.oecd.org/competition/abuse/49604207.pdf> (OECD Roundtable) at para 5.3.1 p61.

⁶¹ In the USA, excessive pricing is not in and of itself a matter for competition enforcement at the federal level, but many individual states have laws that specifically prohibit 'price gouging'.

⁶² OECD Roundtable p60.

⁶³ OECD Roundtable p47 referencing Lewis n 47 above.

*“Using the pre-crisis price as a benchmark is sensible because demand and supply conditions at that time were presumably “normal” (Emphasis added.)*⁶⁴

[154] The OECD, in its note of 26 May 2020 titled *“Exploitative pricing in the time of Covid 19”* writes that:

*“in the context of a crisis it is likely that the main method to determine whether prices are excessive will be to focus on price-based benchmarks, particularly before and after the crisis has begun.”*⁶⁵

[155] The approach in many states of the USA to price gouging also gives a reference for how and what evidence can be used to assess potential excessive pricing abuses in circumstances such as a crisis / pandemic / disaster. For example, the Californian Penal Code PEN § 396 explains what data / information are required for the pricing assessment, as well as what threshold could be used to assess the differences in price:

*“(b) ... a price of more than 10 percent greater than the price charged by that person for those goods or services immediately prior to the proclamation or declaration of emergency. However, a greater price increase is not unlawful if that person can prove that the increase in price was directly attributable to additional costs imposed on it by the supplier of the goods, or directly attributable to additional costs for labor or materials used to provide the services, during the state of emergency or local emergency, and the price is no more than 10 percent greater⁶⁶ than the total of the cost to the seller plus the markup customarily applied by the seller for that good or service in the usual course of business immediately prior to the onset of the state of emergency or local emergency.”*⁶⁷

[156] Finally, and consistent with the approach outlined above, the CAC in *Sasol* (referencing paragraph 49-50 of *Mittal*) indicated that excessive pricing may involve a simple test to establish a *prima facie* case: *“Likewise, where the*

⁶⁴ *Motta* n 46 above.

⁶⁵ 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> p7

⁶⁶ Many states in the USA, including for example New Jersey and Oklahoma, use the above-mentioned 10% increase from previous prices as the relevant threshold. Other states, like Florida, rely on more qualitative language, such as prices that “grossly” exceed the average.

⁶⁷ California Code, Penal Code - PEN § 396.

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".⁶⁸ The relevant comparator after the 2018 amendments is a "competitive price"⁶⁹ and no longer economic value⁷⁰, but the same principle applies.⁷¹

[157] As we indicated above, there is ample precedent to conclude that where a dominant firm, in the context of a health crisis increases its prices significantly without any increases in costs, this could establish *prima facie* that its new prices are higher than the competitive benchmark, and there is no need to quantify this benchmark more precisely.⁷²

[158] The fact that Dis-Chem might have had regard to Clicks' prices before implementing its own increases, does not undermine this principle simply because we have no insight into Clicks' pricing conduct at the time. In our discussion on dominance and relevant market we alluded to the likelihood that more than one store (even within the same shopping mall) could conceivably enjoy market power *vis-à-vis* consumers. In the context of 'Covid-land', Clicks could, like Dis-Chem, have enjoyed market power *vis-à-vis* consumers in the market for surgical masks. The fact that it was already more expensive, on a per mask basis than Dis-Chem, tends to suggest that this was indeed the case.

[159] For us in this case, the central consideration is to ask whether Dis-Chem would, but for the Covid-19 outbreak, be able to increase its prices in the manner that it did and which it would not otherwise be able to do in the counterfactual world of normal market conditions.

[160] In the counterfactual world of pre-Covid, surgical face masks were but an insignificant item in Dis-Chem's overall business. In the economic conditions of

⁶⁸ *Sasol* n 25 above at para 102.

⁶⁹ Amended section 8(3) of the Act.

⁷⁰ As per the definition of an excessive price prior to the 2018 amendments to the Act.

⁷¹ See also *United Brands* n25 above 40at para 250.

⁷² *Mittal* n 25 above at para 49.

the Covid-19 outbreak surgical masks are considered as essential to consumers as water in a drought. The market conditions in Covid-land, conferred on Dis-Chem the ability to materially increase its prices for surgical masks, which it could not do in the counterfactual world of normal market conditions.

[161] Thus, we conclude that the relevant comparator or “competitive price” in this exercise would be Dis-Chem’s own pricing or margins prior to its March increases.

[162] However, as indicated earlier, the issues in this case are interwoven and the same facts that are relied on to infer market power i.e. the materiality of a price increase serve as a factual matrix in which to assess the excessiveness of the price.

Complaint Period

[163] Before going any further however we pause here to clarify the relevant complaint period. In the Commission’s founding affidavit, the complaint period is identified as the month of March 2020. We assume that this would be a period from 1-31 March 2020.

[164] During the course of the hearing, Ms Le Roux, appearing on behalf of Dis-Chem suggested that the complaint period could only be from 15-31 March 2020. This ostensibly followed from the non-application of the consumer protection regulations and a somewhat loose comment made by the Commission’s advocate that the regulations must apply at the very least from the date of the proclamation of the national disaster.

