Competition Tribunal of South Africa

[This transcription is a redacted version]

Hearing in the matter of

THE COMPETITION COMMISSION

and

DIS-CHEM PHARMACIES LTD

Case No. CR008Apr20
(Complaint referral)

held at

DTI Building
Sunnyside

on

4 May 2020

Panel:	*Y Carrim* *F Tregenna* *I Valodia*
Case Manager:	*A Day-Van Heerden*

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CHAIRPERSON: Thank you good morning. Can you hear me?

MR DAY-VAN HEERDEN: I confirm yes, we can hear you.

CHAIRPERSON: Can you see me?

MR DAY-VAN HEERDEN: We can now, thank you very much.

CHAIRPERSON: Thank you. Good morning everybody. Welcome to our hearing in the matter of the Competition Commission versus Dis-Chem Pharmacies Ltd. The panel today is Prof Fiona Tregenna, Prof Imraan Valodia and myself, Yasmin Carrim presiding. Please could you put yourselves on record from the Commission first?

ADV NGCUKAITOBI: Thank you Chair. My name is Thembeka Ngcukaitobi. My junior is Mr Tadiso Ramokgali. I am together with members of the Commission, Mr Bakhe Majenge, Ms Candice Slump and Mr James Hodge. Thank you.

CHAIRPERSON: Thank you Mr Nqcukaitobi. From the respondents?

MR DAY-VAN HEERDEN: Apologies Ms Carrim. It seems somebody is sharing their screen at the moment.

CHAIRPERSON: Yes.

MR DAY-VAN HEERDEN: If whoever is sharing their screen on the call could please stop. There should be an option with a share icon on the option bar, if you could please click that and stop sharing. Thank you very much. Sorry Ms Carrim.

CHAIRPERSON: Thank you for that Alistair. Can the respondents please put themselves on record?

ADV LE ROUX: Yes, good morning Chair and members of the Tribunal. Michelle Le Roux together with my learned friends Ms Avidon, Mr Quinn and Mr Paladi for Dis-Chem, instructed by ENS Africa.

CHAIRPERSON: Thank you. Just a few housekeeping matters before we proceed. We did indicate to the parties that we will give each side 2 hours for argument and half an hour for the Commission to reply. However, just looking at the logistics again, I want to provide for some questions from the Tribunal members and we will be taking away 10 minutes from each side and maybe 10 minutes at the end.

So, in total we will be utilising half an hour from our side for questions. We will try to keep our questions to the end of your presentations so that we don't interrupt your flow. So, that's the issue of timing.

On the issue of confidential information what we have arranged is for a second meeting link, which is the confidential meeting and I suggest that what we try to do is as far as possible leave the confidential discussions around figures and margins to the end of the presentation or at least do them in one chunk so that we don't have to keep in switching between the two meetings, if that's possible.

If you have obviously difficultly in the course of your presentation where you want to perhaps point us to a particular number, perhaps just refer to the number in the record. Be mindful of the fact that there are 124 people in this meeting. Members of the public and members of the media are present. So, you must be aware that confidential information is something that you must be in control of to the extent that you can be.

In relation to the hearing, please note that this is virtual hearing is being recorded by an independent recording company and which will then attend to the transcription of the hearing. Unless there are any questions around the logistics, Mr Ngcukaitobi, I ask you to commence with your presentation.

ADV LE ROUX: Sorry Chair, could I just confirm? So, when you say 10 minutes taken, you mean we've got an hour and 50 each.

CHAIRPERSON: Yes.

ADV LE ROUX: That's what we are trying to do.

CHAIRPERSON: Yes.

ADV LE ROUX: And then I understand that the lunch adjournment would be at 12 o'clock. Is that still our position?

CHAIRPERSON: Well, a slight change there, because I just thought it might serve us all better to take short breaks on the hour. So, at 11 am I will give us a 5-minute leg stretch, at 12 a 10-minute

adjournment and then we can have the lunch adjournment, a full hour, one to two, so that people can at least take time to assess where things are going and re-gather and then we are back at 2 and we can manage that as to the hearing in the time that is left.

ADV LE ROUX: Thank you Chair. If I could also then just say that we have … Mr Smith and I will be presenting on behalf of the respondents. We have attempted to structure our presentations so that we do the non-confidential first. I expect to be able to do my presentation non-confidentially. Mr Smith will then start in non-confidential and then we will need to do into confidential for the closing of our presentation.

Chair, then also just for the record, if I could just note a concern from Dis-Chem's side about the participation of Mr Hodge. Mr Aproskie is the Commission's expert in this case. We note that he was the one who put up the affidavits. We merely note our objection. We are in your hands with respect to that issue. I assume Mr Hodge will be referring to Mr Aproskie's evidence. We just note the objection to that, given that Mr Aproskie was the expert chosen by the Commission, reserving our rights in that regard just for the record.

CHAIRPERSON: Yes, well we note that reservation of your rights. I'm sure Mr Ngcukaitobi will deal with that matter. Proceed.

ADV NGCUKAITOBI: Well, thank you Madam Chair. My learned friend is simply noting an objection, but not asking us to take any action at this point in time. So, we don't intend taking any action. Could I outline what we plan to do this morning? The speakers will be myself. I will address a narrow issue, which relates to the relationship between the regulations and the Act.

Our understanding is that there are two issues that have been raised. The one is the question of *ultra vires* and the question of retrospectivity. So, I will address both of those questions. Mr Majenge will address the test for excessive pricing under the Act and Ms Candice Slump will deal with what we've generally referred to as the merits of the case.

Then Mr Hodge will deal with the economic issues and he will be making reference to the expert evidence that has been adduced and he will also be making reference to what you referred to, Madam Chair, as facts and figures in due course, but luckily in line with the suggestion you have given us, Mr Hodge will only come last with the presentation.

If I could then commence with my presentation, I appreciate that we have little time. So, I'm going to try and be crisp. We've circulated supplementary heads about 15 minutes ago. The Chair would have noted that although in the affidavit an indication is given,

the affidavits from Dis-Chem, an indication is given that some dispute will be taken in relation to the status of the regulations. It is only clear in the Heads of Argument the nature of the legal argument that has been raised.

So, in the first paragraph, the Tribunal need not concern itself with it. We just outline what the case is about. It's really from paragraph 3 that I want to start, which is what is the legally correct relationship between Section 8 and the regulations and whether or not the regulations … sometimes criticism is that they purport to amend the Act and sometimes the criticism is that they are *ultra vires* the Act.

Firstly, the starting point is the Act itself, it is Section 8, the Tribunal knows that there is a new Section 8, which has come into effect after the amendments and particularly there is Section 8(1)(a), which defines an excessive price.

Then there is Section 8(3), which imposes an obligation on a body like the Tribunal about what it should do when it determines what an excessive price is. The language of that section is particularly relevant. I would refer to it briefly.

"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…"

So, I want to focus in the last part of that paragraph or passage rather. So, you determine it by taking into account all relevant factors. So, that's the first indicator. It's all relevant factors. There is no limitation. It is simply a permission that all relevant factors are to be taken into account.

Then the second part is *"those factors may include".* That too is permissive. So, two crucial parts of that section is that when you decide an excessive price, you have to take into account all relevant factors and those factors may include. That's the first part.

The second part about that section is that the controlling provision or the principal provision … there is something wrong here. Sorry Madam Chair, there is someone writing a message. So, the second part to it, which is what we deal with in paragraph 7 of our Heads of Argument is that the controlling provision or the umbrella provision is the substance of Section 8(3) itself, which is what you must do is two elements. The one is you must determine whether that price is higher than a competitive price and secondly whether the price difference is reasonable.

That is what the function is, but insofar as the regulations are concerned, their authority stems directly from the application of all

relevant factors and the fact that the factors mentioned in Section 8(3) are not themselves exhaustive. So, in paragraph 8 we make the point (a) that this language used in this section is 'may' and secondly it is 'all relevant factors that may be considered'.

So, what that means is that the statute does not constrain the Tribunal. The Tribunal may in fact take into account a factor not mentioned in the statute. That is crucial to mention, as long as it comes to the conclusion that that factor is a relevant factor. It needs not be mentioned expressly in the statute, because the language of the statute is inclusive, which suggest that it is not an exhaustive list of the factors that may be taken into account and the language of the statute is clearly permissive. It says 'may'.

So, if you are allowed by the statute itself, quite apart from the regulations, to take into account all relevant factors, which may be factors not expressly mentioned and that the subcategories in Section 8(3) are merely indicators of what may be a relevant factor, but ultimately the authority is of the Tribunal to decide what a relevant factor is.

Then the question really is in those circumstances is there anything objectionable in the Minister describing a relevant factor, which the Tribunal must take into account, because that ultimately is the function of these regulations. It is simply to define the factors that

will be relevant in determining whether an excessive pricing has occurred in the context of Covid.

So, the first proposal that we make is that you have authority to take into account all relevant factors, whether they are in the Act or they are not in the Act and secondly you have a discretion, which is permissive and then thirdly the Minister has simply prescribed by regulation the factors that will be relevant.

That does not displace Section 8(3) in substance. It in fact implements or gives effect to Section 8(3). This much is clear from the text of the regulations. We quote the regulation itself at paragraph 18 of the supplementary heads where we say the regulations provide that *"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 does not correspond to or is not equivalent to the increase in the cost of providing that good or service or 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 3-month period prior to 1 March 2020, if a relevant and critical factor in determining whether the price is excessive or unfair or indicates prima facie that the price is excessive or unfair".*

So, all the Minister simply does is to unpack by way of regulation a relevant factor, which is in any event, with or without

those regulations, you would have been entitled to take into account. So, even if the Minister had not passed the regulations, it would have been within your authority to take into account a relevant factor, for instance, the spike in prices during the period of Covid.

So, the mere fact that the Minister has now prescribed this by regulation neither amends nor goes outside the purview of the section itself. So, that is clear from the text of this section. The Minister has the power to pass regulations. The source of the regulations is the statute. Those regulations do not go outside what is provided for in the regulation.

We then go to … so, that's clear from the text and the context of the provisions of Section 8 itself. We go then to the question of the purpose. I think the purpose is self-evident. The purpose is to deal with the peculiarity of price increases that emanate from Covid itself and the Minister has decided for himself that there should specificity about what factors should be taken into account. That is not outside the statute. It is within the parameters of the statute.

The context of the statue … the context of the regulations rather goes beyond the provisions of the Act. It is taking into account also the provisions of the Disaster Management Act and that much is also clear from the provisions of the Act itself.

So, on question one, is this a purported amendment to the Act, the answer is no, it is not a purported amendment to the Act. Is it *ultra-virus* the Act? No, the answer is that it is actually within the contemplation of the Act. Is it generally permissible to pass regulations such as this? Yes, because the language of the legislation makes it clear that it's all relevant factors and they may include factors not explicitly listed in the legislation and the language in any event is a discretionary language. It is 'may'. So, there's nothing *ultra-virus* about the legislation.

That takes me then to question number 3, which is the question about the retrospectivity of the regulations. Could I start with the language? Because a lot of time is spent by our learned friends on the language and particularly if the Tribunal has regard to paragraphs 138 and 139 of our learned friend's Heads of Argument, because that is where they deal specifically with their complaint about retrospectivity.

What the panel will recognise from those two paragraphs is the shift in language. In paragraph 138 they talk about application and then in paragraph 139 they talk about the coming into effect. Those two concepts are different, but they have been conflated by our learned friends. It is clear when the regulations come into effect. The

regulations come into effect on the 19th of March, which is the date on which they were promulgated.

That is not surprising. All statutes come into effect when they are promulgated or alternatively when the President brings then into force, but that is not an answer to anything. That is probably the beginning. The real question for retrospectivity is when does the legislation or this section, when does it apply? What conduct does it apply to? There is no ambiguity that it applies to conduct that predates the coming into effect of the statute or the legislation.

So, when our learned friends jump from application, they use the term apply and then they move in paragraph 139 to coming into effect, there they conflate two concepts, application and coming into effect. Retrospectivity focuses on application, because legislation always comes into effect when it is promulgated.

But in order to decide what conduct or what is the subject matter of the legislation, you have to look at the language of the legislation itself. Here it is clear that the Minister intended that the application would be conduct that predates the date in which the legislation comes into effect. So, on the language issue there is no confusion whatsoever. The confusion in fact is created by our learned friend's conflation of application versus coming into effect, which are completely different concepts.

The second part to be emphasised here is if it is clear on the language that application is a different concept and that application is in relation to conduct that predates the coming into effect of the regulations, what is our learned friend's complaint? Their complaint seems to be that there is a presumption against retrospective application, but they themselves accept that this is merely a presumption and we know that presumptions are simply aids in interpretation of statutes. Presumptions can be displaced by a statute itself.

So, the presumption is that if there is nothing in the language of the legislation that shows that it applies to conduct that predates its coming into operation, you will apply the presumption, but if in the language of the statute there is something that says that it applies to conduct that predates its coming into effect, the presumption has no application.

So, where we are ultimately left with is when or to what conduct does the regulation apply? That is a question of statutory construction. What is the conduct is governed by the regulations? Now, the conduct that is governed by the regulations clearly predates the coming into effect of the regulations and it is the conduct that is covered during the period of the national disaster.

So, the period of the national disaster starts before the 19th. It starts on the 15th when the national disaster is declared by the President and it is clear when the legislation stops being operative. It stops as soon as the national disaster has been lifted. We know that the national disaster has been declared and its maximum period under the legislation is 3 months and the Disaster Management Act says it may be extended by another period of a month.

So, the question of the period is explicitly provided for in the regulations themselves. So, there could be no question about what period is governed by the regulation and the presumption against retrospectivity, even if this was a proper retrospective legislation, I mean, we have debated here whether or not this is not a question of retroactivity, which is not the same thing as retrospectivity, but even if we accepted what our learned friends suggest that we are not dealing with retroactivity, we are dealing with retrospectivity, we point out that the presumption is displaced by the language of the legislation and here there is no question that the language of the regulations have clearly displaced the presumption against retroactivity.

So, in paragraph 37.1 we emphasise the point I have just made that a distinction needs to be drawn between the date when the

regulations come into effect and the conduct, which I refer to this as the subject matter, which I have deal with.

Then we say that the coming into effect of the 19th of March, but that they applied the conduct that predates it. Then we say this much is clear from regulation 2.1, regulation 2.3 and regulation 3. So, if one looks at those regulations and looks at them purposively, (1), there can be no debate that the regulations were intended to cover the entire period of Covid and that the presumption actually takes the debate nowhere.

So, we would submit with the greatest of respect that those two submissions should take care of the complaint made around the question of the *ultra-virus.* We've made another point perhaps to emphasise in our affidavit, replying affidavit, that any complaint about *ultra-virus* about the illegality of these regulations is utterly irrelevant before the Tribunal.

The Tribunal has found the regulations. It must apply the regulations. It is irrelevant if the regulations are unlawful. The question of the lawfulness of the regulations is not before you. There is no application to set aside the regulations. There is no application before the High Court to set aside the regulations, no application before the Competition Appeal Court to set aside the regulations.

Whether or not the regulation comprise administrative action is a different issue, but even if they comprised administrative action, the fact of the matter is that the law is clear on the subject. Administrative action, whether lawful or unlawful, continues to apply as long as it is factually extant.

No doubt the Tribunal is familiar with the principle coming from Oudekraal, but ultimately we are debating an irrelevant subject about whether these regulations were unlawful or lawful, because what is crucial for the Tribunal to ask itself is do the regulations exist as a fact? If they exist as a fact, they are of application, end of the debate. It is really a question of what to make of those regulations in the light of the peculiar facts.

So, I think I have now done my 30 minutes, Madam Chair. Thank you very much. I will allow Mr Majenge to take the conversation forward.

CHAIRPERSON: Thank you Mr Ngcukaitobi. Mr Majenge?

MR MAJENGE: Thank you Chair. Chair, I'm going to address a very narrow point and that point really relates to the applicable test for an excessive pricing, outside the context of the declaration of a national disaster.

As you will have noted, Chair, from the papers, in particular if the Tribunal could have regard to paragraph 27 of the Commission's

founding affidavit on page 16 of the paginated papers, of course, this issue will be dealt with in greater detail on the merits. Part of the price increase occurred in the period between February and March and that is the period before a national state of disaster was declared on 15 March 2020.

So, the question then arises as to how a case of excessive pricing can then be advanced outside the framework of the regulations and we will submit that a case of excessive pricing can be advanced, both on the basis of the interpretation of the Act as well as the jurisprudence of both the Tribunal as well as the Competition Appeal Court.