[165] Notwithstanding the legal arguments put up by the different advocates, the Commission however has not amended its case, and the relevant complaint period remains 1-31 March 2020.

Factual assessment of market power and excessive pricing

[166] In this section we first set out in some detail Dis-Chem's price increases, then set out the Commission's calculations in relation to the size of the increases, the price-cost tests conducted by it and finally a gross margin comparison. Because the exercise involves a comparison of Dis-Chem's own prices, we also set out its prices prior to the March increases, as the appropriate benchmarks of the competitive prices, in some detail.

[167] At the outset it is important to note that Dis-Chem does not dispute its prices were increased in the manner described below. Nor does it dispute any of the underlying calculations done by the Commission.

[168] Mr Smith on behalf of Dis-Chem confirmed that:

"First I wanted to say a huge thank you to Competition Commission's economists. I don't know individually who they are, but I think this is obviously how it should always be, but there's hardly any disagreement on any of the empirical facts."⁷³

[169] Then again in the discussion on the margins, he confirmed that:

The fifth point is that margins were substantially higher in March. They were lower in April than they had been in the preceding months and I think that's agreed and I say again thanks, because I think the empirical points are largely agreed between the Commission and Dis-Chem."⁷⁴

[170] However, Dis-Chem does provide some reasons or justifications for these increases, namely higher anticipated costs, increases costs of procurement, and a net margins comparison test. We deal with all of these in the course of the assessment.

⁷³ Transcript p181.

⁷⁴ Transcript p 182.

Dis-Chem's Price Increases

[171] During the month of December Dis-Chem sold [...] masks, generating a VAT exclusive revenue of below [...].⁷⁵ This was considered typical for Dis-Chem and was self admittedly, a minor line item across the multitude of products sold by Dis-Chem.

[172] In December, the price for surgical masks at Dis-Chem was recorded as R25,40 for SFM50;⁷⁶ R4.10 for SFM5;⁷⁷ and R53.12 for Folio50.⁷⁸

[173] During this period, Dis-Chem was able to procure adequate stock to meet the level of demand. In December 2019, Dis-Chem ordered just [...] masks to replenish its existing stocks.

[174] During January, Dis-Chem sold [...] surgical masks, generating VAT exclusive revenue above [...].⁷⁹ Dis-Chem submits that [...] % of all the masks purchased in January 2020 were acquired by just [...] % of the customers, with the largest order for a single order amounting to over [...] masks. In other words, the vast majority of the customers buying masks in January 2020 were not consumers looking to buy masks for their personal use. Rather, these were bulk buyers. Notwithstanding this, the volumes of masks sold in January had increased astronomically by [...].

[175] Dis-Chem submitted that it was able to meet this surge in demand for masks, but that this surge depleted its stock and additional stock was sourced from its regular, local suppliers.

[176] Dis-Chem did not increase its prices in January, but did, however, introduce a new pack size for the Surgical Face mask Foliodress Blue on 30 January 2020.

⁷⁵ [...]. *Table 8: Dis-Chem mask sales November 2019 to 23 April 2020* Answering affidavit p37 TB p101.

⁷⁶ For a pack of 50 masks.

⁷⁷ For a pack of 5 masks.

⁷⁸ For a pack of 50 masks.

⁷⁹ [...]. *Table 8: Dis-Chem mask sales November 2019 to 23 April 2020* Answering affidavit p37 TB p101.

In this regard, Dis-Chem began repackaging the Foliodress50 and SFM50, which until now had typically been sold as a box of 50 units, as single units (as well as units of 5 and 10) to ensure that it had sufficient stock to satisfy the needs of its retail customers (as opposed to bulk buyers that were likely resellers or exporters). The single units retailed for R1.31 (excl. VAT).

[177] Dis-Chem submitted that the additional cost of this repackaging into singles was R[...] per bag. This, so Dis-Chem argued, should be added to the additional cost of labour in repackaging. However no further quantification of the cost of labour was advanced by Dis-Chem. The Commission, based upon initial discussions held with Ronald Govender, quantified the additional cost of labour as R[...] per bag, bringing the total cost of repackaging to R[...] per repackaged unit.

[178] During February, Dis-Chem sold approximately [...] masks, generating a VAT exclusive revenue of R[...].

[179] On 14 February 2020, Dis-Chem adjusted its price upwards (excl. VAT) on two of its product lines for the first time as follows:

- 179.1. SFM50 was increased from R41.70 to R47.78; and
- 179.2. SFM5 was increased from R9.52 to R13.00.

[180] A second round of price increases (excl. VAT) was instituted on 26 February 2020, this time in respect of all available mask SKUs as set out below:

- 180.1. SFM50 - R78.22 (previously R R47.78);
- 180.2. SFM5 - R17.35 (previously R13.00);
- 180.3. Folio50 - R78.22 (previously R53.12);
- 180.4. Foliodress10 - R17.35 (previously unavailable); and
- 180.5. Foliodress1 – R4.31 (previously R1.31).

[181] During February, Dis-Chem more than doubled the volume of new mask stocks purchased compared to the previous month. In this regard, it ordered an additional 507,660 masks from its regular suppliers but received only 274,320 masks.

[182] During March, a third round of increases was implemented by Dis-Chem as set out below:

- 182.1. Folio50 from 78.22 to R81.70 (2 March);
- 182.2. SFM5 from 17.35 to R19.96 (7 March); and
- 182.3. SFM50 from 78.22 to R173.87 (9 March).

[183] In March Dis-Chem sold fewer masks in total, only [...], however its volume of units sold increased from [...] in February to [...] ⁸⁰ in March possibly due to the repackaging of 50s into smaller packages. These sales generated a tax exclusive revenue of R[...] and significantly higher margins that increased.

[184] We reproduce for ease of reference the table reflecting the price increases implemented by Dis-Chem as summarised by RBB:⁸¹

Table 2: Summary of price changes by product, 1 November 2019 to 22 April 2020²⁸

Product	01-Nov-19	30-Jan-20	14-Feb-20	26-Feb-20	02-Mar-20	07-Mar-20	09-Mar-20	02-Apr-20	11-Apr-20	22-Apr-20
SURGICAL FACE MASK BLUE 50PC	41.70	-	47.78	78.22	-	-	173.87	-	-	-
SURGICAL FACE MASKS 5PC	9.52	-	13.00	17.35	-	19.96	-	-	-	-
SURGICAL FACE MASK FOLIODRESS BLUE 50PC	65.18	-	-	78.22	81.70	-	-	-	-	-
SURGICAL FACE MASK FOLIODRESS BLUE 10PC	N/A	N/A	N/A	17.35	-	-	-	-	-	-
SURGICAL FACE MASK FOLIODRESS BLUE 1PC	N/A	1.31	-	4.31	-	-	-	-	-	-
SURGICAL FACE MASKS 3PLY 1PC	N/A	N/A	N/A	N/A	N/A	N/A	N/A	22.57	17.35	13.00

Source: RBB analysis of Dis-Chem Transactions Data
 Note: Prices are expressed in per unit / pack-size terms, exclusive of VAT.

[185] The Commission submits that a comparison of the costs of the SKUs do not justify such material increases in prices as reflected in the table below:

⁸⁰ Table 8: Dis-Chem mask sales November 2019 to 23 April 2020 Answering affidavit p37 TB p101.
⁸¹ Table 2- Summary of price changes by product, 1 November 2019 to 22 April 2020 Expert Witness Statement of Patrick Smith (RBB Expert report) p32. TB p389.

Table 2: Comparison of increase in price per unit against change in cost per unit (March 2020 versus February 2020)⁸²

	Cost per Unit (Feb 2020)	Cost per unit (Mar 2020)	Price per unit (Feb 2020)	Price per unit (Mar 2020)	Increase in cost per unit	Increase in price per unit
SURGICAL FACE MASK BLUE 50PC	[...]	[...]	43.47	156.95	[...]	261%
SURGICAL FACE MASK BLUE 5PC	[...]	[...]	13.27	19.03	[...]	43%
SURGICAL FACE MASK FOLIODRESS BLUE	[...]	[...]	65.16	81.52	[...]	25%

[186] The highlighted figures in the table above show that Dis-Chem's -

186.1. SFM50 prices increased by 261% while its costs only increased by [...]

186.2. SFM5 prices increased by 43% while costs only increased by [...]; and

186.3. Folio50 prices increased by 25% while costs declined by [...].

[187] In the cost analysis the Commission has estimated a cost of 15% attributed to repackaging SFM50 into smaller SKUs. Dis-Chem could not provide evidence of any actual costs incurred but the 15% estimate included costs for packaging materials as well as labour costs.⁸³ Dis-Chem did not dispute the Commission's estimate.

Anticipated costs

[188] Dis-Chem submits that the Tribunal must have regard to the anticipated higher prices that Dis-Chem was being quoted by suppliers (anticipated costs argument), and higher procurement costs.

⁸² Table 2: Comparison of increase in price per unit against change in cost per unit (March 2020 versus February 2020) Aproskie affidavit TB p61.

⁸³ "Workings table 3" in the Excel spreadsheet 63. Commission Dis-Chem - Aproskie Affidavit - Underlying Calculations - 25 April 2020 submitted as electronic evidence.

[189] Here the essential argument was that during the period November 2019 and February 2020, Dis-Chem had sufficient stock of surgical face masks to meet the surge in demand from January onwards. March was the first month in which it was forced to use new suppliers to meet the surge in demand. It claims it sourced from five different suppliers, as opposed to its two usual suppliers.

[190] On the issue of increased procurement costs, it was submitted that Dis-Chem was required to pay cash on delivery ('COD'). Ordinarily Dis-Chem pays its suppliers on [...] terms, so the COD requirement had the potential to negatively impact Dis-Chem's cash flow, and interest charges.

[191] It argued that price increases were implemented to "prepare" customers for future higher prices. In support of its customer-centric motivation, Dis-Chem submitted that it was to ensure equitable access to customers, that it repackaged packs of 50 masks into singles. Pursuant to this it had sent an email to all stores to limit the number of items per customer, so as to ensure equitable access by customers.⁸⁴

[192] However, the factual evidence does not support any of these submissions.