But maybe perhaps Chair before I get into these issues, I just want to just make one point about the reservation of rights, which was noted by our learned colleagues for Dis-Chem in relation to Mr Hodge's participation in this hearing. That reservation, Chair, simply has no basis, because if one has regard to Section 53 of the Competition Act, which deals with the right to participate in a hearing, Section 53(1) states that *"the following persons may participate in a hearing in person or through a representative and may put questions to witnesses and inspect any books, documents or items presented at a hearing. If the hearing is in terms of Part C"* and this hearing being an abuse of dominance case, it will fall within Part

C, then (i) says *"The Commissioner or any person appointed by the Commissioner".*

So, there is simply no basis whatsoever for the so-called objection or reservation of rights in relation to Mr Hodge's participation in these proceedings.

Now, coming on to what the legal basis is for price gouging outside the context of a disaster, we begin our submission, Chair, with reference to paragraph 50 of the Competition Appeal Court judgement in AMSA. That paragraph, Chair, makes it clear that it is possible to advance a case of excessive pricing where there is an increase in the normal price for goods or services, which has no correspondence in cost. In other words, there are no corresponding costs to justify the price increase.

So, that is possible even outside the context of a disaster and if I may quote the relevant passage, it is the second sentence of paragraph 50 of the decision of the Competition Appeal Court in AMSA and I quote. *"Likewise where the dominant firm raises the normal price for its product substantially without any corresponding rise in costs, this may indicate prima facie that the new price is higher than the economic value without the need to quantify the latter more precisely".*

So, one could just replace economic value with a competitive price and you arrive at the same conclusion that the framework of the Act, as interpreted in the AMSA judgement, does allow a case of excessive pricing to be advanced, purely on the basis of a substantial increase in the normal price where there is no corresponding rise in costs. So, this formulation was made even outside the context of a disaster.

Then the Competition Appeal Court again, in the Sasol judgement, it again reiterated the same point and we cite the Sasol decision at paragraph 82 from page 49 to 50 of the Commission's Heads of Argument in this matter and if I may quote from the Sasol decision, this is where the court says that for example *"where the actual price is shown to exceed the normal price for roughly similar products to a degree, which on the fact of it is utterly exorbitant, then the need to quantify economic value more precisely before concluding that the actual price bears no reasonable relation to it, may fall away. In this way a prima facie case would have been made out, leaving it to the respondent firm to adduce evidence to the contrary if it is to avoid the case against it becoming conclusive".*

So, what is clear from the authorities is that it is possible, even outside the context of a disaster, to advance an excessive pricing case

on the basis of a substantial rise in price where there is no corresponding cost justification.

So, it is precisely drawing from these principles, Chair, that we submit that within the context of a pandemic, even outside the disaster context, one can still sensibly advance an excessive pricing 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.

Further support for this proposition, Chair, is also found in how the Tribunal approached the question of margin squeeze in the Senwes matter. Interestingly margin squeeze, the term 'margin squeeze' was only expressly introduced in Section 8 by the Amendement Act for the first time, but already the Tribunal found in 2012 that it is possible to advance a case of margin squeeze under Section 8(c) for as long as the theory of harm underpinning margin squeeze would be of the same character as an exclusionary act as defined in Section 8(c).

So, if retrace the reasoning of the Tribunal then in the Senwes matter, it is, I think we will respectfully submit, clear that if one can find a margin squeeze contravention on the basis of an analysis that assesses whether the requirements for a margin squeeze coincide with the character of an exclusionary act, one can apply the same reasoning that the Tribunal applied in the Senwes case to ask the question whether the character of price gouging coincides with the elements for establishing an excessive price and we will respectfully submit that it clearly does.

We also make a point, Chair, and this appears in the affidavit of Mr Aproskie. In the supporting affidavit we reference the work of Snyder. I will give the Tribunal the quotation shortly. We reference the work of Snyder where Snyder makes it clear what the dynamics are within the context of a disaster. This Chair you will see as paragraph 11 of the affidavit of Mr Aproskie on page 36 of the paginated bundle.

At the bottom of that paragraph 11, this is where the submission is made with reference to Snyder that within the context of a disaster, the market does not operate to maximise welfare in that context. This is quotation then drawing on from Snyder, and I quote. *"Instead, for a period of time between the occurrence of the disaster and when the market again becomes competitive and the prices*

normalise, the market serves to distribute scarce and essential goods on the basis of pre-existing privilege within a community".

So, this makes the important point, Chair, that within the context of a disaster because of the market disruption that occurs, you then have the market then distributing goods on the basis of privilege and this is the point then that is made at paragraph 11 what price gouging does and why it is considered to be a concerning form of excessive pricing, is that it disconnects consumers then from access to these essential goods or services, which are required to maintain their health, safety and welfare within a disaster context.

So, we will then respectfully submit, Chair, that there is nothing in the language of the Act, in the jurisprudence of the Tribunal as well as the jurisprudence of the Competition Appeal Court that precludes the application of a price gouging test within the context of this case. Thank you Chair, those will be my submissions. Mr Hodge will then deal with the economic issues.

CHAIRPERSON: Can I just, before Mr Hodge comes in, ask a question, which could be posed to both you and Mr Ngcukaitobi in relation to the challenge that is put up by the respondents whether the conduct, i.e. the increase in the price, fell within the ambit of the regulation? Because what the Commission is arguing now is that the regulations apply, i.e. the test that is put out in the regulations, which

is to be considered as a relevant factor when assessing an excessive price, is effective or applies from 15 March and the respondents raise in their Heads that, well, their last price increase was on the 9th of March. So, the conduct, in fact, there is no conduct that the regulation covers, because there's no price increase after the 9th of March. What do you say to that?

MR MAJENGE: Chair, the issue of the … of course, the facts, we will address them in greater detail shortly, but what we can point out for present purposes is that the pricing conduct straddles both the period before the declaration of the disaster as well as after the declaration of the disaster.

So, it straddles the two periods. Hence we make the submission that has been made by counsel that in respect of the period of the disaster, then the regulations would apply and in respect of the period outside of the regulation of the disaster, the Tribunal can source its mandate to deal with price gouging directly from the Act as well as from the jurisprudence, which has been developed by the Tribunal as well as the CAC.

So, there is no merit whatsoever, Chair, we will respectfully submit, to the contentions, which have been made on behalf of Dis-Chem on this score.

CHAIRPERSON: Thank you. Well, maybe we should hear from Mr Hodge and I'm quite sure that this debate is going to come up when we consider the calculation of the margin, because obviously the test that is set out as a relevant factor in the regulations applies for a certain period. The Commission has utilised it over the entire period of March and we hear that. I'm sure we will hear more debate on it. Unless Mr Ngcukaitobi has anything to say to this point, we can ask Mr Hodge…

ADV NGCUKAITOBI: Not at this stage, Madam Chair, but I've noted the point. I think it's probably best to let the debate unfold.

CHAIRPERSON: Alright, Mr Hodge.

MR HODGE: Thank you Chair. I think to begin with, you made the correct observation that the Commission alleges that price increases occurred from mid-February through to early March and those price increases endured through to the end of March when further price increases were implemented.

The focus of the exploitative behaviour is through that end of February/March period. We note that at the referral stage there was uncertainty as to whether the conduct may continue. In the investigation phase there was a question put to Mr Govender who indicated that costs were coming down and these may be passed on.

We just note at this stage that in fact the day of the referral prices were dropped from around 19.95 per mask to 14.95 per mask. So, we may have been right to be wary that such price decreases may not have occurred absent the referral.

In terms of just the conduct, I know the panel wants to preserve the confidential session for the end and I'm not going to go into confidential elements now, but I do want to just traverse the facts for this period of mid-February through to early March and I will just do it by referring to parts of the trial bundle and the Heads. There's no need for me to speak to some of the numbers at this stage, but I think it is important context, because as Chair you've correctly pointed out, almost that is where some of the debate is lying within this case.

We make the case that from mid-February through to early March prices increased by a substantial amount. They weren't warranted by costs and throughout March weren't warranted by costs. What Dis-Chem and their counsel seek to do in their Heads is to focus the debate around end of March and into April and say that is the relevant period for assessment.

There is an element of inconsistency in their own approach as well in the sense that they say that the regulations don't apply. They say that we cannot apply them retrospectively. Yet when it suits them, they wish to focus on precisely this April period when their costs did

finally go up and affect their margins, but we would say that one needs to focus on the relevant period and for that period there is no justification for the price increases. They cannot be explained by costs and despite the most recent efforts in their Heads to find some *ex post* rationalisation for this, it remains the case that they cannot explain those price increases and that's where the excessive pricing has happened.

Very quickly in context we all know the context is a global pandemic starting in China in December and by the end of January the WHO was declaring a public health emergency of international concern. I think it also should be common cause that surgical masks and medical masks are used to protect frontline workers and the public and that there was a rapid increase in demand globally, not just locally and that this demand increased substantially in South Africa and this Dis-Chem does not dispute, because they showed … their own figures for January and February and that's in their answering affidavit, table 2 at page 82 of the trial bundle, shows a massive increase in demand in January, late January through to February.

What is, I suppose remarkable, is that a lot of time is spent in the answering affidavit and a bit in their Heads as well as to announcements by various departments and agencies, even globally,

on the use of masks as a form of protection in this period of the Covid crisis.

Why I say it's remarkable is because the demand that even Dis-Chem is seeing in its own sales is visible to it, it accepts that there is a massive spike in demand for surgical masks and that these in fact are difficult to course supply coming into March.

The focus then seems to have shifted to, well, cloth masks are equally proficient and perfect substitutes for surgical masks, but what is clear from all the advice is that even some of the early warnings were public please don't go buy surgical masks, because they are meant to be reserved for frontline workers and others treating those with the Covid virus.

So, they clearly are better. On the facts, as has been put in the replying affidavit, they are better on the scientific facts and the fact that you send a message to the public to say, well, please don't buy these masks because they are more effective and we want to reserve them no doubt leads to in fact the public buying these masks in any event.

So, there's no substance, I think, to the claim that these are substitutes to cloth masks or the fact that the Department of Health may have not made an announcement by some point in February or

March about the use of masks denies the fact that it's useful in the treatment and there's been an increase in demand.

Just in terms of the price increases, these are set out in table 5 of the answering affidavit at page 95 of the trial bundle. They start on 14 February, if the Tribunal panel wishes to look at that. The prices are initially set on the 1st of November. The next price increases go through on the 14th of February, then the 26th and then we have price increases from 2 to 9 March across different products in this range.

Why I just want to make the point on these dates is it becomes important when we look at the rationalisation put forward by Dis-Chem for their conduct and the price increases, because what we will claim we see is that many of the factors they talk about happened after these dates. Most of the price increases, in fact, were pushed through in late February.

In terms of our own Heads at paragraph 68.1 we do the mathematics for you in terms of what those price increases are, but this isn't confidential and we are looking at the order of over 200% price increases. To the point made by Mr Majenge, these are exorbitant price increases.

So, although much time is spent in Dis-Chem's Heads about debates about the vagueness of the term 'material price increases' in

terms of the regulations, I think we can all agree that over 200% price increases are material.

In terms of the cost to procure, this does not change in this period and it does not change until the end of March and that should be common cause facts. The answering affidavit, table 8 on page 101 of the trial bundle puts out the cost of sales and the revenues and the volumes for each of these months and one can simply do the maths on that to work out the margins that are earned across each month.

We've done that for you in paragraph 68.2 of the Heads, but it also again should be common cause. So, if the panel wishes to go to the trial bundle and the RBB report at page 394…

CHAIRPERSON: Just give me a minute. I will be there now. Alright.

MR HODGE: So, there's a few figures. The figure on the previous page and the next page are also relevant, but in essence this figure tracks the daily weighted average price per mark or the daily weighted average, moving average cost per mask and moving average cost we are told is what Dis-Chem measures in terms of stock in store, so being sold to the public.

One can see the effect of the price increases from mid-February absent any cost increases. There's a growing gulf between the average price per mask and the weighted average, moving average cost per

mask. That only ends at the end of March when costs aren't escalating and prices respond to that too.

If one looks at the next page, 395, this just plots the daily weighted average gross margin per mask and again one can see that towards the sort of mid-February/end of January it starts escalating rapidly and then it only declines towards the end of March.

Maybe just to also take the Tribunal a few pages back to page 391, which looks at the stock, the difference between old stock, which is procured at the old prices and new stock, which is procured at the higher prices. Clearly the new stock only starts hitting the shelves on the 1st of April. Even then some of the old stock is washing through in terms of sales as well.

So, I think what is clear is that from mid-February prices escalates, costs didn't escalate, margins and the margin gap grew considerably and this is in essence a response to the surge in demand for face masks caused by the pandemic. This is visible to Dis-Chem through its sales and even in its Heads it admits in paragraph 42 and 58 that in response to the demand it sought to push up prices.

Our case is that the conditions of the pandemic at this stage, the awareness of a growing shortage, the fact that Dis-Chem, as a major seller of masks and with a substantial stock of masks, could exploit the situation and raise the prices on the stock and, in fact, continue to

get some supply deal prices for this period, but it exploited the situation until basically the point it ran out of stock and was forced to look into new supply.

In terms of the cost justification, much will be said about justifying cost increases at the end of March, but that's not my concern. My concern is in mid-February. In terms of when the investigation was undertaken in response to an e-mail about the price increases, Mr Govender indicated that in fact repackaging costs were incurred and this was the only cost justification put up. This e-mail is at the trial bundle page 32 where it is stated the margin increase Feb/March was due to repackaging.

The Commission is criticised in the Heads and in numerous places for apparently only looking at cost of sales, for ignoring all other costs and even to the extent that the Heads claim that this makes the regulations and their application uncertain and businesses are uncertain, but this is not correct.

So, if one looks at Mr Aproskie's supplementary affidavit, he in fact took into account these repackaging costs. He had an interview with Mr Govender and was told that these had a particular increase. That's at trial bundle 59 to 60. I won't go into the actual cost increases, but even he concludes that the calculations of margins are

not particularly sensitive to these costs, because in fact they are not material.

These are also dealt with in the replying affidavit and the Heads and in the Heads particularly at paragraph 70.2. The reality in terms of repackaging is it is a tiny cost and you will see it there, but more than anything, in fact, repackaging from 50 piece units to 5 piece units also gives an addition price benefit to Dis-Chem.

So, Dis-Chem seek to put this up as an altruistic act in order to stop mass purchasing and to contain a limit to the number of purchases that may be made by an individual, but as with any retail pricing, the cost of per mask is much cheaper if you buy it in 50 pieces versus 5, much like when you bought Coca Cola in a 6-pack versus a single.

So, in fact, as we point out in the Heads and the replying affidavit, just the mere switch to a different pack size gives a price increase that's more than the cost incurred by Dis-Chem.

There are some vague references in the answering affidavit to the cost of sourcing new supplies. These are never even specified, let along quantified. So, what these costs are, is it picking up the phone? But it's never quantified, still not quantified and yet if these are substantial costs there within the knowledge of Dis-Chem and they are capable of putting those costs up, they haven't.

There is also some vague reference to distribution costs because of volume, but in fact, in January they sold more volume than in March or February and yet their margins were the lowers of all periods. So, the fact that you are distributing more, well, you recover that in your gross margin or your mark-up on the product.

There is also criticism that the Commission has not accounted for all these other costs that in fact when you do an excessive pricing and a price cost test, you must count for economic costs, overhead costs, asset costs, all efficiency incurred costs, but as Mr Majenge pointed out in terms of even the CAC's ruling, that is not required in the context where price increases and costs do not change.

So, in a retail environment you have a mark-up on a product. That mark-up is there to reflect your recovery of the cost of the sale, plus your overheads, your store, your stock turns on that item, how much shelf space it takes. So, in fact, that is a good reference. That margin or mark-up is a good reference to the recovery of these overheads.

So, the question remains, well, what changes? The only thing that has been put up, as I said, from the investigation in an answering affidavit is repackaging costs and some vague sourcing new supplier cost, but those can't account for the difference. So, they are accounted for by the Commission, but it can't account for the difference in price.

What we also make as an observation though is in fact because of the panic buying after the state of the disaster and the looming lockdown, in fact, March was a bumper month for Dis-Chem and you will have reference to that in the Heads, but also in fact the RBB report confirms this. So, if anything, for stores in that time, then bumper revenues, their unit costs or overhead costs are diluted over far more sales.