[193] Evidence of quotes Dis-Chem had received (but not actual orders placed) from several suppliers during March and April were put up in support of these higher anticipated costs. But these were quotes only, and in any event fall outside the Complaint Period. The RBB report does indicate that Dis-Chem's sales of its historically procured masks, which were locally produced, had largely run out by the end of March, and Dis-Chem proceeded to sell mainly imported masks, but again this was only in April.

[194] No quantification of increased procurement costs was handed up nor was any impact shown on Dis-Chem's cash flow or interest earnings.

⁸⁴ Answering affidavit p 21 para 46.

"With regard to the limitation on the number of masks that a single customer could purchase, Dis-Chem sent an email to all of its store managers on 19 March 2020 to inform them of a 6 unit per item limit on various products, including masks". TB p84.

[195] In *SCI*, the CAC found that a firm's anticipated costs of an input were permissible in the price cost test.⁸⁵ However, unlike *Mittal* and *SCI*, Dis-Chem is not a producer or manufacturer of surgical face masks but merely a retailer. As a retailer, all it does is add a margin to whatever price it acquires the product from its suppliers, which is reflected in its mark-up. Hence there is no basis for us to have regard to these anticipated higher costs, when Dis-Chem would already have factored these in its mark-up.

[196] As to the customer-centric arguments, Dis-Chem's retail operations serve the public at large and not only a few regular customers, so the suggestion that prices were increased to 'prepare' unidentified customers rings hollow. On its own version, Dis-Chem started converting 50s into singles or smaller packs. Single packs of Foliodress masks were made available on 30 January for R1.31. But the price of these was raised in February to R4.31, a price increase of almost 230%.⁸⁶ Its limitation per customer was only implemented on 19 March 2020 after the consumer protection regulations were published.⁸⁷

Per mask price vs costs

[197] Another helpful way to look at the data is to reduce the point of sales figures down to an average cost per mask across all surgical face masks. A figure prepared by RBB and reproduced below shows in graphic form the difference between Dis-Chem's daily weighted average price and costs⁸⁸ of surgical face masks in the month of March represented by the gap between its prices and moving average cost (MAC) for the period mid- February to 30 March 2020:

⁸⁵ *Mittal* n 25 above para's 152-160 (addresses the inclusion of PP and the incumbent anticipated cost increases).

⁸⁶ We simply point to this material price increase for purposes of information. The Commission did not include this in its referral.

⁸⁷ Regulation 6.1.1. requires suppliers to ensure equitable access to products listed in annexure A.

⁸⁸ Dis-Chem's moving average cost (MAC).



[198] The graph reflects an increase of the average price paid for a mask in January and February, but a consistently high price paid throughout March. The graph also shows that for the duration of February and March, costs remained stable.

[199] RBB's graph above accords with the Commission's calculations that prices for masks increase significantly in March, with very minor increases in costs.

[200] This then leads us to the next issue, namely that of the gross margin comparison.

Gross margin comparison

[201] The Commission provided a second test for consideration namely the gross margin comparison pre- and post the Complaint Period. This economic test is contemplated in regulation 4.2.

[202] The Commission’s findings on gross margin are summarised in the table below:⁸⁹

	Nov-19	Dec-19	Jan-20	Feb-20	Average Dec-Jan-Feb 2020	Mar-20
SURGICAL FACE MASK BLUE 50PC Total	[...]	[...]	[...]	[...]	[...]	[...]
SURGICAL FACE MASKS 5PC Total	[...]	[...]	[...]	[...]	[...]	[...]
SURGICAL FACE MASK FOLIODRESS BLUE	[...]	[...]	[...]	[...]	[...]	[...]
COMBINED	[...]	[...]	[...]	[...]	[...]	[...]

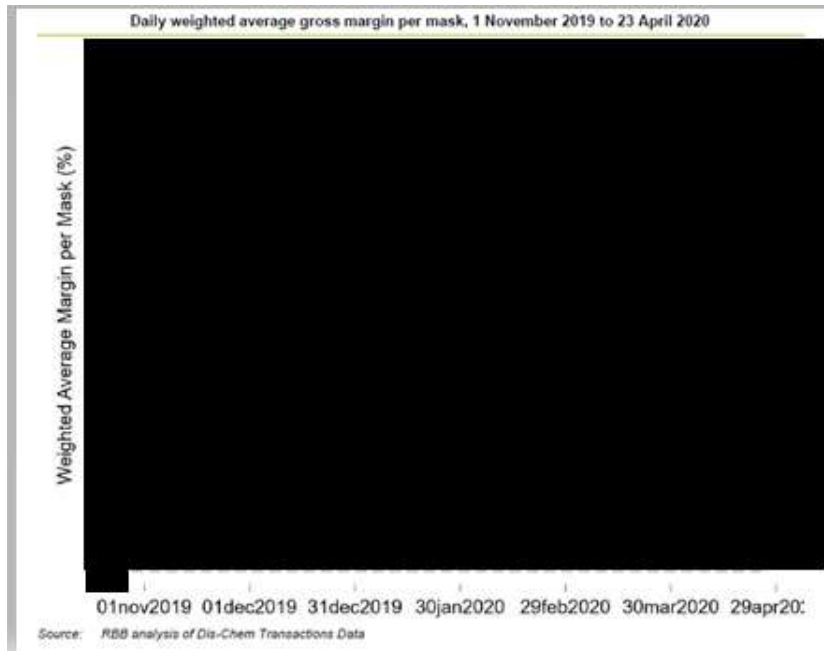
[203] In their referral, the Commission calculated an average margin for the period December 2019 to February 2020 and compared it to the March margins. As can be seen from the table above, on this calculation, gross margins in March increased -

- 203.1. From [...] to [...] for the SFM50;
- 203.2. From [...] to [...] for the SFM5;
- 203.3. From [...] to [...] for the Folio50; and
- 203.4. From [...] to [...] combined across the products.