The only last thing put up, and this is in the confirmatory affidavit by Ms Parsons, is in fact that in early March she had regard for the price of another retailer and therefore indicated that pushing up the price closer to that was fair and appropriate.

I think there's a couple of difficulties with that claim, because this is one where Dis-Chem seek to say, well, that is the competitive price, but the price of another retailer doesn't necessarily equate to a competitive price. What is apparent is that Dis-Chem acquires at a much lower cost. It pushed through already multiple price increases in February before Ms Parsons apparently had any regard to what else was happening in the market and in the knowledge that they had stock and that stock was running low elsewhere, knew that they could push that price up even further in the process.

Even if we look at the arguments made in the Heads and the economic report about long-run incremental costs and the cost

benchmark, in the retail environment that revolves around margins, around the margins you make as a mark-up on your products and your efficiency in terms of operating a retail environment at those margins in order to deliver prices to the consumers. So, again it is the mark-up that is the competitively relevant element here.

So, if we look at the conduct from price increases in mid-February through to early March, the enduring prices beyond that, there isn't in the Commission's view a justification for that price increase. The price increase is unreasonable. It's exorbitant and the margins increased materially and cannot be explained or justified by costs.

What we see in the Heads for the first time is the desire by Dis-Chem to big on the argument that in fact it's the anticipated cost increase that matters; that in fact they expected costs to increase and increased prices as a result. So, this is elevated to one of the main arguments in the introduction at their paragraph 3.8, but almost their entire exposition on price cost margins in paragraphs 221 to 240 and the detriment to consumers is premised on this anticipated cost increase argument.

They say, and the only evidence to this is to say that in fact in April when costs declined, it reflected that this is their policy; that they look at expected costs going forward. I think the difficulty for

the Commission is that this has never been their case. It's never been the case of Mr Govender, Ms Parsons and the facts simply don't support it. So, this does smack of an *ex post* rationalisation or attempt at it and it seems to be given some legs by the fact that Dis-Chem stumbled upon an FTC review of price gouging laws and whether to have a federal law in the US and there they made comments about anticipated cost increases.

Whilst the RBB report postulated this as a theoretical proposition in the answer, it didn't in fact say that this was factually the case for Dis-Chem and no one at Dis-Chem had tried to confirm that. That's why they couldn't say so, but if we look at the answering affidavit, it's completely silent on this reason and so is Ms Parsons' confirmatory affidavit.

So, Ms Parsons is there to say why she increased the price in early March and she confirms that is because she looked at some other price in the market. She doesn't say that my expected cost was so much and because my expected cost was so much, I in fact increased the price.

A further problem with this is that all the price increases went through from mid-February to the last one on the 9th of March. Yet the evidence that the answering affidavit puts up, even on quotations,

and this is not quotation where they were going to buy, is the first one starts on the 9th of March, so after the period of the price increases.

Their communication with their regular supplier about possible price increase is on the 13th of March, so after all the price increases have gone through. There's no sense of what is this expected price? So, why did they move to this particular price and not others? Because even their regular supplier quotes a cost well in excess of the price increases that they pushed through.

So, from our perspective this is an *ex post* rationalisation. It should be dismissed. There is no basis that Dis-Chem operates on this and, in fact, I took you previously to the RBB report and figure 5 on page 394 also for the reason that they explained that Dis-Chem uses a moving average cost in-store to look at their cost of procurement. So, not what's even in the warehouse, but in-store, and that's the basis for the pricing comparisons that were done.

If we go back to that page 394 and figure 5, I would also venture to say that the claim that on expected price increases in April they adjusted their prices is also incorrect. If one looks at figure 5, then the daily weighted average price per mask goes up with actual cost in-store, not expected, not orders done, and we are told that a big order at a lower price was coming through later in April, but prices only just once those feed into the system.

As I alluded to earlier, in fact, the first price adjustment, if you look at that graph downwards, is despite the fact that costs further declined and the further increase only happens in fact on the day of referral and hence the fact that if the policy was to drop based on expected price changes, then we would have seen a decline far before or many days before the referral actually happened.

So, this, as I indicated, is something that becomes a big feature in the heads, but it doesn't feature before argument and it's never confirmed by a witness and can't be, because it's not the way that Dis-Chem operate.

I think the other element for the Tribunal panel just to look at when reviewing the Heads and some of the argument is there is, I would say, a little bit of obfuscation and opportunism by Dis-Chem. Our case is that increases in prices happened in mid-February through to early March. They know that. That's why they run the retrospective application of the regulations argument.

Yet they also accept that even if we can't rely on the regulation, nothing precludes the Commission from running a Section 8 case in the ordinary course. That's at paragraph 160 of their heads. So, if we are able to run that we are running that, regardless of their views on the legal issues, what we see in much of the reply is a deliberate focus on the end of March or potentially from 19 March

onwards and to the point picked up by the Chair that was there a price increase following the 19th of March and through April?

In fact, if we look at this, in many cases a lot of that discussion is when we exactly get into the discussion of mark-ups, price increases, in the discussion in their Heads under Section 8(3) and the different factors that should be taken account of by the Tribunal. There's a deliberate avoidance of this early period where in fact they don't have a cost justification and where prices did increase without costs in order to focus on the end of March into April when costs did increase, prices increased in response, but where because of the rapid nature of that margins were lower initially.

So, in the introduction almost straight up at paragraph 3.3 Dis-Chem state that in fact costs went up and that is why prices went up. That's not the case from mid-February onwards. That's only the case from the end of March and as I took you to the earlier tables within the RBB report, it is clear that that stock only arrived and was put into store in the beginning of April.

The discussion under Section 8(3)(a) of one of the factors that the Tribunal must take into account on mark-ups and price cost margins, aside from putting up this new defence of anticipated cost increases, they simply resort to looking at margins and price cost

margins from 19 March onwards and say that we can basically ignore the prior period completely.

In the Section 8(3)(g) discussion on comparative prices, historic prices the focus is entirely on 15 March and the claim that we see no price increases and so on any test in the regulations the Commission must fail. The same under 8(3)(d) for length of time the focus is from March 19 onwards only.

So, this may be a legal point that needs to be resolved with the Tribunal, but in terms of if one is looking at the period, which the Commission says is the period of harm, then nothing in the submissions, in the Heads under 8(3) factors talks to that at all and there is no answer to it and the reason that is done is because Dis-Chem quite plainly doesn't have an answer to that. Prices increased and costs didn't and it couldn't be justified through the repackaging.

Just in terms of some of the other challenges put up in their Heads, there's broadly a case that I think I would say it's not pleaded properly, there's no market, no market power if there's no market. There's no competitive price in the establishment of dominance. In general let me quickly deal with these issues, because I think these are all plain.

In terms of a market, they say without a market there is no market power and the claim that the Commission has not defined the

market within market power may be found, but it's quite plain that the Commission has referred a case on surgical masks at the retail level with Dis-Chem. That's clear from the analysis done, but also it's so clear that in fact in the answering affidavit Dis-Chem tries to make a case that in fact the surgical masks as a product market should be expanded to include all cloth masks and the other substitutes.

So, they have no difficulty in identifying the product market that the Commission has identified for the complaint. In terms of the dominance and market power, as we state in the Heads and in the other replying affidavit and founding affidavit, this can be inferred from conduct. In fact, the very definition in the Act is one of conduct, the ability to set price and behave appreciably and independently of one's competitors, etc.

As we also point out in the Heads that it is, I think, well accepted that one doesn't need to define a market and determine market shares in order to determine market power. That's plain from Section 7 where shares may be a shortcut, but absent that one can determine market power, but as we point out, there is a big difference between *ex post* and *ex ante* analysis within competition law enforcement.

So, in a merger context, which is forward-looking and *ex ante,* one might have more regard to a market definition exercise in order to

predict behaviour moving forward, but as recognised in market enquiries, by the OFT, by the EU that in fact in an *ex post* enquiry one can also refer to actual conduct and conduct can give one valuable information about potential market power.

We argue in this case that that is precisely the point; that if we look through outside pandemic periods and outside the disruption to the supply and retail of surgical masks, that in fact margins were relatively constant, despite even fluctuating margins and even came down in January when more margins were pushed through. That is in a retail environment the relative measure, your mark-ups on products that you purchase.

There is also a logic that in fact disruptions due to a disaster can create forms of market power and, as is traversed, I suppose, the supporting affidavit of Mr Aproskie, in the replying affidavit as well as the references in there to Massimo Motta's article recently in the Daily Maverick, this has complete sense in the context of either a narrowing of the geographic market and that can be and can start with a global towards a national type market, but also in terms of where demand spikes and exceeds the capacity or stock holdings of those already within the market.

So, looking at the conduct is something that can be done. It does give suitable inferences and there is a logic to that within the

context of a pandemic. In terms of the competitive benchmark and reference to a competitive price, again historical prices and historical margins do have reference and have reference, as Mr Majenge pointed out, in terms of even our presedent outside the pandemic periods. In fact, what we see in the Dis-Chem case is that the historical prices, which form some of the factors in Section 8(3) as well, were far lower, no cost change, these increased and the mark-ups increased substantially over this period, well above what would be the norm in terms of mark-ups for these sorts of products.

The fact that another firm may have a price in the market doesn't necessarily mean that is a constraint, especially when that price is used to justify further price increases by Dis-Chem. So, in terms of just pleading a case on the basics, I think the Commission would contend that all of that is in place.

In terms of then finally more the excessive pricing regime and the legislative scheme, I think this is where there is a difference of disjuncture between Dis-Chem and the Commission. The Commission says price gouging is just a species of excessive pricing. There are other species, the systematic and systemic abuse, which we say is identified by the kind of Mittal/Sasol cases.

If we look at the main arguments from Dis-Chem and its counsel and economist, if one had to sum it up, it is effectively that

excessive pricing enforcement should be limited, not that necessarily the legislation limits it, but it should be limited, because there are potentially some severe unintended consequences that arise. It's a very complex assessment to be made about what is an excessive price and therefore the Tribunal must be cautious, but as they indicated, this is really an argument around caution in enforcing the excessive pricing because of unintended consequences. It's not to say that the actual Act includes provisions like super dominant persistence.

The other reference is of course to case precedent. Now, we've already heard from Mr Majenge that case presedent in this case includes simple tests or what we may class as simple tests around price increases without cost increases, even in the absence of a pandemic, but we also say that the mere fact that our limited jurisdictional experience at this stage means that we've only encountered a number of Sasol and Mittal type cases and not cases like this doesn't mean that that has to bind every future case. Each case is different. The context is important and the Tribunal will look at that context, assess those risks and make its decision within the legislated framework and the same will happen with the CAC.

In fact, if we look at price gouging as a species of excessive pricing, in fact, many of the difficulties and cautions that are raised by Dis-Chem and its advisors don't arise in the case of price gouging.

So, we cite in the Heads, I think around paragraph 38 and 39, that in fact the architecture of the Act, and the first Tribunal Chair Dave Lewis seemed to have no difficulty with considering invoking Section 8, as it was then, in terms of a disaster period and dealing with the concept of temporary monopoly power.

In fact, because this was a footnote when discussing the complexities of dealing with Mittal and systematic and systemic abuse and their conundrum of whether to act as a price regulator or not, in fact, Lewis said that in the case of a classic price gouging none of those difficulties really arise, because one can use the reference period of prior to the disaster as a reference and set price accordingly. In contrast he was more battling with the complexities that other cases arise and which are put to us in the Heads and the economic report of Dis-Chem.

What we also see is that in terms of the concept of temporary dominance and these are all referenced in the Heads and replying affidavit, is that the CMA has no difficulty it seems in identifying that a disaster may confer dominance on a firm and Massimo Motta who is well known internationally also seems to have no difficulty with the concept that as firm that wouldn't have market power in the ordinary course may well have market power under these exceptional

circumstances. So, that whole disruption to supply and demand may precisely bring about and confer market power.

But not only does Mr Lewis identify that there are little complexities in a price gouging case where one has an easy reference point, one doesn't have to go through, in fact, the assessment of all the costs, replacement costs and be cautioned about the difficulty of profitability analysis, because we have an easy reference point. That is the mark-up, at least in the retail context, that recovers those overhead costs and provides a fair return on those and now we see it changed. Similarly the CAC had no difficulties by saying, well, in a case where prices increase and costs don't, it is relatively simple. There's no cost justification for it and that's all one really needs to look at.

So, in terms of what factors are primarily relevant within this context, one can in fact simplify the assessment without the risks of some unintended consequences. In fact, as Motta points out in his article, many of the usual criticisms of precisely interfering with the market don't arise in these sorts of contexts, because it's not as though Dis-Chem pushed through that gross margin increase because of ingenuity, innovation, investments. It happened to have stock at a point of a crisis and exploited that position to the detriment of consumers.

I mean, I think we would point out that I think we all accept that ideologically the United States has avoided at a federal level excessive pricing in this potential belief that this is interference in the market, but what is interesting from our perspective is that in fact the majority of states within the US have price gouging laws. So, a subset or a species of excessive pricing, in fact, is identified as not having these problems in terms of interference in markets and are seen, as Mr Majenge pointed out through that quote of Snyder, actually are abhorrent in the context of a disaster, because they do exploit those that are vulnerable and, in fact, typically inequitably so.

So, the idea that caution must be taken on board that in fact we should restrict excessive pricing to very particular cases because of unintended consequences is not something that applies to the case of a price gouging incident. In fact, these are particularly ones where we are not going to see these unintended consequences and, in fact, it is relatively easy without creating difficulties in determine what is a relevant price, to look at it historically and to look at historic margins.

That's why price gouging laws are simple and that's why the regulations in saying, when one looks at this type of behaviour, are also similarly simple in that context.

Maybe just to round off from myself on detriment to consumers, we are faced now with almost, I suppose, a threat in the

Heads that in fact the counterfactual where we are proceeding with this prosecution is that Dis-Chem won't stock these products. There is this claim and it runs through right from the beginning with a long legal exposition on why the regulations are *ultra-vires*, is that the regulations are so vague that in fact firms are unable to determine how to respond to them, unable to determine what behaviour or not fall fowl of them and therefore given that vagueness and given the approach of the Commission that in fact the obvious solutions is not to stock these products.

I think the idea that the regulations are vague and create uncertainty for business is quite frankly far-fetched. If anything, the regulations are highly specific and as specific as similar laws elsewhere. So, it is quite clear in terms of the regulations that price increases that are material are not … will be prosecuted, if they are not justified by costs and one measure of looking at that is mark-ups in a retail environment, because that is what the retailer does. They buy from a supplier at a certain cost of sale and add a mark-up and their pricing approach is around mark-up levels and in the case of a manufacturer it would be net margins.

But even in terms of that context it's a benchmarking it in the 3 months prior to 1 March and furthermore against then after and nothing could be simpler in terms of that assessment. Dis-Chem make

much of the claim that the Commission has not acknowledged other costs and that's why there's uncertainty, but as I indicated earlier, the only cost argument put up at the time of the investigation was in fact that there was repackaging costs. Those were factored into the analysis, factored into the referral and Dis-Chem was still found wanting on that.

The answering affidavit still referred to packaging, repackaging costs and then a vague notion of additional sourcing costs, but that happened after all the price increases in March and, as I indicated previously, in fact, it has never been quantified or even specified what these costs are associated with sourcing.

What we see even on their own behaviour now and, as I said, their claim in January, they were dealing with bulk volumes at much lower margins. They have every incentive to sell products, increase turnover through their stores and knowing that a product is in high demand, no doubt will still incentivise these sorts of firms to stock them and make their margin. What these cases at least make clear is that to exploit that situation and to earn excessive margins on that is something that would fall fowl, but no more.

The claim also is made that in fact these are important price signals. There are price signals that must go out in order to stimulate supply. I think the difficulty we have with that and it is covered in

both the reply and the Heads of Argument, is that Dis-Chem doesn't manufacture face masks. Dis-Chem is just yet another intermediary in the value chain.

So, if there is a price signals that needs to go, it's to manufacturers to increase production, but what we are seeing and experiencing in South Africa is that every intermediary in the value chain is using the argument of shortage and cost increases to escalate their own margin and Dis-Chem is precisely one of those. That extra margin that Dis-Chem earns does not go back to the manufacturer. It does not go back and stimulate their production. It is kept by Dis-Chem.

So, in terms of that argument we would also say that that is not persuasive and there is no risks to the Tribunal that in fact face masks will ceased being stocked by retailers throughout South Africa if this case is prosecuted.