[204] Perhaps a better picture of the pre- and post March increases in margins is to be gained from the RBB report Figure 6, reproduced below, which visibly demonstrates a significant increasing margin over the period 01 November to end March. Here, RBB again uses a weighted average gross margin per mask, rather than segmenting the analysis into the different SKU’s.

⁸⁹ Information extracted from the tab “Workings Table 3” Commission Dis-Chem- Aproskie Affidavit- Underlying Calculations Discovery item no. 63.

RBB figure 6⁹⁰



[205] RBB’s numbers differ slightly from those of the Commission. However, the pattern of the increase in prices and margins is the same. Dis-Chem’s gross margins from the middle of February increased exponentially, the biggest hike being in mid-Feb around the time of Dis-Chem’s first price increases, then towards the end of Feb after its second round of increases and then another hike in early March plateauing thereafter.

Net margin comparison

[206] Mr Smith submitted that because the Commission only considers gross margins and does not consider net margins, the Commission has not presented information on the “*relevant and critical factors*” for determining whether the price is excessive in terms of a section 8 analysis.

[207] He submitted that Dis-Chem is a multi-product retailer, and thus incurs several other categories of costs, in addition to simply procurement costs, which would normally be considered in the calculation of net margins. However, as a multi-product retailer many of these categories of costs may be shared across multiple

⁹⁰ Figure 6: Daily weighted average gross profit margin per mask., 1 November to 23 April 2020 RBB Report p38 TB p395.

product lines, and the allocation of these common costs of operation across different product lines is difficult, and to some extent can be arbitrary. It is for this reason that Smith indicates that conventional section 8 excessive pricing cases are very rarely brought against multi-product retailers.

[208] The Commission argued mark-ups or gross margins in the case of retailers reflects their returns on the product sold and these mark-ups would have been set at a level to recover overhead costs in the ordinary course. A net margin comparison would be more appropriate for suppliers (manufacturers) of surgical masks. It is for this reason that one can use mark-ups as a benchmark when comparing Dis-Chem's prices, because even if the cost of the product changes, the mark-up should not.

[209] To avoid unduly burdening these reasons with the arguments put up by both sides, we make the following conclusions on the relevance of net margins in the context of this case:

- 209.1. Dis-Chem as a retailer would simply apply its mark-up and that would include a component of overhead costs. Hence comparison of its gross margins would be an appropriate and relevant factor. We agree with the Commission that the net margin analysis is more relevant to a producer or manufacturer of masks.
- 209.2. Mr Govender and Ms Parsons do not set out any factual basis for consideration of net margins, or reduced profits from other line items as a justification for the price increases.
- 209.3. We are not concerned here with an enquiry into Dis-Chem's overall prices in general but are concerned with Dis-Chem's pricing of a surgical face masks only, considered to be an essential safeguard against Covid-19 contagion, in the context of abnormal market conditions during the Complaint Period. And in this context, a net margin comparison serves little value.

Conclusion on Market Power and Excessive Pricing

[210] Having regard to the above evidence evaluated in the economic context of a global health crisis, we find that conditions for exploitation of the crisis for sellers of surgical face masks and PPE existed as early as the end of January 2020. But for the surge in demand for surgical face masks in January and February, triggered by Covid-19, Dis-Chem would not have been able to increase its prices to the extent that it did.

[211] Dis-Chem's pricing conduct, of successive massive price increases in March shown in the table above, demonstrates that it exploited this crisis.

[212] The Commission showed that Dis-Chem's margins in March (the complaint period) increased significantly.

[213] Dis-Chem's own calculations contained in the RBB report show the increasing gap between price and costs per mask and that Dis-Chem's gross margin for the overall sale for face masks was at [...] % in March. Its calculation of the average over the preceding three months was [...] %. Thus, in the month of March, Dis-Chem was able to more than double its gross margin on face masks.⁹¹

[214] We find that in the context of a global health crisis, with excess demand of surgical masks, considered to be essential in the fight against Covid-19, Dis-Chem has demonstrated that it enjoyed *and* exerted market power by materially increasing its prices, without a significant increase in costs, and significant increase in margins.

[215] But for the economic conditions brought about by the outbreak of Covid-19, it would not have been able to implement such material price increases in surgical masks. Dis-Chem could not have implemented these significant price increases

⁹¹ Table 7: Dis-Chem's prices, costs, and gross margins per mask, for all masks sold RBB Report p43 TB p400.

but for the economic conditions of 'Covid-land' that created excess demand and weakened countervailing power, and which conferred on Dis-Chem the advantage it would not have otherwise enjoyed.