So, I think to sum up, on the substantive case, the price increases from February through to March, there is no answer. There is no answer on cost justifications. The price increases are exorbitant and the margins earned are unreasonable on any measure. We don't need to have the fineries of debate about material price increases to understand that.

What we see now is a case that attacks it on either seeking to refocus on a different period or to present a series of legal challenges in order to dislodge this from a Section 8 case. I think those are obviously matters for the Tribunal to consider, but that doesn't go to the substance. If one looks at the answering affidavit, their Heads of Argument, they still do not answer that those costs, those price increases from February through to early March can be justified by any costs and are not exorbitant.

CHAIRPERSON: Mr Hodge, I need to interrupt you. I just need to know how much longer you are going to be, because we still have to deal with any confidential numbers. I see that it's almost 11:37 now and we also have a few questions for you. But before you continue, I forgot to ask the parties. We had directed that you file a joint statement of issues that have been agreed and issues that have not been agreed and areas of differences. Have you prepared that?

ADV LE ROUX: Chair, perhaps I can respond. I see my learned friend is on mute. Chair, we obviously received that direction yesterday afternoon from the Tribunal. We proposed that the Commission prepare a draft of that joint statement so that we could provide input into that.

The Commission shared something with us yesterday evening that we didn't think did the job of what the Tribunal was looking for.

It essentially said the following tables in RBB are admitted. Otherwise look at the pleadings and anything that isn't admitted or is inconsistent with what we say, take it as in dispute, and we assumed the Tribunal actually wanted sort of fact-by-fact, agree, disagree.

So, Chair, in the time available when we received that draft last night, neither party has been in a position to prepare that document. If it would still be of assistance to the Tribunal, I'm sure that we can work together with the Commission, prepare that and submit it in the coming days, because we are assuming you wanted a fact-by-fact common cause of in dispute. So, we apologiese, I think for both parties, that we haven't been able to do that in the time we got the directive yesterday, but I'm sure we can work together to prepare something jointly and submit in the coming days.

CHAIRPERSON: Alright. Yes.

MS SLUMP: Chair, sorry just to indicate…

CHAIRPERSON: Ms Slump?

MS SLUMP: Yes, thank you Chair. Can you allow me? Just to indicate that the Commission wouldn't want the proceedings as far as possible and, of course, subject to the Tribunal's directives, delay it by way of trying to arrange documents somewhere later down the line. I think Mr Hodge has already referred to a number of factors that are common cause.

We will be able to discern, once we hear Dis-Chem, what else is common cause, but as far as the relevant tables, the numbers relating to increases of prices and costs, those are indicated in the relevant tables. We are able to establish that. We seem to have agreement on that, but it is questionable whether we are actually going to achieve anything further by talking to address matters fact-by-fact.

CHAIRPERSON: Alright.

ADV LE ROUX: Chair, I would just…

CHAIRPERSON: No, Ms Le Roux, let me discuss it with my colleagues over the adjournment, because they might have some usable … changing the nature of what we might request from you, depending on how the hearing goes, but let me come back to Mr Hodge and ask how much longer you are going to be and when you are going to deal with the confidential margin numbers, if at all?

MR HODGE: Thanks Chair. I'm actually done. I tried to avoid having to speak to the confidential numbers by taking the panel to those pages. So, we can still in the confidential session, if required, discuss those numbers further, but hopefully it's quite plain what the numbers are and I don't need to do that, but I'm in your hands.

CHAIRPERSON: Alright, so let me then take this opportunity to ask you a few questions. Can I ask you this? Let me come back to the

question I had posed to your counsel and Mr Majenge. I know that you said it's a legal issue, but from an economic perspective the regulations put forward a particular test that one can have regard to and it's a simple test and we say from an economics point of view, yes it makes sense in the retail market, but the difficult of course that is raised by the respondents is, well, that relevant factor only became effective from 15th of March.

So, how do we apply it from an economist's point of view looking backward? Are you saying that we take the same test and beat it in like as if we had had regard to jurisprudence in the US, but that we are doing it through the lense of a pandemic or a disaster?

MR HODGE: Ja, I think that's precisely the point is if we look at it from an economic perspective, one has to look at the context of the pandemic and the effect it has on the market. So, you know, what has often been criticised, at least in a previous hearing before the Tribunal, is that if one looks at price gouging laws in the US, they in fact state from the point of the disaster, but that's also in the nature of the particular disasters they may face, which are often around hurricanes, earthquakes, which happen instantaneously and then put it into a disaster.

What is interesting about the global pandemic for Covid is that it is global. So, the disruptions to supply and the massive increase in

demand happened globally first before it even hit our shores in terms of the first person with the recorded case and that's particularly relevant to face masks and we would argue hand sanitizer where already those demands were escalating.

So, we hear about requests from China at the end of January for large shipments of face masks. I think even the respondent in this case puts up articles of South African firms responding to that call. So, already it is starting to affect supply and demand in South Africa well before the actual regulations. Obviously a minister is constrained in the state of disaster period to then putting in a regulation at that point and maybe that captures opportunistic behaviour on things like food and other basic essential items, but it is well-known in January that in fact face masks are important for treatment. It is well-known there is global shortage looming and that's precisely what Dis-Chem looked to bank on.

So, I think as I pointed out earlier, the February increase on the 14th of February, as they point out in the Heads at paragraph 43, is a recognition that there's rising demand. This is not even the March let's look at another retailer price. This is Dis-Chem realising they hold considerable stock, there's rising demand, we are seeing it our numbers. So, in terms of the economics, the conditions for an exploitation of a crisis exists already at that period, the beginning of

February and that's clear. We don't need an announcement by Minister to say that the market has changed. The market has already changed at that point.

So, from that perspective one can look at it in terms of it economically and say what's happened to the market and then to also say, well, can we consider it within the ordinary course, even if the legislation or the regulations don't permit that? That's where I think one can. One is looking at context and in any case, one looks at the context of the market and that's the appropriate context.

CHAIRPERSON: Mr Ngcukaitobi?

ADV NGCUKAITOBI: Yes, thank you Chair. I did want to come back to this question. I wanted to give it some thought. We would submit, Chair, that firstly the language of Clause 4.22 of the regulations is relevant in determining what one does with the period prior to the 15th of March. To illustrate that, the regulations do contemplate that that is a period that can be taken into account. This is what it says.

So, the principle clause, 4.2 says *"in terms of Section 8(3)(f) of the Competition Act, during any period of a national disaster a material price increase of a good or service, as contemplated in Annexure A, which…"* then it explains under item 4.22 *"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 3-month period prior to 1 March 2020".

So, it already within the contemplation of the drafters that the 3-month period prior to the 1st of March 2020 would be a factor to be taken into account in deciding what a material price increase would be regarded as excessive. Then it says *"that would be a relevant and a critical factor to determine whether the price is excessive or unfair".*

So, if the regulations apply, the regulations already direct you that your starting period is 3 months prior to the 1st of March 2020. So, that's on the language of the legislation. You are not operating, as it were, outside the parameters of the regulations when you take into account the price increases prior to the 15th of March 2020.

The second, of course, is linked somewhat to what Mr Hodge was saying, which was, well, what was the point of these regulations? What was the purpose of these regulations? It is clear that the purpose of these regulations was consumer protection as a consequence of exploitative conduct that is linked to the pandemic.

It would be artificial to split that purpose from the period prior to the 15th of March, because if the point was the protection of consumers from exploitative conduct prior to the 15th of March, when would that have been the case? Mr Hodge points out in our respectful

submission correctly that by January/February, because this was a global pandemic, it was quite clear to anyone with common sense that there will be a demand. There had already been an international demand that there would be a demand for face masks in South Africa.

So, the question of the purposive construction in order to meet the real underlying object behind the regulation would also give you a sufficient hook, if I can put it that way, to interpret the regulations rather generously. So, we would say you have two strong indicators that the period prior to the 15th of March is the relevant and a critical period and may not be ignored. One, you've got the language of the text, but secondly you have the purpose of the regulations and then of course you have the economic arguments that Mr Hodge has outlined. Thank you.

CHAIRPERSON: Thank you Mr Ngcukaitobi. I think I may have overlooked Ms Slump. You also want to make some submissions and I apologise if I didn't give you an opportunity.

MS SLUMP: Thank you Chair. I don't know if you want to take a break at this stage of if I can proceed. Hopefully I won't be too long. I think I have about … not much time to make my submissions.

CHAIRPERSON: Yes, we were going to adjourn at 12. So, let's give you that space.

MS SLUMP: Thank you Chair. Yes, I think that my colleagues have addressed you fairly fully on most of the legal issues as well. Simply just to follow from what has been stated before that it's artificial to differentiate between the period pre-19 March and post 19 March. If we have a look at the article of Lewis, which Mr Hodge has referenced a number of times, which I understand is more than a decade old, there is clear contemplation that even without the application of the regulations that the Tribunal has the authority to consider price gouging matters on an urgent basis and to apply a simple technical test and that test is very clearly indicated as being a reference to the price that prevailed immediately prior to the disaster and the price after the disaster.

As Mr Hodge has indicated, the lense through which we view this matter in relation to which it has been referred is the Covid 19 pandemic, which we know was already evidenced in South Africa at least since early February.

I believe that the legal element, as I've said, for excessive pricing has been addressed and has been proven by the Commission. The contention by Dis-Chem is that, well, you can't simply look at an amount of 10% when trying to determine an excessive price. Just in regard to indicate that there is no alternative that is proposed by Dis-Chem. They don't tell us that 11% or 20% would be sufficient and it

remains an issue that is within the discretion of the Tribunal based on the relevant facts.

My colleagues have referred to the Sasol judgments, which indicates that a robust approach may be taken by the Tribunal. Where the actual price is shown to exceed the normal price and it's utterly exorbitant, which the Commission submits an increase of over 200% is, then a *prima facie* case has been proved. It's not necessary to look at anything else. The onus then falls to the respondent to come and explain why a final determination shouldn't be made against it.

If we have regard to the Section 8(1)(a) itself, there's a reference to the fact that there must be detriment to consumers and customers. Now, that as indicated in the Commission's Heads of Argument and it is found from paragraph 85 of the Commission's Heads of Argument, this is a value judgement to be considered by the Tribunal. Reference is made in paragraph 6 of the Commission's Heads of Argument to the Mittal matter referencing the Tribunal's decision in that matter where it indicated *"after all, what could more clearly inure to the detriment of consumer than an excessive price"* and the Commission submits that the greatly increased price in this matter is one that surely must inure to the detriment of consumers, particularly within the environment of the Covid 19 virus.

As is submitted in the Commission's Heads of Argument, the issue of detriment is in any event a subordinate factor and flows from the charging of an exorbitant price.

If one has regard to the factors indicated in Section 8(3) of the Act, which require consideration, counsel has already addressed in a detailed manner the fact that what the Tribunal has to have a look at is whether there was a competitive price and whether that is reasonable or unreasonable. That is the only prescriptive factor in Section 8(3) and it is then discretionary as to which of the relevant factors to be considered in determining that, but very important to Section 8(2) of the Act as well, which indicates where the onus lies.

So, the minute that the Commission proves that there has been excessive pricing, it falls to Dis-Chem to show that that was reasonable; that the price difference can be justified in some or other manner and the Commission submits that that has not occurred in the present case.

Insofar as those factors are indicated, these may be considered and as counsel has indicated, it's not a closed list, but also it's not a prescriptive list. It does not require that each and every one of these factors must be considered. Regard must be had to what is relevant to the particular circumstances and in the present case it is submitted by the Commission that the price before the disaster that was felt in an

economic manner must be compared to the price that was charged during the complaint period.

Section 8(3) specifically makes mention to the fact that historical prices can be considered. It refers to the length of time that the price has been charged and it has regard to the structural characteristics of the market, the fact that the advantage is not due to the commercial activity or investment of the firm, which Mr Hodge has already addressed, and also provides that regard can be had to regulations. It is submitted that whether or not the regulations apply before 19 March, they certainly are an indicator of what the Minister believes is an appropriate means of determining an excessive price.

Chair, the Commission submits that Dis-Chem has not placed any relevant facts before you that can in any way discharge its onus to prove that its increase is reasonable, particularly given these exorbitant prices. Reference is made, strong reliance on the fact that this is a matter that's being determined by way of the papers that are before you.

Reference is made to the Plascon Evans matter and also to a judgement of the CAC in Dawn, but this matter is different, significantly different to the Dawn matter. We have to bear in mind that it is possible at all times for a matter to be determined on the papers only, as is evident from Dawn itself. The Covid 19 Tribunal

rules and particularly rule 6.5 and 6.6 deal specifically with the fact that if there is a dispute of fact that is evident from the affidavits, the Tribunal may determine an expedited process for resolving those disputes, including the hearing of oral evidence and it may further call for any further evidence, if that is necessary.

Plascon Evans will only ever apply after all of the evidence has been led and after the Tribunal has exercised its discretion to call for more evidence, if it feels that it's necessary, but in the present matter that is in any event irrelevant. If one considers the comparison between Dawn and the present matter, it's important to also highlight that in that matter there was reference to papers that were not in the pleadings. There was no replying affidavit filed by the Commission and there was an argument of a deemed denial, but in the present matter there are no material disputes of fact. While there are explanations provided as to what the motivation was for certain conduct, there is no dispute regarding the fact that Dis-Chem did increase its prices. Mr Hodge has already laid before the Tribunal and the Commission's Heads are clear on what those increases were, when they were effected. We know that they were effected subsequent to the Covid 19 pandemic.

The evidence relating to costs Mr Hodge had also addressed in a lot of detail and he is correct in saying that there are in fact no facts

proffered by Dis-Chem in respect of costs that it has incurred, save for the two limited costs in relation to packaging that we indicated.

So, this is not simply a matter of, as in Dawn it was considered, well, if you make an allegation and you say that something is the case, you don't necessarily need to attach all of the proof for that, but we don't even have that. We don't even have an allegation of this is the amount that was expended, these were my costs. We are simply told that there were some costs and frankly that is not sufficient.

Chair, I'm not going to go any further on the issue of whether or not there has been a case of excessive pricing proven, safe to state that the Commission submits that there has been. I would like to move just very briefly to the relief and penalty in this matter that is sought by the Commission. You would have noted that…

CHAIRPERSON: Ms Slump?

MS SLUMP: Yes Chair.

CHAIRPERSON: We actually do have to take the adjournment, because Prof Valodia has to attend to something in the adjournment. So, we are going to take a 15-minute adjournment and allow you 5 minutes on your penalty. I mean, we've got it in your Heads, not even 5 minutes. Try and do it in 3 minutes. So, we will adjourn now for 15 minutes. The link to the meeting will remain valid. What you all

could do is just switch off your audio and your video and stretch your legs and we will be back in 15 minutes. Thank you.

MS SLUMP: Thank you Chair.

A d j o u r n m e n t

On resumption:

CHAIRPERSON: Good afternoon. We are resuming our hearing. I wanted to just check, Ms Slump, are you online? Ms Le Roux?

ADV LE ROUX: Yes Chair.

MS SLUMP: Yes Chair.

CHAIRPERSON: Thank you. Ms Slump, the Commission is in serious overtime here. So, you are going to have to make your submissions very quickly, to the point, because we still have some questions for the Commission from the panel's side.

MS SLUMP: Yes Chair, I will be extremely briefly, simply to say that the Commission references the Isipani matter, which makes it clear that the test in the Aveng 6-step approach is not necessarily appropriate in all matters. Just to refer the Tribunal to Dis-Chem's Heads of Argument and there's a discussion on the last two pages of the Heads of Argument in relation to an appropriate penalty. Without going into the numbers, at paragraph 339 is an indication of what Dis-Chem submits that it should be paying as a penalty.

The submission of the Commission is that that certainly is not an appropriate amount. If one has regard to paragraph 324 of Dis-Chem's Heads of Argument alone, there is a reference to the amount there for the combined turnover of mask sales for the period 19 March to 31 March 2020. It is essential that in determining an appropriate penalty, regard must be had to the atmosphere of the matter, to the time when this conduct took place, the impact of the Covid 19 pandemic and the fact that there must be a disgorging of the excess profit that is being made by Dis-Chem. Those are the submissions. Sorry Chair, I can't hear you.

CHAIRPERSON: Can you hear me now?

MS SLUMP: Yes, thank you.

CHAIRPERSON: Sorry, I was on mute. Thank you for that. You did well. Let me ask my colleagues if they have any questions following both you and your colleagues' submissions. Let me start with Prof Valodia.

PROF VALODIA: Thank you Chair. I have a question for Mr Ngcukaitobi. It's with respect to 4.2.2 in the regulations. It's possible to have another interpretation of the language in 4.2.2 and that would be that the date of 1st of March is not there to be establishing the start date or the end date of any action, but that that 3-month period is

actually a kind of issue with regard to how one would interpret a price test.

So, if you were governing action that happened after the regulations came into place, then you would compare the price action in the period from the 15th of March onwards with the prices for all three months prior to 1st of March. The real issue with 4.2.2 is not that it's attempting to bring within the regulations action on the part of any party that might have happened after the promulgation of the regulation, but that it is in fact kind of setting up what prices you should compare to. So, I would just like to hear your thoughts on that.

ADV NGCUKAITOBI: Yes, no, that is true. I mean, it is possible. My understanding of the question is that does it set only the benchmark against which you measure the rule, which is you look into what happened prior or does it play a bigger role than that? I would submit with respect that the only point I tried to make is that it is not as if that period is completely irrelevant. Even if it serves as a benchmark, it is still a relevant period for the setting of the benchmark.

But the second point, which is probably a lot stronger than the textual argument is the purposive argument that the baseline for why we have these regulations is to protect consumers against the gouging of prices as a consequence of Covid and if we know what Covid

means globally and locally, it would be artificial to draw the split between the 15th of March and the period that precedes the 15th of March.

CHAIRPERSON: Thank you. Mr Valodia, do you have any other questions?

PROF VALODIA: No, I'm fine, thank you Chair.

CHAIRPERSON: Prof Tregenna?

PROF TREGENNA: I just have three questions for Mr Hodge. Firstly, in terms of price dominance, are you only establishing it on the basis of the pricing, which is the subject of the complaint or do you have any other data on market shares or anything else in relation to dominance?

MR HODGE: Thank you. We are basing it on the conduct. As I indicated in argument that in fact, looking at conduct in an *ex post* environment is in fact very informative and is used by the courts. It is different to the sort of *ex ante* consideration in a merger control where you may want to predict and therefore you use other tools, but actual behaviour is in fact informative.

I think on top of that we know that obviously Dis-Chem is a major retailer and pharmacy chain doing enormous volumes, at least in terms of face masks, but we are looking at in the context of a crisis where supply is disrupted and demand increases, that this puts them

in the position where they know that holding a large amount of stock they can in fact push up price without constraint from any competitor and earn excessive margins in the process.

PROF TREGENNA: Thank you. Then secondly, in terms of Dis-Chem's argument around anticipated higher prices associated with the replacement costs, you did speak to that earlier. I just wanted to check in your perspective do anticipated higher prices, based on replacement costs, have any relevance and, if so, what relevance would that be? If not, can you just succinctly state why not?

MR HODGE: I would say in this case they have no relevance, because if in fact that was the mechanism at which they set prices, they would have some record of these are the costs we anticipate and therefore we set the price in that regard, but at no point have they produced that evidence and, as I indicated earlier, at no point did they make that claim that's how they set prices. This appears for the first time really in the Heads, apart from the theoretical exposition in the RBB report.

I also think if we look at large retailers like this with the working capital they have, they are not in a position where they desperately need to increase a price in order to replenish stock and the margin they make on that stock will give them the return on that stock. So, they don't need to make the return ahead of time.

PROF TREGENNA: So, just a follow-up on that before I come to my third question. If they were to face a situation in their stores of the previously sourced stock and the replacement stock being concurrently available on the same shelf, would you foresee them then charging different prices on those two categories of stock so that the replacement stock wouldn't affect the price of the previously sourced stock?

MR HODGE: So, it wouldn't be that they would necessarily charge two different prices. That obviously is difficult in the retail environment, but I took the panel to page 394 early on and I mentioned at that time the concept of moving average cost and what the RBB report says is that in fact Dis-Chem measures its procurement cost with reference to the moving average cost.

So, it's a mixture of stock that is sitting in the store, but even if one looks at those figures, which are based on the moving average cost, so if some new stock is coming at a slightly higher price, they may want to push up all prices, accounting for the weighted average, but even then throughout the period from mid-February through to the end of March nothing changes in terms of the moving average cost. So, this only start to become relevant in April and that seems to be the way they deal with different priced stock.

PROF TREGENNA: Thank you. Then my third question goes to the reference period, which you are using by way of comparison, so the previous 3-month period in line with the Act, as I understand, the 1st of December 2019 to the end of February 2020 to compare to subsequent price increases.

Now, that reference period itself saw prices going up, at least during February. So, have you done some kind of sensitivity analysis, either to a truncated period before the prices increased or an earlier period to see how different the results would then be?

MR HODGE: The short answer is yes. In fact, in the Heads in the timeline, which is put out … let me just find it. It's from pages 9 onwards or 11 onwards, sorry. In that timeline and at the top of page 12 of the Heads is the gross margin percentage for January. So, you should be able to see that in the month prior.

Then in the replying affidavit, so January's high volume and that's the gross margin and in the replying affidavit December and January are used in terms of calculating the quantum of harm for the period from February through, but also the Tribunal panel can undertake its own analysis, if need be. I referenced previously tab le 8 of the answering affidavit. I think it's at page 101 of the trial bundle, but that has the monthly cost of sales, revenue from sales and

volumes in order to work that out, but certainly if you looked at January alone, the jump in margin is even greater.

PROF TREGENNA: Thanks.

CHAIRPERSON: Thank you. I have one question for Ms Slump or the team in relation to remedies. I note that the Commission is asking for a penalty to be imposed on Dis-Chem and the question I have is that given that the Commission's case is that there has been a serious detriment to consumers in the form of excessive pricing, would this not be a case, which is more appropriate for a pricing remedy or some kind of return to consumers in the form of a discount in the market on these essential items?

MS SLUMP: Chair yes, you will note from the notice of motion and it's reflected in the Heads of Argument in the address on remedies as well, that what the Commission is asking for is not just an administrative penalty, but also interdictory relief and also if the Tribunal deemed it appropriate, some or other kind of pricing condition.

The Commission has not made any proposals as to what would be an appropriate pricing condition, but given the conduct of Dis-Chem thus far, it is a concern about what is going to happen in future should there be an increase in Covid infections. We do know that

people are in lockdown at the moment and that lockdown is being less strongly enforced as time goes by.

But what is also important to note and which I didn't point out earlier is that appropriate administrative penalty amount that Dis-Chem contends is appropriate is determined with reference to pricing as from the 19th of March and that is entirely inappropriate. It must be for the entire period of March.

So, the Tribunal is correct, yes, the penalty in whichever form that it takes should disgorge those excessive profits. I'm not certain if this is an appropriate matter. It does seem that Dis-Chem does have at least some information about who its clients are, some of its clients at least and may be in a position to reimburse them for excessive prices charged, but it would seem that practically that is not going to be a reality; that not everyone is going to be able to be reimbursed.

One of the orders that has already been granted by the Tribunal recently is a payment into the Solidarity Fund. That remains an option, but the Commission's approach is that the penalty must match the conduct and this has been reprehensible conduct and it must set an indication, a clear message must be sent that deters all other firms and deters Dis-Chem again from engaging in the same conduct.

For that reason the penalty must be a substantial penalty. It certainly can't be something that is less than the amount that they

have benefited as a result of the price gouging and if regard is had to the damages calculation that is utilised in the US, the treble damages calculation that is methodology that is referenced by the Commission, there in order to give effect to that consideration, you are certainly given to at least tripling the additional profit that has been earned and that would be for the entire complaint period. Chair, I hope that addressed your question.

CHAIRPERSON: Yes, thank you, it did. Can I just check with my colleagues if there are any other questions to the Commission before we move on to the respondents?

PROF TREGENNA: Not from my side, no.

PROF VALODIA: Not from mine.

CHAIRPERSON: Well thank you then. Ms Le Roux, I think you could commence and we will take an adjournment at 13h00. So, if you want to start with your submissions and then we will continue after the adjournment.

ADV LE ROUX: Thank you Chair and good morning to the members of the Tribunal as well. Chair, what I would like to do is address six topics in the course of my address. The first of those is how much changes because of Covid and I will make submissions around that.

The second is the exercise that is still required in terms of the Act of the Commission, which it has not performed, namely starting

with Section 7 and establishing dominance and then moving through the various elements of Section 8 and proving each one of those, address you on the 8(3) factors.

I then plan to address the relationship between price gouging and the Act, so the regulation and the Act and finally very briefly on administrative penalty and then I must put some procedural objections on record.

So, with respect to those procedural objections, I will detail them all at the end, but just to say that Dis-Chem's participation in the hearing and in the way the authorities have run this case is over those objections and it reserves all of its rights because of how this case has been proceeded with.

Chair, also because of the time pressure that is inherent in the presentation, we obviously refer the Tribunal to our Heads of Argument as well as the answering affidavit and the RBB report, we may not be able to cover every aspect of what is set out in those various documents. We've certainly tried to pull out the most important for purposes of assisting the Tribunal today, but certainly we do not abandon any of those arguments and despite the focus of these oral submissions, we rely on all of the arguments that are set out in our Heads.

Chair, let me then start by saying that Dis-Chem is obviously very sympathetic to both the Commission and the Tribunal. We recognise that both institutions are under enormous public pressure to prosecute price gougers. The Minister has taken very seriously that during the Covid pandemic there must be price gouging, there must not be the type of exploitative profiteering that we've been debating so far this morning.

We, of course, are confident that the Tribunal will not succumb to public sentiment and will instead be looking at the facts, be guided by law and will be applying economic theories and legal precedent that has traversed the provisions of Section 7 and 8 and apply those equally when considering how to apply Regulation 4.

We submit that it seems as if the Commission wants a test case. The difficulty is the test cases, if they are going to be workable and if they are going to be good test cases, need to have very clear and compelling facts. The ideal test case has no inconvenient facts. The party bringing a test case would be able to reference all of the facts and use them to support its case.

Unfortunately the Commission's approach to this case is cherry-picking and incredibly selective. So, there are enormous amounts of information that it simply ignores and we submit that this is therefore not an appropriate or good test case.

It also seems that the … Chair, someone seems to be sharing their screen with the meeting. I don't know if whoever is sharing the screen could stop that. There we go. It still seems to be shared.

CHAIRPERSON: Yes.

ADV LE ROUX: Chair, I'm not sure who is sharing, but let me carry on. The second aspect of the Commission's choice of this case and the way it has run it and the way it has presented it and argued it in an evolving fashion, because the founding affidavit is not the same as the case in the replying affidavit. It is not the same in the Heads of Argument that were filed by the Commission. Is it not the same as the Heads of Argument filed this morning after the set-down time for the hearing and it's not the same as the case that's now been put in argument.

So, the Commission clearly wants to set an example with this case, but again, the facts of this case are not a good example. So, for all of those reasons we submit that the Commission has brought a wrong case and the Tribunal is being put in a very difficult position as a result, because it may well end up distorting the law and having to contend for contorted interpretations and endorsing some sort of selective cherry-picking of facts and evidence if it were to accept the Commission's case here.

So, what I would like to do then is an overarching submission that says the questions that we see in the case, the questions that we believe need to be determined by the Tribunal are the following. Can the Commission only claim this incredibly short timeframe? Sometimes it's February and March. Sometimes it's only March. Sometimes it's 15 March to the end of March. Sometimes it's 19 March to the end of March, but in all of this the first question is can the Commission's complaint referral rest only on this truncated period, ignoring what happens before in the market and ignoring what happens after, particularly in April and until the 22nd of April when the referral is made?

The second question is can the Commission ignore the evidence about replacement costs, about competitive pricing, about supplier quotes, about the non-delivery of goods during the course of the pandemic in the timeframes that even the Commission accepts are relevant?

Does the Tribunal ignore the series of price decreases that occurred before this referral and before the Commission came knocking? Does it ignore the margin collapse that Dis-Chem has experienced in April?

So, what we submit as an overarching framing submission is to say that this case actually tells the story of competition and markets

that are working. We are dealing here with markets that have been disrupted to a level never before seen. We see spikes in demand. We see complete collapses in supply, but ultimately what you see this market doing is precisely what competition regulators hope for, which is that ultimately the supply and demand curves find each other after a few weeks of dislocation and the market then begins to clear. It stabilises.

It succeeds in ensuring that as supply opens up, as China begins manufacturing, as everybody enters the market to supply masks, we start seeing that product is delivered to consumers, to retailers and through to consumers and we see that this starts happening at affordable prices.

So yes, prices have increased, because the costs of these goods have increased, but what we see is in fact a story of competition and the market working and it therefore would be inappropriate and we submit risky and dangerous if the competition regulators were to punish for an incredibly limited period of time the dislocation caused by a global pandemic that has never been seen since 1918 and even then has not caused the disruption of supply chains to the extent of this pandemic.

It also means that we need to take account of the even broader economic context of the recession that we are in. So, we submit that

this case in fact shows competition and markets working. It does not show the creation of dominance, whether temporary or otherwise, and it does not show an abuse of that dominance.

So, we submit there is no need for intervention by the competition regulators on the facts of this case. We submit that there has been no excessive pricing by Dis-Chem.

Chair, what I would like to do then is look at what the conduct is of Dis-Chem that we are actually here for. Chair, with the benefit of a preliminary test drive that I undertook last night and holding thumbs that the technology does not disappoint me, I would like to, for the first time in my life, run a PowerPoint presentation and share the screen.

CHAIRPERSON: Alright, we can see it.

ADV LE ROUX: You can see. I hope you can see a slideshow that says respondent's exhibit.

CHAIRPERSON: Yes.

ADV LE ROUX: Now Chair, I'm going to start that slide show. Can you now just see the slide?

CHAIRPERSON: Yes.

ADV LE ROUX: Great. So, this for the non-confidential session. Mr Smith will deal with it in the confidential session. So, what I would like to do is look at the conduct of Dis-Chem, because that is what

this is all about. So, this is a slide that will be very familiar to the Tribunal. It comes from the RBB report. It sets out prices per mask over a time period starting in January and running until the complaint referral period.

I would like to start on the 13th of April. That is Easter Monday. It's the day before the Commission contacts Dis-Chem. Its price for a mask is R17.00. It is making losses at that value. At this point in time it has received less than 10% of the millions of masks that it has ordered in the preceding weeks. There is simply unreliable delivery. Literally it receives less than 10% of millions of masks. It is ordering those masks at higher costs and it starts receiving them.

So, let's go back in time. On the 11th of April, again preceding any contact from the competition authorities, Dis-Chem cuts its price to the R17.00 level. From the end of March to the 9th of April multiple orders of more than 10 million masks begin to arrive, but only two-thirds of the actual orders arrive. They arrive at costs that are higher if you want delivery in early April and lower for late delivery and the price before the price cut was R22.00 for a mask.

So, before the Commission has even showed up, the day after Easter Monday, Dis-Chem has implemented a price reduction. It's been able to do that, and so I just note at the foot of the slide that this is the end of the complaint referral period, as we understand the

Commission's case, and I will have to address you on the time period, given how it's moved around in the case and again today.

So, the 27th of March is when lockdown begins. Again Dis-Chem is placing multiple orders for more than a million masks. None of those orders even get to South Africa. In the period 25 to 26 March, again multiple orders, trying, scrambling, trying to find suppliers that can help it, because its traditional suppliers who are two South African firms have been unable to satisfy the demand, these orders are happening at much higher cost. 10% of those orders managed to arrive.

19 to 23 March, again multiple orders being placed with multiple suppliers for tens of thousands of masks. These are at the historic prices, but under half of those arrive and in this process of scouring the globe to try to find masks, it is receiving incredibly inflated quotes. So, what it is dealing with is not only an unreliability of supply, a complete scarcity of supply, even when you manage to place an order, the goods don't arrive, but also it is receiving inflated quotes.

So, now we look at 19 March. It's marked at the bottom and that's when the regulations promulgate. So, on one version of the relevant time period, this is it, 19 to 31 March, this is what Dis-Chem is busy dealing with on a line item that until January was practically

insignificant. On the multiple products that my client sells, these surgical masks, you've seen the levels at which they trade. Mr Smith will deal with them as well in his session, but until January this is basically an insignificant line item.

This is the complaint period on one version of what we've heard and this is what Dis-Chem is dealing with. If we can go back to 16th March, the day after the disaster is declared, again hundreds of thousands of masks are being ordered. Most of those arrive. Most of those are coming in at the old prices, but the quotes from these suppliers, and all of this is set out in a table in the RBB report, the quotes, are at massively inflated prices.