[216] In our view the Commission has thus established, that Dis-Chem exerted market power in its pricing of SFM50, SFM5 and Folio50 by increasing its prices to such significantly high levels in the context of the Covid-19 pandemic. One of those material increases took place on the very day that the first Covid-19 case was announced in South Africa.

[217] The Commission has accordingly shown a *prima facie* case of excessive pricing in relation to the three SKUs, namely SFM50; SFM5 and Folio50, of surgical face masks.

[218] We now turn to consider whether Dis-Chem has acquitted its burden of showing that the price increases in March were reasonable in the context of Covid-19.

Reasonableness

[219] Section 8(3) of the Act provides that the determination of whether a price is excessive requires a determination of whether the difference between the price and the competitive price is unreasonable. The enquiry in this case then requires us to assess whether the differences between Dis-Chem's prices and margins prior to the Complaint Period and during the Complaint Period, are unreasonable.

[220] The Commission submits that a low threshold is appropriate for the difference between the price charged by the firm and the competitive price especially so in the context of Covid-19. For this, it relies on jurisprudence in the USA on price gouging laws.⁹² It suggests that a 10% threshold for a price (or mark-up)

⁹² See Price Gouging Laws by State, available at <https://consumer.findlaw.com/consumer-transactions/price-gouging-laws-by-state.html>.

increase would be indicative of an unreasonable difference to the normal competitive price (or mark-up) that prevailed historically.⁹³

[221] But why should there be any allowance at all when we are concerned with pricing of an item considered to be essential to the fight against the pandemic of Covid-19 and crucial to public health? In the context of a highly contagious virus for which there is no cure on the horizon, surgical masks, together with other PPE and hygiene standards, are a matter of life and death for health service providers and vulnerable consumers.

[222] In our view, Dis-Chem's massive price increases of surgical masks during the complaint period, which constitute an essential component of life saving first line protection in a pandemic of seismic proportions, without any significant increases in costs, are utterly unreasonable and reprehensible.

[223] Accordingly, we find that Dis-Chem has failed to show that its price increases for SFM50 and SFM5 and Folio50 were reasonable in the circumstances of the Covid-19 pandemic.

Detriment

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

[225] The CAC in *Mittal* states "*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*".⁹⁴

[226] The Commission submits that price increases applied during Covid-19 have the most detrimental impact on poor individuals and families, who are already the most vulnerable during such crisis. Material price increases in times of crisis (which could be viewed as price gouging) are especially concerning because

⁹³ Aproskie affidavit para 32 TB p46

⁹⁴ *Mittal* n 25 above at para 55.

they are likely to cut off poor consumers from goods essential to their health, in this case surgical face masks, either by making them unaffordable or imposing higher costs to such consumers.

[227] The CAC further states in *Mittal*, “*Competition proceedings involve the public interest, and under the Act, the Tribunal has an active role to play in protecting that interest.*”⁹⁵

[228] We agree. Material price increases of the magnitude of 47%-261% without corresponding increases in costs, of any goods in a country such as South Africa with a long history of economic exclusion and deep inequality would seriously affect the public interest adversely. Material price increases of surgical face masks, without corresponding costs justifications, in the context of Covid-19 for which there is no discernible cure and where health services are skewed towards the wealthy, would seriously impact vulnerable and poorer consumers even more. Poorer customers would have been excluded from accessing the masks by such exorbitant increases, other customers would have spent more on these items as a percentage of their disposable income.

[229] Accordingly, we conclude that the Commission has shown that Dis-Chem has engaged in excessive pricing to the detriment of consumers

Remedies

[230] We turn now to consider the relief sought by the Commission. In its notice of motion, the Commission seeks:

- 230.1. A declaration that Dis-Chem has contravened the provisions of section 8(1)(a);
- 230.2. An interdict restraining Dis-Chem from engaging in any further conduct in contravention of section 8(1)(a) of the Act until the end of the National Disaster; and

⁹⁵ *Mittal* n 25 above at para 74.

230.3. an administrative penalty in terms of section 58(1)(a)(iii) amounting no less than 10% of Dis-Chem's turnover for the preceding financial year.

[231] As to the interdict sought, there was no evidence put up by the Commission that the conduct in question is ongoing. Dis-Chem submits that it has in fact reduced its prices in April. Furthermore the relief sought is crafted in a clumsy manner seeking to interdict Dis-Chem from not contravening section 8(1)(a) "*until the end of national state of disaster*" thereby implying that the interdict should only cover the period of the national state of disaster and not the period thereafter. In any event there is no benefit in granting an interdict over conduct, which is not shown to be ongoing, and which the Act in any event prohibits.

[232] This then leaves us to consider the issue of penalty. In argument the Commission submitted that the Tribunal impose a penalty based on the overcharge but in accordance with the principle of treble damages utilised in US anti-trust enforcement. The Tribunal was entitled to deviate from its six-step approach as confirmed by the CAC in *CC v Isipani*⁹⁶ and ought not to fetter its discretion in the matter of remedies.

[233] The Commission submitted that the excess profit earned by Dis-Chem over the three products, was R834 076. But the Commission estimates an overcharge of R162 993 for February 2020 and R671 083 for March 2020. The total overcharge is therefore R834 076. The Commission's calculations can be found at paragraph 95 of its heads of argument.