So, 15 March the national disaster is declared. So, on another version of the Commission's case that it has presented, this is the period, 15 March to 31 March. Again, this is what Dis-Chem is busy dealing with. What you will notice is that there is no price increase in this period. So, we submit that as a jurisdictional fact, the regulations cannot apply, because Regulation 4 governs a material price increase that occurs in the period of the disaster. There is no material price increase here.

So, let's keep walking back in time. If we go to 5 March, again multiple orders, trying to find hundreds of thousands of masks. About 1% of those orders actually come through, again inflated quotes. If

you want to make future orders, the orders that are placed in this early March period are at the old prices. 5 March is significant, because that's the first confirmed case of Covid in South Africa. So, in terms of the global pandemic, this is when it arrives on our shores.

Let's go back to the beginning of March. The 2nd to 9th of March we have price increases that occur. They occur below Clicks and below online sellers like Take-a-Lot and Loot and all of these other online marketplaces that have sprung up. Mr Smith will address some of those in his session, but this is where Dis-Chem is in this time period. It is selling 50-piece boxes, so 50 masks for a maximum of R174.00 and there's another option, which is R82.00 box. Five masks will cost you R20.00. One mask will cost you R4.00. This is March, which on one version of the Commission's case is the relevant period.

So, let's look at February. February sees demand above 500 000 masks that people want to buy at Dis-Chem stores. There's another interesting feature that the Commission has failed to address you on today, which is 1% of customers buy 50% of masks. This is from the customer loyalty card and account information that Dis-Chem, in the one week has had to prepare its case, has been able to look at and provide to the Tribunal. It shows you that there are these

enormous amounts of bulk orders and it seems to be that this was for export and reselling.

So, this is not the poor, vulnerable individual consumer hunting for a mask. So, when we address you on detriment to consumers, it's very important to keep in mind what consumers were actually buying masks from Dis-Chem. These were firms buying them to export to resell.

We see the same pattern of multiple orders being placed for hundreds of thousands of masks, but only half of those quantities ever arrive. Again you see a price increase that takes place below Clicks, below online sellers, again Take-a-Lot, etc, etc, and this is where a 50-piece box is at R78.00, a 5-piece R17.00 and 1-piece R4.00. So, the 1-piece has stayed largely stable, the 5-piece is a small increase to the early March period and the box of 50 does go up.

But I will also mention that at the moment, in fact, the day before we filed our answering affidavit National Treasury put out an instruction that says government will pay today, in April, R511.00 for a box of 50. Dis-Chem never charged more than R174.00, but government will pay you R511.00 in April for a box of masks.

So, these are all relevant comparators for the Tribunal to consider. Then we go to January where demand spikes 12 times that it had been to date, 12 times more customers are looking for these

masks and they are buying hundreds of thousands of masks. In January one customer buys over 100 000 masks, again to this threshold question that the Commission must establish of detriment to consumers. Chair, someone seems to be sharing. I don't know who is sharing, but if they could…

CHAIRPERSON: I don't know. I don't know who it is. I'm just going to click on you. Alistair will sort it out. Have you lost your document?

ADV LE ROUX: I've lost … can you still see my document? Chair, can you still see my slide?

CHAIRPERSON: No, we can't.

ADV LE ROUX: So, now I think perhaps I need to share again. Can you now see it?

CHAIRPERSON: Yes.

ADV LE ROUX: Okay, apologies for that. So, we are in January. We've got demand spiking 12 times. One customer is buying 100 000 masks, not for personal use, not just to keep them and their family safe, unless it's a very, very, very large family. This is also when Dis-Chem introduces single masks, because until this point it's been selling bulk. It's been selling 50-piece boxes or 5-piece packs. So, this is when it begins to start breaking bulk. It starts taking the boxes

of 50, which are all the stock that it has and repackaging them into packs of 5 and into singles.

So, in this January/February time period this is what Dis-Chem starts doing, which it has never had to do. It is doing that to enable when you and I walk into the store and want a pack of masks for our family to be able to buy single or smaller packs. Again, multiple orders being placed for more than 150 000 masks, not all of them arrive.

So, if we look at what Dis-Chem has gone through, if we look at what it does in the time period, this is the sorry tale. There are two other points I need to make. From the end of March it no longer sells the three products that are at issue in this complaint referral. Those three SKUs drop out and it only sells single masks.

Chair, to end, if we go back to where I started, which was up here, Easter Monday, the 13th of April, before Mr Govender received an e-mail from the Commission to which he tried his best to respond while trying to trade during a lockdown and during a global pandemic and while his consumers face a recession. What he does is Dis-Chem introduces a new SKU, which is a single mask.

So, let's end with where we were the day of the referral and it's before the Commission refers. Dis-Chem decided and put through the 22nd of April yet another price cut. So, the contention purely to create

atmosphere, which is very regrettable, the contention that somehow Dis-Chem has been dropping prices because of what the Commission has done is simply untrue. It dropped its price for the first time before the Commission contacted it. It dropped it for the second time before the Tribunal had picked up the referral.

Why was it dropping prices? Because all of this history of unprecedented demand in January and February and you will be addressed by Mr Smith about where that's when most of the sales occur, it's for this incredible spike in demand. It was unable to satisfy that demand from its suppliers. It had to scour the globe, find reliable suppliers and clearly, as you can tell, that was a very challenging part of its job, because so much of this was not in fact reliably ordered. Prices for every quote it was receiving were going up and up and up and up and it had to follow its competitors, follow the signals it was getting from its competitors and then address those.

So, Chair, where we end up is with, we submit, what this story tells you, as I started, was this is competition working. This is a market that is responding, both at retail level and at supplier level. What's happening is suppliers are scrambling to enter the market. They are trying to open up their factories in China so they can start producing again. You see dealers entering the market and finding a

batch of masks and being able to bring in a shipment of masks and then starting to trade.

So, you had massive entry at the supplier level. You also had it at the retail level, because the number of places where you can now buy a mask has absolutely blossomed and bloomed. So, the point on this timeline, and I'm conscious that I'm two minutes from 1 o'clock, but the point of this timeline is to show you that if the Commission is allowed to select a matter of days, if it's permitted to say we are only going to look at 19 to 31 March or we are only going to look at 15 to 31 March or we will look at the whole of March, but we are going to ignore January and February, we are going to ignore April and even within the time period we are going to selectively look at only the price on the purchase order for the goods that you sold in your store and the history of your price before that and the margin that they calculate from that, then what the Tribunal will be doing is ignoring all of this other evidence.

All of this evidence that we submit is relevant to an excessive pricing case is relevant to evaluating and determining the case that the Commission has brought and we submit that the Tribunal will not fall into the trap that the Commission has laid for it, which is to be incredibly selective in terms of the evidence that it considers.

Chair, let me stop there, because I see that it is 1 o'clock.

CHAIRPERSON: Yes, let's take the lunch adjournment, Ms Le Roux. I think we do need an hour, because people are still in lockdown and have to attend to children and whatever else. I heard Mr Majenge's children in the background. I'm sure everybody else did. So, we will come back at 2 o'clock and we will take it from there.

ADV LE ROUX: Thank you Chair.

CHAIRPERSON: Now again, you can leave the meeting, if you want, and re-join through the link, because the link will remain valid, or you can switch off your audio and your video so that all your sounds are not travelling into the meeting room. Thank you, we will be back at 2 o'clock.

A d j o u r n m e n t

On resumption:

CHAIRPERSON: We continue with Dis-Chem's submissions. Ms Le Roux, you have the floor.

ADV LE ROUX: Thank you Chair and members of the Tribunal. So, I'm going to attempt for the second time to do this. Chair, just confirming, you can see the slide I have of the timeline.

CHAIRPERSON: Yes. I can see it. They can see it.

ADV LE ROUX: Thank you. So, Chair, the point that I would like to end on here just highlight my submissions before lunch is to say that what the Commission is asking you to do as the Tribunal is to identify in this period which days you would like to consider and crop first, but for reasons I will develop shortly, because I will now move on to address the relationship between the regulations and the section, anything other than the very terms of the regulation would be entirely arbitrary and would again be the Commission trying to be very, very selective and prejudicial in what it considers.

So, if the Commission were to try to persuade you that anything other than on their one version of their case, 15 March to end March, if we were to try to drag it back into a bit earlier period, but on the Commission's version it's all entirely arbitrary. So, before 15 March there is no passing regulations in effect. It's in the ordinary excessive pricing period. So, to bring case against Dis-Chem under Section 8 and it could only apply ordinary Section 8 and Section 7 criteria.

So, the regulation must be doing some work and the work that we say it does, and I will develop this argument further, is it prohibits specific conduct and the conduct that it prohibits is a material price increase. That satisfies one of the two tests in the regulation. There is no price increase, material or otherwise, after 15 March. So, they

can't then try to, on some arbitrary basis, get the Tribunal to apply the shortcut test in the regulation in an earlier period.

So, Chair, the final point is just to say that what the Commission is trying to do is to be very selective, be irresponsible, we submit, and try to persuade you that a mere snapshot is all that you should look at. Chair, the difficulty of a snapshot is that it ignores what could be potentially relevant facts and here the Commission is asking me to ignore facts, because they hurt the Commission.

So, what the Commission is doing, if I can be a little dramatic, is they are presenting you with a snapshot. They are presenting you with a photograph of a person kneeling over a body and they are telling you that it's the murderer, but it might be the paramedic. So, without the context and all four of our colleagues who have made representations for the Commission have stressed to you context, context, context matters.

So, we need that context and it means that the Commission must actually commit to what its case is and if it's anything that is defensible and not arbitrary, it has to be 15 March to end of March and there is no price increase. It cannot use the regulation. It can only use the normal excessive pricing test, because there is no price increase in that period. So, Chair, if I can then move on…

CHAIRPERSON: Before you do, Ms Le Roux…

ADV LE ROUX: Yes?

CHAIRPERSON: Are you going to continue with this timeline or are you done with this issue?

ADV LE ROUX: I was going to go to my next … I was going to move to the relationship between the regulation and the Act.

CHAIRPERSON: Alright, just in relation to the timeline that you have put up in your slides, I think it can be very useful for the Tribunal if the parties can do a joint minute for us, the Commission and yourselves, on those facts that you put up in that timeline and where the points of agreement and disagreement are, because you know, then that will lay a good overall picture that you presented, but I'm sure that I myself had some questions about the facts first.

So, let's, without burdening the record and in the interest of time, we would ask that you do a joint minute. We can decide at the end of the proceedings when all these things … in case there are any other requests, when all the agreement is submitted.

ADV LE ROUX: Yes Chair, I'm sure we can prepare something together with our learned friends. So, Chair, if I can then move on to the next topic, which is how to determine the relationship between the regulations and the Act and again there unfortunately I will have to address you on the moving target that is the Commission's case in this respect.

So, even today we heard new things about how the regs apply, how they factor into Section 8 and how the Commission can approach this. So, let me therefore lay out Dis-Chem's case. So, Dis-Chem submits that this is a typical excessive pricing case. Section 7 and Section 8 are where we start. So, we start, because the first thing that the Commission has to do is get itself into Section 8(1)(a). This is the language of Section 8(1)(a) and the first thing that it requires is that it establishes dominance.

Now, dominance is required to be established in terms of Section 7. Section 7 of the Act, and the Commission, in its Heads of Argument, has accepted that we are in the category of below 35% market share and therefore have to demonstrate some market power. That's the Commission's Heads at paragraph 52.

So, we are in a Section 7. The Commission bears the onus and it has not discharged the onus to show that we have market power. Market power is defined in Section 1 of the Act and it's the ability of the firm to do three different things. The first is control prices and there is no evidence before you that Dis-Chem has in any way controlled the prices of surgical masks. We submit that what you see in the evidence is it responding to demand, responding to supply constraints, taking into account the quotes that exist and most importantly taking into account its competitors' pricing.

The next requirement for market power, whether temporary or otherwise, is that it must exclude competition. Again, the Commission bears the onus. No evidence placed before you of anyone being excluded because of the conduct of Dis-Chem.

Third, and this seems to be the component of the definition that the Commission relies on, it requires Dis-Chem to be shown by the Commission to be behaving to an appreciable extent independently of competitors, customers or suppliers.

Now, in that regard what you in fact see here is that it is checking consciously what its competitors are doing and making a deliberate choice to price below them. With respect to customers you see Dis-Chem lose volume in the period after its price increases. You see some evidence of inelastic demand. You see some evidence of substitution with cloth masks, which of course have not been mentioned at all by the Commission today.

So, the peak sales are before the period that the Commission wants you to look at. They are January and February predominantly and so you don't see customers being held hostage by Dis-Chem at all.

Then lastly, with respect to suppliers, as we've explained, Dis-Chem isn't a price taker. This is not a firm that is impervious to pressure from its suppliers. It's having payment terms dictated that it

never had to endure. It's being told this is when I get it to you and even when commitments are made, they are broken by the suppliers.

So, this is not a firm that is showing you that it is acting independently of any one of those groups or categories. So, we say that the first hurdle that the Commission falls off is dominance. It also fails to establish dominance, because it doesn't engage in market definition and it brushes that off by saying, oh, you just look at the conduct to see what the market is.

The circularity in the Commission's case just cannot be sustained and is not the way in which the Tribunal approaches excessive pricing cases. We need to have the market defined. We need that and the Commission needs to be the party that does that, because we need to know what market is relevant? Who are the competitors that are relevant? What does that supply chain to that market look like? Who are the customers? How can we then assess how customers respond to price increases? Do they switch away to cloth masks? Do they behave in any other way?

Chair, I'm not sure if I'm currently on camera as well. I'm not sure, but you know, if we were in fact in Pretoria at the Tribunal, I would have put on my fetching leopard print cloth mask and come off to Pretoria, because that's the world we now live in and there would be people in the Tribunal wearing cloth masks. There may be some

wearing surgical masks, but you would … the Commission has to do a market definition exercise and it has to consider consumer behaviour.

What we see as well is the Commission engaging in a circular argument about dominance. So, you are dominant if you've got market power. You've got market power, because you priced excessively and you still sell (inaudible). So, therefore you are dominant, but this is assertion with absolutely no evidence placed before you or any argument made to you that actually establishes the elements of dominance, which it has to do.

Mr Smith will of course address you on this notion of temporary market power, yet another novelty in the Commission's case, and even if temporary, it still needs to have the characteristics of market power that independents have the ability to be impervious to pressure from customers, suppliers and competitors. We simply don't see market power, whether temporary or otherwise.

Now, the other element of market power that the Commission needs to establish, because this is a Section 8 case and it has not, is the requirement that it be persistent and durable. This is why there is selective hopping of the timeframe to a period that suits them, disregarding all sorts of relevant facts and periods that are more

useful and of more assistance to the Tribunal. This is why that approach is deeply problematic.

So, the Commission also seems to, at some point in its papers, flirts an argument that somehow the pandemic itself confers market power on Dis-Chem. Well, the pandemic is ongoing. South Africa is yet to face its peak. Lockdown is easing, yet Dis-Chem has already dropped its prices twice.

So, it's unclear how, if the pandemic is the thing that is giving Dis-Chem market power, why isn't it exercising that market power? The pandemic is carrying on. We are all having this hearing from our homes and we are sitting with our cloth masks because of the pandemic. So, the Commission has not explained to you and has not discharged its onus to show you how somehow, from 15 to 31 March, there is pandemic-specific market power that's created.

Finally, the Commission on dominance flirts its next novel theory about local dominance and Mr Smith in his presentation will explain to you the reality and the evidence of the local alternatives and options that are available, given that Dis-Chem stores are generally located in malls.

Chair, I must briefly make a comment. They referred to a Daily Maverick Article of Motta, a book excerpt from Dave Lewis and the ABG Oil case and the CMA decision. We've explained in our Heads

why they have again very selectively read Motta, read Lewis to somehow say there's a temporary monopoly that's at play here, but haven't managed to establish what monopoly Dis-Chem has, completely inconsistent with the claim that we only have 35% market share.

Then on ABG Oil the mechanics of that case are distinguishable. They are addressed in our Heads, but again the finding there was about prevailing circumstances and incredibly high entry barriers to oil refining. This is not the world where anybody with a sewing machine or any dealer or broker who could procure masks from China, manages to enter a market and compete with Dis-Chem.

So, there is simply no pedigree or foundation for these theories that the Commission has flirted on this element of a dominant firm and it would be risky to follow them down this precarious path they've chosen.

Then 8(1)(a) requires you to determine the excessive price and obviously 8(3) gives you the factors that you need to determine, but all I would say on that is that the final element of 8(1)(a) has been dismissed by the Commission this morning as somehow superfluous. Detriment to consumers and customers is a requirement that the legislature left in 8(1)(a) after it amended it. It clearly is not

superfluous. There's a canon in interpretation of statutes that the words must be there for a reason.

So, it's not for the Commission to sweep away and say detriment to consumers follows axiomatically if I've shown you an excessive price. The Commission has to do a separate exercise to establish detriment. It hasn't even tried.

What we have done, as Dis-Chem, is explain to the Tribunal that the detriment that follows here is with respect to the counterfactual in our respect. So, the risk here of a false positive in this enforcement action is enormous. It's not a threat from Dis-Chem to say I won't sell masks anymore. As Mr Hodge has already conceded, there are loads of new entrants that are happily selling masks.

So, it's not some threat that Dis-Chem is making. It is simply that there would be no incentives for Dis-Chem to do what it did, as I showed you in the timeline, to scramble and scour the globe to try to find suppliers, to invest in new supply chains and logistics, to try to secure supply so that it can continue trading from a mall hall. It will leave the market to the true price gougers, to the pirates who outbid on orders that it placed and they got delivery of the stock that my client ordered.

So, the counterfactual here, the detriment to consumers with the approach that the Commission has taken is not simply to say there was an excessive price. That's certainly not and the Commission has not discharged the onus and the detriment.

Then the section requires us to look at 8(2). Of course, this comes slightly out of sequence in the legislation, because the onus only shifts to Dis-Chem to show the reasonableness of its prices if there has been a *prima facie* case established. The Commission has obviously, in our opinion, not even got out of the starting blocks. It hasn't done a market definition. It hasn't identified the basis for dominance. It hasn't established an excessive price. It hasn't established detriment to consumers. There clearly is no *prima facie* case.

Because what then happens on one version of the Commission's argument is that it says that where the two shortcut tick box tests in the regulation could help it, that's a *prima facie* case, but I will address you on whether that's in fact competent when I get to the regulations.

So, then we get into 8(3), which very clearly puts both the Commission and the Tribunal, as the parties determining whether a price is excessive, on notice, that it needs to be looking for two things. The one is whether there is a competitive price. On that again

the Commission bears the onus of proving what a competitive price is here.

The Commission seems to be saying that Dis-Chem's pre-disaster price is a competitive price, but it has not laid a foundation for why pre and post the national disaster the Dis-Chem pricing is the correct standard for competitive pricing and why you should disregard all of the evidence that is before you about what competitors were doing.

So, it also seems to say that the pandemic changes everything and you don't look at anyone else, even in the pandemic. So, the one thing it says is your competitive price is Dis-Chem pre and post disaster. It then at some point seems to be saying your competitive price is Dis-Chem in the disaster, but not really doing an exercise to see what competitors are doing in the disaster.

So, what we know from the evidence is that Mrs Parsons, on the day that she did a price increase, before the regulations, she looked at what the main competitor of Dis-Chem was doing and consciously chose to come in below that. We've also provided you with all the data points about what other prices are in the retail market, the extraordinary prices of hundreds of Rands, you know, R1 500.00 for a box of 50. This is all for Dis-Chem who never gets above 175, 173 for a box of 50. The onus is on the Commission to

show what the competitive price is. It has not even started that exercise.

So, then the legislature says let's look at 8(3) and you've got to take into account all the relevant factors and I will address you shortly on whether the regulations, how the regulations add to this menu, but then if we look at what's required in (a), there is an assessment of price cost margin. Critically the legislature did not tell you which costs to consider.

So, when the Commission says to you it's only the cost on the invoice of the stock sold on a particular day, that's not in the Act. That is not something that excludes the economically rational and plausible theory that Dis-Chem puts forward, which is that costs can include not only all of the costs incurred by a multiproduct firm like Dis-Chem, but also the replacement costs of the stock.

8(3)(b) asks you to look at competing products, other geographic markets, similar products in other markets and historical pricing. Again, that is that world of relevant information that I set out and summarised in the timelines. The Commission has to show that there's competing products elsewhere, how they factor into establishing a competitive price.

8(3)(c) asks you to look at comparative firms' prices and how they operate in a competitive market. Again, the Commission is being

told explicitly to make a case that other firms in competitive markets are not doing what Dis-Chem has done. Then length of time is obviously a critical factor in our case. So, it goes back to the Commission's selection of a 2-week period for its complaint, when in fact the timeline that is relevant here is that forever, until before February, Dis-Chem was charging it, the margin it was charging, it was charging the prices it was charging and then the Covid 19 pandemic hits and it increased prices to be below its competitors and to match what it was being told in terms of quotes.

If it wanted to continue trading in this product line out of the many thousands of SKUs that it sells, it charges that price for a mere number of days and then before the Commission comes knocking, it drops its price for the first time. Why? Because it's managed to secure some stock. Then it drops its price again for a similar instance.

Then 8(3)(e) says look at structural questions in the market, market shares, again no market share exercise done. Of course, Mr Govender, in his affidavit, explains the market shares of Dis-Chem in the different sectors, degree of contestability and barriers to entry. It's quite clear there's been a flood of entry, both at supply level and at retail level to provide masks to people.

Then lastly let me pause now on 8(3)(f), which is the question of regulations. The first point to note is that 8(3)(f) is very specific

about the regulations that can be added to the menu of the 8(3) factors. These are any regulations made by the Minister in terms of Section 78 that are about calculation and determination of an excessive price.

The first point to make here is that if the Minister purports to make these regulations, and the Commission today has confirmed that it says the regulations are made in terms of Section 78, Section 78 has mandatory requirements for how regulations are made. Those requirements are not followed. Section 78 says the Minister must publish a draft, give notice and comment and then promulgate. What the Minister did here was promulgate with effect immediately and then say come and talk to me afterwards. Consultation is very important in a constitutional democracy. Order of law has not been suspended.

So, if the Commission's case, as it was presented today for the first time, is that Section 78 is where the power comes from, Section 78 didn't get complied with. So, then if that is the basis on which the Tribunal finds the regulations are before you, that would be unlawful. Of course, Chair, in the Heads we submitted that we think the regulations, albeit defective under Section 78, the argument advanced by the Commission, are probably saved by the very wide and flexible powers given under the Disaster Management Act to the Minister to

promulgate regulations, but if the Commission were to persuade you that it's actually a 78 set of regulations, that would be completely unlawful.

The regulations are then only made for calculation and determination of an excessive price. So, again if the Commission were to persuade you that somehow the regulations were about shifting onuses to us, that you could do a shortcut through the two tick box exercises in the regulations and somehow shift an onus to Dis-Chem to show the reasonableness of the price, again that would be unlawful.

So, let's look at the regulations. Again, 4(1) says what is prohibited is charging an excessive price and then very clearly the Minister chooses to use different language and say that what I'm regulating here is a material price increase. On the Commission's case today, the regulations matter to capture the conduct regulated from 15 March, there is no price increase after 15 March. The regulations must then be totally irrelevant and do not apply to this case on the Commission's version as advanced today.

The regulations then obviously also talk about costs and I've addressed you briefly on costs, net margin or mark-up. Of course, then merely to note that Mr Aproskie only talks about gross margin. The Commission didn't even try to do a net margin exercise.

Then the Minister says these are relevant and critical factors for determining whether the price is excessive or unfair and perhaps if the Minister's regulation had stopped there, all would be well, but the regulation goes further and says this indicates a *prima facie* case and for the reasons I've submitted about how that becomes difficult for the Minister to amend the Act and shift onuses and the like, if the Commission is going to ignore all of Section 8, then it has not established … it cannot through the regulation short-circuit the stock sheet and say a *prima facie* case is my two checkbox exercises.

If the Commission accepts that it still has to do a full Section 8, as we submit it does, then for all of the reasons I've already said, it doesn't get out of the starting blocks, because it hasn't done any of its homework required. It hasn't discharged its onus to prove all of the highlighted portions of the section above.

Chair, I hope I have now stopped sharing and I'm just back with you.

CHAIRPERSON: Yes, you are.

ADV LE ROUX: Well, then I'm very proud of myself for my first PowerPoint. Chair, if I can then just say something about the Commission's test here, and again, you know, not only is the Commission selective, but it's contradictory at every step of the way.

So, the Commission started off telling us in its Heads at paragraphs 20, 29 and 35 that the regulation sits at the bottom of the menu of 8(3). There somehow it canvassed up the hierarchy to become the only test for proving a *prima facie* case. Then it fudges the time periods, because at various points in the Heads, paragraph 44, for example, at one moment it's 19 March. Today it's 15 March. Sometimes they want to pull the time period back earlier, but it seems as if we are dealing with a case from 15 to 31 March.

Then the Commission, in its Heads at paragraph 35, tried to stake out the position that you could apply the Regulation 4 test before the regs came into effect. That seems to have been abandoned by our learned friend today. So, I won't press that point, but then it also re-characterises Regulation 4 at paragraph 66 of its Heads, now calling it something of an economic test, so no longer some legal test that you must apply, but somehow a pure economic indicator or something.

So, the Commission keeps dodging. It keeps adopting inconsistent positions. It keeps not clearly articulating its case and we might be living under extraordinary circumstances in Covid land, but certainly the respondent is still entitled to know what the Commission's case is.

I suspect that the reason why the Commission is ducking and diving at this is because it needs Regulation 4 to be its whole case, because it hasn't done any of the work it needed to do in terms of Section 7 and Section 8.

So Chair, the Commission has just failed to demonstrate that it's into this section at all. So, then very briefly, the Commission again keeps trying to describe what's going on here is price gouging, but price gouging can only be Regulation 4. We've shown you that there's no price increase to which Regulation 4 can be applied. So, then it must be an excessive pricing case.

So, what would have been better and what this case gives the Tribunal an opportunity to do is provide guidance and assistance to the Commission and also some feedback to the Minister about the regulation, because if the Tribunal were to guide the Commission and say look for a price increase after 15 March, that would filter a lot of cases, if they want to use the shortcut test. If they want to bring cases before the 15th, based on increases before the 15th of March, they must run a full Section 8 and they must think about whether it's appropriate to do that under the Covid regulations that make that happen in a matter of days.

So, the Tribunal could write a decision here that explains that if it's after 15 March and it's an increase, then you can use the factors

under the regulation, but anything else is a typical Section 8 and Section 7 and you have to do your homework.

What of course would avoid all of these contortions and all of these difficulties and which would actually enhance enforcement in these difficult times, because like every South African, we are all concerned about price gouging and people taking advantage of market circumstances because of the Covid epidemic, would be for a much simpler price gouging regulation that doesn't even mention Section 8.

It could set up Mr Aproskie's safe harbour of 10%. It could list the goods that it applies to and the Minister could allocate the task of enforcing that to the Commission. Then the Commission is running a tightly new set of enforcement cases that can only rely on the regulation and can do the simple exercise it wants to do. Otherwise it has to do the Section 8 exercise. It hasn't even attempted it here.

So, if I can then turn to my penultimate topic, which is the administrative penalties, and just to note that I obviously listened very carefully to my learned friend's submissions on that this morning, because they do diverge from the Heads. So, in the Heads the Commission still seeks 10% of total turnover. So, I must just say for the record that that would be shockingly inappropriate. It would go far beyond being punitive and so in excess of any deterrence that it

would be wholly irresponsible, completely unjustified, an unexplained eagerness for scapegoating Dis-Chem.

I started my address this morning by saying that clearly the Commission is feeling some bloodlust. It seems to have forgotten some sense of perspective and proportion. It's trying to find a good company to humiliate and make an example of for everybody else. So, to propose 10% of turnover in your Heads of Argument as an appropriate penalty under Section 59 simply cannot stand.

We set out in our Heads how, if the Tribunal were to follow the well credentialed and well established formula in the case law what the effected turnover for masks would be, obviously given the Commission's case today that it's about 15 to 31 March, it's only that period of turnover that could be used and then we obviously have explained why, if you apply the usual approach to crafting an appropriate penalty, you would in fact reduce it to the number that is set out in our Heads of Argument.

I must just then address the various proposals that my learned friend embraced with vigour on the administrative penalty this morning and say the following. So, first of all, a donation to the Solidarity Fund, however laudable, is not statutorily competent. Section 59 says the penalties are paid to the National Revenue Fund

and it would not be competent to instead say, oh, make a donation to the solidary fund.

There was a suggestion of disgorgement of profits. That's a civil remedy that while Section 59 wants to consider the question of how much profit is made, there's no disgorgement mechanism that exists in Section 59. Then she embraced the American case of treble damages once you've identified the relevant amount, but again it has not explained why we should follow that approach and why it would be superior or preferable to doing the exercise under Section 59.

Section 59 allows you to not apply where contraventions satisfy the elements. It allows you to increase penalty amounts for aggravating circumstances. To just somehow say mechanically we must follow the Americans and do treble damages is simply not a responsible position to take.

Then finally on the interdict idea or a pricing remedy, the question at this stage of the case is what are you interdicting and what pricing remedy could possibly be required? There is no ongoing conduct. Dis-Chem has reduced its prices and as was set out in the answering affidavit it's likely to continue to do that. Its margin is now wafer thin. It is single digits. What would the Commission like to interdict and what would it like to police with the remedy?

So, again, to go back to where I started this morning, what happened in this case was that the market responded as you wanted to. It got an enormous shock at the start of the pandemic and supply and demand became completely dislocated from each other, but they found each other. It re-stabilised the market. Those curves came back into some sort of synchronisation. Prices have since dropped, because there's been an expansion of capacity, because there's been massive entry, both at the retail and at the supplier level. So, the market worked. It does not need regulatory intervention.

Chair, just one other element on that component, the Commission, at some point in its case, even suggested that Dis-Chem restricted output. There is simply no basis for that contention. What you see is Dis-Chem massively expanding output, showing that it didn't have … it didn't suffer the temptations of a firm with market power where you would try to maintain your position in the market by creating shortages. It in fact went from selling a few thousand masks to millions of masks that it is now trading in. So, this is not a firm that has tried to restrict output to its customers.

Chair, I am onto my final topic, which is just, for the record, to put some procedural objections on the record in the Tribunal proceedings, because unfortunately as we all know, often the Tribunal hearing is not the final destination for complaints of this nature. So,

the first objection I must put on the record, for the record, is the Tribunal rules imposing extraordinary time limits and time pressure where there has been no ongoing conduct and wholly unnecessary given that Dis-Chem had already dropped prices or had completely collapsed its margin at the time that the case was run.

Now, obviously superhuman efforts and extraordinary resources have been expended by both parties to try to meet the timetable, but certainly the pressure to process this case, if it's any indication, it's not sustainable that all of the other cases coming behind it should have to do it under this type of pressure where there is no ongoing conduct.

Secondly, just to note that if the Commission, for reasons I've explained, were to find that Regulation 4 was in terms of Section 78, that would be unlawful. If it were to find that Regulation 4 is all that the Commission has to do in terms of Section 8, that would be unlawful. Those would also mean that the Minister had acted *ultra-vires* and Dis-Chem would then have to take a view and consider its position.

It's true that it has not yet challenged the regulations in the appropriate forum, but certainly it reserves its rights depending on the outcomes here and the reasoning adopted by the Tribunal. Finally if the Commission were to persuade you in terms of the time period and

to merely do a check box exercise on Regulation 4 and then shift an onus to us to a regulation by the Minister amending the Act, that too would be unlawful.

Chair, then finally the Commission makes various attacks on Mr Smith and RBB and I must place on record that we object to those attacks and those accusations. They are speaking accusations with no particularity that are grossly unfair, saying that somehow he contradicts the answering affidavit.

First of all, the answering affidavit, paragraphs 2, paragraph 107 explicitly say I'm preparing this answering affidavit under extraordinary pressure. I have provided information and data to Mr Smith and it appears in RBB and I incorporated it into the answering affidavit, which is under oath.

So, to accuse him of producing evidence when in fact the answering affidavit explicitly says that this is all Dis-Chem's information, Dis-Chem's evidence, that is unfortunate and regrettable.

I must finally then just address again the position of Mr Hodge. So, Mr Aproskie is chosen as the Commission's expert. We say nothing about his qualifications as an expert. We reserve our rights in that regard. Mr Hodge comes today and it's very unclear in what status and in what position.

We are pointed to the section of the Act that says a representative can come to the Commission, but we have two internal legal representatives and one external counsel. It's not clear whether Mr Hodge is here to provide his economic opinion as some additional expert, because he certainly opined about economics, but more concerning is that he contravened all of the admonition of the CAC in Sasol, paragraph 178 and … sorry, 101 and 178 of the Sasol decision where economists opining on the law were excoriated by the CAC.