[234] It argued that the ultimate fine should be trebled to R2 502 228 (R834 076 * 3) because of the nature of the contravention and its impact on poor and vulnerable consumers in the light of the Covid-19 health crisis. The penalty should serve as deterrence to other firms against engaging in exploitative abuses.

⁹⁶ *Isipani Construction (Pty) Ltd v Competition Commission* [2017] 2 CPLR 542 (CAC) (Isipani).

[235] The Commission's overcharge calculations are based on the figures contained in Table 8 of the answering affidavit of Dis-Chem. These figures include total revenues and volumes of masks sold per annum.

[236] The Commission included an overcharge for February which is outside the Complaint Period.

[237] However, we note that the underlying calculations relied upon by the Commission for the overcharge of R671 083 for March were not disputed by Dis-Chem.

[238] Dis-Chem, disputing the necessity for a penalty calculation, argued that the amount should be limited to R15 388.40. This amount was arrived at through an application of the conventional *Aveng* six-step approach summarised below:

- 238.1. Step 1: Affected turnover. Dis-chem used the combined turnover of its mask sales for the period 19-31 March, being R[...].
- 238.2. Step 2: Determination of the base amount. Dis-Chem argued that there was no evidence that the pricing policies affected small businesses or poorer people, that there were plenty of substitutes available, and that the barriers to entry in the relevant market were low. As such, they proposed using 10% (of the scale from 10-30%) of the affected turnover as the base amount. I.e. R[...]
- 238.3. Step 3: Duration. Dis-Chem argued that the contravention lasted for 13 days and thus there was no need to multiply the amount
- 238.4. Step 4: Factors in mitigation / aggravation. Dis-Chem submitted that its prices were consistent with normal business practices, with a focus on ensuring sustainable supply to customers whilst keeping its prices below those of its competitors. It also indicated that it had attempted to engage early with the Commission on the case in taking steps to immediately lower the prices once referred. As such, Dis-Chem argued for a 10% discount on the amount in mitigation (R[...] - [...]) being R15 388.40.
- 238.5. Step 6: Rounding off if the penalty amounts exceeds the 10% statutory cap. There was no need to round off the figure.

[239] In this calculation Dis-Chem also relied on the combined turnovers for all face masks contained in Table 8 of the RBB report, although it sought to limit the turnover only the 19-31 March period and not for the entire complaint period for the month of March.

Appropriate Penalty

[240] While the Tribunal has often utilised the six-step approach developed in *Aveng*, it has also argued for a discretionary approach in light of its discretion in sections 58 and 59.⁹⁷ In *Isipani*, the CAC found that our discretion to impose an appropriate penalty is not fettered by the six-step approach in *Aveng*.⁹⁸

[241] But as a regulator we are alive to our responsibility to weigh up the factors contemplated in section 59, having regard to both mitigating and aggravating factors in this balance. We have previously outlined that all the factors listed in section 59 would not necessarily find relevance in each case. All contraventions of the Act are not the same and do not invite the same degree of sanction, and each case must be decided on its own facts.⁹⁹

[242] We have thus taken the following approach in arriving at an appropriate penalty in this case. We first consider the extent of the overcharge calculated by the Commission and then consider the aggravating and mitigating factors relevant to the facts of this case.

[243] In relation to the overcharge, we note here that while the Commission had initially sought a penalty of 10% of Dis-Chem's turnover, a figure which runs into billions of rand, it subsequently amended its relief to seeking three times the overcharge it had calculated, based on the principle of treble damages in the

⁹⁷ *Competition Commission v Deican Investments (Pty) Ltd and another (and a related matter)* [2016] 2 CPLR 942 (CT) para 20; *Competition Commission v Standard Bank of South Africa Ltd* [2016] 2 CPLR 989 (CT) para 22; *MacNeil Agencies (Pty) Ltd v Competition Commission* [2013] 2 CPLR 416 (CAC) para 78.

⁹⁸ *Isipani* n 96 above at para 30.

⁹⁹ *Competition Commission v Stanley's Removals CC and another* [2016] 2 CPLR 531 (CT) para 28; *Competition Commission v Stanley's Removals CC* [2017] 2 CPLR 505 (CAC) para 51.

US. Leaving aside the issue of treble damages for the moment, the Commission's overcharge figure cannot include the overcharge for the month of February since on its own version the Complaint Period is that for the month of March 2020. Hence the basis of our calculation, namely the overcharge for March, is R671 083. As we stated before, this figure and the underlying calculations of the Commission were not challenged by Dis-Chem.

[244] We now turn to consider the aggravating and mitigating factors as required by us under section 59 of the Act.

[245] We accept that Dis-Chem co-operated with the Commission and the Tribunal by providing information as sought and participating in the referral hearing despite its many reservations. The conduct was short lived (persisted for a period of 4 weeks).

[246] We then turn to consider the nature of the offence. It involves a contravention of section 8 of the Act and not section 4(1)(b), the latter being considered the most egregious in Competition Law.¹⁰⁰ However, in our view the exploitative conduct of Dis-Chem of excessive pricing was particularly reprehensible. It exploited customers desperate to lay their hands on an essential item in the fight against a pandemic of global proportions, with potential consequences for consumers and public health.

[247] Dis-Chem implemented *material* price increases during the Complaint Period without any significant increase in costs. In relation to SFM50 its price increase in comparison to February was 261%, for SFM5 it was 43% and for Folio50 it was 25%.

[248] While it claimed that it had incurred additional costs for repackaging packs of 50 into smaller units, and the Commission was generous in allowing an amount of

¹⁰⁰ *Competition Commission v Deican Investments (Pty) Ltd and another* (and a related matter) [2016] 2 CPLR 942 (CT) para 20; *Competition Commission v Standard Bank of South Africa Ltd* [2016] 2 CPLR 989 (CT) para 22; *Southern Pipeline Contractors and another v Competition Commission* [2011] 2 CPLR 239 (CAC).

15% for this in the price-cost test, Dis-Chem could not provide any evidence that it in fact had incurred costs additional to its normal packaging and labour costs.

[249] Its gross margins increased exponentially across all masks as evidenced in RBB figure 6,¹⁰¹ and more than doubled to [...] % across the three product categories during the Complaint Period.

[250] Dis-Chem is a retailer and not a manufacturer of surgical face masks. While this fact might be neutral in many cases, in this case of exploitative conduct it bears relevance because Dis-Chem, as retailer, already would have accounted for all its costs in its mark-up. As we have discussed earlier, unlike a manufacturer, Dis-Chem, as a retailer need not be concerned with higher anticipated costs, because it would have simply added its mark-up to that higher cost. Hence its material price increases were completely unjustified.

[251] Dis-Chem claims that it returned to lower prices in April. However, its return to lower pricing only happened during the enforcement period, after the Commission had asked it for information. It only provided equitable access for customers to surgical face masks after the consumer protection regulations were promulgated and not of its own initiative.

[252] In the hearing Dis-Chem described itself as a “good” company, serving the needs of consumers. Notwithstanding its professed commitment to the interests of consumers, Dis-Chem elected to increase its prices of surgical face masks by exorbitant percentages in the context of the life-threatening outbreak of Covid-19. To this end we consider its conduct was not only exploitative of vulnerable consumers, especially the poor, but was especially egregious.

[253] Dis-Chem has a large footprint of about 165 stores across the country as well as an online store. Hence the impact of its material price increases was likely to be widespread because it implemented these prices nationally. In addition,

¹⁰¹ *Figure 6 Daily weighted average gross profit margin per mask, 1 November to 23 April 2020* RBB Report p38 TB p395.

as a retailer it sells directly to the consumer and not to intermediaries, who might have been able to absorb some of the material price increases. Thus, many more consumers throughout the country were directly affected by the full impact of Dis-Chem's price increases.

[254] Dis-Chem is a large national listed company with many resources, including legal and compliance advisors, with vast expertise and procurement ability in the hygiene and medical products field. It is not a small family owned firm who might have been unaware of its corporate responsibilities arising from the Act. It markets itself as a low-price consumer friendly store. For this reason, its conduct, of exploiting vulnerable consumers in the grip of a pandemic, can be regarded as even more reprehensible.

[255] Finally, we consider that an appropriate penalty must have a deterrent effect,¹⁰² especially in the context of a state of a global health crisis, the proportions of which we have not witnessed in this century. Thus, it cannot simply be the quantum of the overcharge or the profits earned by Dis-Chem as a result of the contravention.

[256] The Commission argued for a penalty of R2 502 228 which is three times its overcharge figure.

[257] Having regard to the aggravating and mitigating factors in totality we find that the aggravating factors far outweigh any mitigating factors. While we would be hesitant to impose a penalty of the magnitude requested by the Commission, we are of the view that Dis-Chem's conduct was not only exploitative to the detriment of consumers but also reprehensible in the context of Covid 19, and requires serious sanction. Accordingly, we find that an appropriate penalty in this case would be R1 200 00 (one million and two hundred thousand rand).

¹⁰² *Reinforcing Mesh Solutions (Pty) Ltd and others v Competition Commission and others* [2013] 2 CPLR 455 (CAC) Para 54.

ORDER

We therefore make the following order-

1. Dis-Chem has contravened section 8(1)(a) of the Act for the period 1-31 March 2020 in that it has charged excessive prices for surgical masks SFM50, SFM5 and Folio50 to the detriment of consumers.
2. In terms of section 58 read with section 59 of the Act, Dis-Chem is liable to pay an administrative penalty of R1 200 000 (one million two hundred thousand rand).
3. Dis-Chem must make payment of the administrative penalty within 30 days of the date of this order.

Ms Yasmin Carrim

7 July 2020

Date

Prof Imraan Valodia and Prof Fiona Tregenna concurring.

Tribunal case manager : Alistair Dey-Van Heerden

Tribunal economists : Lumkisa Jordaan and Karissa Moothoo-Padayachie

For the Applicant : Adv Tembeka Ngcukaitobi SC *assisted by* Adv Tshidiso Ramogale, Adv Candice Slump and Bukhosibakhe Majenge.

For the Respondent : Adv Michelle Le Roux, Adv Claire Avidon, Adv Shannon Quinn, and Adv Lebogang Phaladi *instructed by* Lizel Blignaut and Aidan Scallan of ENS Africa.