Mr Hodge came today and told you what inferences to draw, how to analyse the pleadings, what arguments should be accorded what weight, how to interpret the legislative scheme, how to interpret precedent, what to do about the challenge to vagueness, what would fall foul of regulations in the act, how to evaluate Dis-Chem's legal arguments. That is entirely inappropriate and again, for the record, we place an objection in the record.

Chair, those are our submissions, if I could just check with my WhatsApp group and then obviously address any questions and then Mr Smith will take over for Dis-Chem, still in non-confidential session to start and then we will move into confidential for the latter part.

CHAIRPERSON: Thank you Ms Le Roux.

ADV LE ROUX: Sorry Chair, I see people typing with the three dots. I don't know what they are typing. Chair, there seems to be nothing in terms of further instructions. So, I don't know if you would like me to do questions now or at the end of Mr Smith in combination. I'm in your hands.

CHAIRPERSON: Well, let's do a few questions to you, because you have dealt with some of the legislative framework issues and I need some clarity myself and I will check with Prof Valodia and Prof Tregenna whether they have any questions. I just want to understand what your position is in relation to the regulation, in particular … now, I haven't seen these regulations being made in terms of Section 78. So, that's a non-starter argument. The regulations make it very clear that the Minister is promulgating them in terms of the powers given under 27(1) of the National Disaster Act and the Management Act. So, Section 78 doesn't even feature.

That doesn't mean that we don't have regard to the regulation, because it's a regulation in relation to both competition authorities and the consumer protection authorities and the consumer commission and the tribunal there.

So, on that score did I understand you to say that the regulation doesn't apply, firstly because of the period of the conduct and that … yes, that's the first and the second is because there were no price

increases after 15 March, but you also said that the Commission's case now is 15 to 31 March. I didn't understand that to be the case. Is that based on what Mr Ngcukaitobi said this morning?

ADV LE ROUX: Chair, let me take those in turn. So, Section … so, what you state Dis-Chem agrees with you that the regulations are promulgated under the Disaster Management Act, which has much wider powers that it affords the Minister. Both the Consumer Protection Act and the Competition Act have mandatory notice and comment periods.

So, Section 78 is only raised because my learned friend this morning said the regulations are made in terms of 78, it didn't entertain the others. So, it's not Dis-Chem's position. It was just to say if that were to persuade you, then of course it's a fatal flaw in the regulation. So, we accept that the regulations are lawful and that they exist and are enforced under the Disaster Management Act powers.

Our submission is then that on the Commission's case, as we now understand it, the case begins with the promulgation of the regulations in the national disaster period. That's 19 March, but they bring it back four days to get to the point of declaration of national disaster, so 15 March.

If that is the case, then we have to look at, well fine, so it only applies from 15 March forward. So, it could only apply from 15

March to 22 April. Of course, Dis-Chem, for the sake of all arguments made in its Heads of Argument, says you do need to look up until the referral date, because April is relevant, but if the Commission says no, no, it's only until 31 March, then the period on the Commission's case is 15 to 31 March. So, lawful regulations apply on the Commission's referred case from 15 to 31 March.

Then you must look in that 2 weeks for the conduct governed by the regulation and that's a material price increase. There is no price increase, material or otherwise. So, then the Commission can only be running a Section 8 case. So, the regulation doesn't join the bottom of the menu of 8(3), because it doesn't apply. There is no increase in the 15 to 31 March period. So, then you just do 8(1), 8(3) factors and 8(2) onus shift. Then for all of the reasons I have said, it hasn't made out its case, no market, they have no dominance, no competitive price, no attempt to understand all of the other factors that could be relevant. So, it loses this referral.

It seems to be saying I don't even need the regulation, because cost and margin are in 8(1). That's fine … sorry, in 8(3). So fine, we say 8(3)(a) says price cost margin. Fine, but then you have to decide which cost and then you are into the argument about it can't just be the cost at which I bought a particular mask sold on a particular day. It must be that you use Dis-Chem's MAC, the moving average cost. It

must be that you consider the replacement costs, the overhead costs and other costs of a multiproduct firm. It could be allocated across and that entire cost exercise hasn't been done in a week. It hasn't been done at all by the Commission. It hasn't been done by Dis-Chem.

So, the Commission, to try to understand the case for the Commission, it would have to be saying I want to look at Dis-Chem for 15 to 31 March. There is no price increase. So, it's a straight excessive pricing case, except it hasn't won one. If it wants to say okay, I'm in trouble now, because I haven't got the shortcut I thought I had under Regulation 4 and it wants to say March, March is still an excessive pricing case, then all of the infirmities and deficiencies and failures that are in its investigation and referral persist.

CHAIRPERSON: Alright, well the Commission will clarify no doubt in reply, but if that is the case, then let's assume that we are with you when you say, well, the regulation doesn't apply for the reasons that you've put up. Does that preclude the Tribunal from having regard to price gouging analyses in other jurisdictions in the context of a pandemic such as Covid 19?

ADV LE ROUX: No Chair, it wouldn't, because Regulation 8(3) says the structural characteristics of the market. That would probably have to … so, 8(3)(e) *[coughing]*… sorry, hopefully it's not Covid. I think

it's talking for too long. Sorry Chair. The market circumstances in which the conduct takes place, so every time 8(3) talks about a market, the Commission … sorry, the Tribunal could think about a Covid market, right, a market in Covid land. So, whenever it talks about similar products in other markets, a competitive market for those goods, with comparative firms, structural characteristics of the market, those would all be places where the Commission could … sorry, the Tribunal could think about how to deal with the fact that we are in Covid land.

CHAIRPERSON: No, thank you for that.

ADV LE ROUX: Sorry, this question of whether … so, the Tribunal could say the Commission is bringing an excessive pricing case, which they are putting a label of price gouging on. The Tribunal would then have to satisfy itself that price gouging and excessive pricing are the same thing. I think we accept it's a species of excessive pricing, but when, and I think I'm anticipating some of Mr Smith's economics, but you would still need to then have the features of an excessive pricing case economically.

So, the persistence and durability of market power, even in the concept of a disaster, and you would have to take into account whether you had market power, whether you had dominance, whether

you had high barriers to entry, whether you had all of those other characteristics of the market where you would typically step in.

CHAIRPERSON: Alright. Let me see if my colleagues have any questions for you and I will come back to a related question. Prof Tregenna?

PROF TREGENNA: I have a lot of questions. Feel free to defer any of them to after Mr Smith's testimony or presentation, if you feel that would be more appropriate. So, firstly in terms of the issue of whether a material cost increase post regulation is required in order for the regulation to apply. So, the way I read Section 4 of the regulation is that Section 4.1 states unequivocally that a dominant firm may not charge an excessive price to the detriment of consumers or customers.

Then what Section 4.2 goes on to set out is (a) a relevant and critical factor for determining whether price is excessive or unfair and it seems to be stipulating that where there is a material price increase, which fulfils 4.2.1 and 4.2.2, that's *prima facie,* it *prima facie* indicates that a price which is being charged is excessive or unfair, but that it's not necessary to fulfil 4.2 in order for 4.1 to hold.

So, 4.1 is not limiting the application to a price increase, because it states that an excessive price cannot be charged.

ADV LE ROUX: Chair, through you, in this respect that is entirely correct. So, we read it the same way and I think we've got the

exposition in our Heads. So, 4.1 is confirming that you are in Section 8 territory. 4.2 says when you've got a material price increase after 15 March on the Commission's case and that price increase fails one of the tests in 4.2.1 or 4.2.2, then its failure of those two tests can be added to the menu in 8(3)(f).

The Commission, in earlier versions of its case, said that is my *prima facie* case, but in the world we are in today where it is still a Section 8 case, the *prima facie* case is that you've established a dominant firm charging an excessive price to the detriment of consumers with reference to all of the other factors.

PROF TREGENNA: Okay, I'm sure it's an issue that we will come back to it, but perhaps related to that, how do you see the relevance of the persistence of an earlier price increase post regulation? How does that feature?

ADV LE ROUX: Chair, again through you, Mr |Smith will obviously describe the economics of persistence and dominance and market prior in the Covid context. I would just say that because we are still in Section 8, the requirements of dominance remain and the requirement of persistence and durability were met. It may be contracted to the dominance in the period of Covid, but in that case then you are in the world that my learned friend for the Commission entertained this

morning, which is the entire disaster period becomes relevant. Not just cutting off at 31 March.

So, if you are saying Covid dominance is now a fact, then it must be before the period of Covid. So, in this case that would then say 15 March to 22 April when the referral is made, in which case Dis-Chem is entitled to rely on all of the price increases, the collapse in margin and everything else that happens in April to say what dominance, what market power, look at what in fact happens here in the Covid period.

So, even in the Covid period the requirements for dominance remain and that's for a second reason as well, which is because it's a dominant firm and dominance defined under 7 and the Commission says you have to show market power here and that's their temporary market power creation.

So, the Commission again wants you to telescope that and say for two weeks I was charging a price, which failed the tests in the regulation. That means temporary market power or pandemic power in some ways, but of course, what we have shown is that that is an unsustainable contraction, because even in that 2-week period Dis-Chem is not acting, to an appreciable extent, independently of suppliers, competitors and customers. It is referencing competitors all

the time. It is thinking through what is affordable to customers all the time and it is a cost taker from its suppliers.

So, it has been told what to pay and that it should feel very lucky if it actually gets masks that it orders. It's looking at what competitors are pricing in the market and consciously choosing to price below that. That's what Ms Parsons' evidence tells you. She consciously chooses to be below the competitor and then customers you see are not just saying oh great, I will continue to buy surgical masks at Dis-Chem. You see the sales drop after the increases and you see the switch away to cloth masks.

But again, I don't want to stray into the territory of Mr Smith, but that would be the approach.

PROF TREGENNA: So, is your view that Dis-Chem is not dominant or is it that the Commission has not successfully made the case for dominance?

ADV LE ROUX: It's not dominant and the Commission hasn't made a case of dominance.

PROF TREGENNA: And are you able to provide relevant market shares, confidentially, in support of the view that Dis-Chem is not dominant?

ADV LE ROUX: Well, I believe Mr Smith will deal with that in the confidential session, but also the market shares are set out in

paragraph 10 of the answering affidavit, or for the category that masks relate to. They don't have a dominant market share. The Commission has not done a market share exercise. So, that is the only evidence that's been placed before you.

PROF TREGENNA: And then my last question at this stage is in terms of the 10% threshold you referred to, do you have any alternative threshold that is being proposed?

ADV LE ROUX: Chair, through you, I mean this is the submissions I made about that this case is an opportunity for the Tribunal to guide the Minister. You know, these are not regulations that have to go through parliament. It is the Minister who promulgates and the Minister can withdraw and we are seeing that in Covid land regulations come out and get withdrawn and come out and get withdrawn and get refined and get updated, because everybody is scrambling to be able to regulate unprecedented market conditions.

So, if the Minister wanted a price gouging statute, he could follow the lead of the international price gouging statutes and they seem to fall into two buckets, two approaches from what we can tell. The one is something qualitative where they talk about grossly unconscionable or totally (inaudible), that kind of language to quantify the increase in some way or they have a much clearer and better defined than Regulation 4. Of course, I referred you to our

Heads where we say they are possibly void for vagueness, we say they are void.

There is the other approach, which is more specific and more certain and more predictable and easier to apply if you are a firm, because it says these products, you can take into account these costs and I stress again that in those regulations and, for example, in the FTC report proposing federal price gouging law in the US, it says take account of replacement and future costs, but it then would say these costs, this is in the cost bucket or half the cost bucket and then it gives a safe harbour provision. Sometimes it's 10. Sometimes it's 15, 20, 25. You know, it sort of depends.

But the critical thing in most statutes is that they regulate for the period of the national disaster. So, the idea is that until supply can come from outside of the disaster area, you want to risk constrain whatever passing power comes in. That of course is not at all what we saw here, firstly because the entire world shut down and secondly because you see a whole lot of entry of clearly very low barriers to entry, but you know, the price gouging statute could either be the qualitative one or these costs are in, these costs are out and here's your safe harbour and that would be much simpler to apply, because we wouldn't be talking about Section 7 and Section 8 at all. It could

be much easier for the Minister to create that forward and allocate the task of enforcing it to the competition authorities.

Then what the Commission did here in its investigation would be what it does. What is the price you paid for the good? What is the price sold it for? I don't think about anything else and I've got a price gouging case.

CHAIRPERSON: Prof Valodia, do you have any questions?

PROF VALODIA: I will wait till after Mr Smith has done a presentation.

CHAIRPERSON: Thanks. I just have a follow-up question on the ones that you've given to Prof Tregenna, Ms Le Roux. The one is that there is an issue of what you are raising is a real issue saying if the regulation was promulgated on 15 March or effective on 15 March and a price increase was effected prior to that. That firm, when it increased its prices, had no knowledge of the fact that that price increase would become subject to 4.2.2, which means that presumption of a *prima facie* excessive price and that's where the *ultra-vires* and the real issue comes up. I mean, that's essentially what you are saying.

So, it would be unfair to say, to require a firm to justify costs when it made its increases, its price increases, they had no knowledge that this would be the consequence of it.

ADV LE ROUX: Chair, with respect, that's absolutely right, because what is the evidence you've got here? The evidence you've got here is Ms Parsons, before there's any regulation, she has been in charge of this line that has been wholly insignificant. It's definitely not the mind set of someone who is a dominant firm who has had, you know, my instructing attorneys march into their offices on an annual basis to explain the obligations of a dominant firm to them.

So, Ms Parsons, who has been looking after many other products, but including this tiny little line item out of the thousands of products Dis-Chem sells, sitting down, going, okay, I've got a world of quotes starting in February, but I had insane prices. I've got demand going through the roof with bulk purchases of people. I've got my suppliers telling me they probably won't be able to fulfil my orders and I'm sitting there and I'm thinking what do I price this at? And she looks at their main competitor, sees the price, which was then R10.99 for two and consciously prices below that.

So, in that decision she says, okay, R10.99 for two, it would be R250.00 for a box of 50s, I'm going to make it 150, it was 150 odd. I can't remember the number exactly. So, she consciously says what's my competitor doing? Let me come in 100 bucks below that. She is not acting like a dominant firm.

So, the rule of law question is absolutely, here Ms Parsons, before there's a regulation, how could you possibly be expected to do a complicated cost margin exercise? What she does is entirely appropriate and acceptable and to condemn her for it, raises all sorts of questions, absolutely.

CHAIRPERSON: Alright, thank you. The last question from Prof Tregenna's question is that assuming that the regulations are lawful and there are no other law questions, maybe perhaps the issue of the presumption of (inaudible) case. If you increase your price on say 13 March, the regulation is promulgated on 19 March.

You look at the regulation, because you know about it, because it was reported widely in the media and in fact you compare aspects of the regulation by making goods available to consumers on an equitable basis and that would be the sort of repackaging and the limiting numbers of items to poor customers. You do all of that, but when you know that there's a pricing concern, but then you retain your increased price. Isn't that ongoing conduct and isn't that in fact a second decision to maintain a higher price?

ADV LE ROUX: Chair, I would say two things in response to that. The first is what you in fact see in Dis-Chem's pricing conduct is the very next pricing decision it makes is a reduction. It starts a series of

price decreases within a matter of days of the regulation coming in. So, that's the first answer to it.

So, what it does is when it looks at its pricing next, it says I in fact reduce them. Now, is it reducing because stock is starting to arrive, it's at a higher cost, but it completely collapses its margin? So, what it is doing is saying on 19 March it's in the world that I showed you in the timeline of placing orders for no delivery, higher prices indicated and then what it does is it collapses its margin, because it has to put through the price decreases that it then can start.

The simple legal answer, the second point is that the regulation doesn't apply to you. So, ongoing conduct is, remember, I lost my page, 4.1 says you may not charge an excessive price. So, that's a Section 8 world. It's not the Regulation 4 world and then you enter all of the exercises of Section 8.

So, maintaining a higher price on your hypothetical is a Section 8 world. There's no obligation, because the regulation doesn't apply to me to reconsider it and the next pricing decision Dis-Chem makes is to drop prices.

CHAIRPERSON: Alright. Thank you for that. Let's move on to Mr Smith.

ADV LE ROUX: Thank you Chair and members of the Tribunal.

PROF VALODIA: Can I just ask another question to follow up from yours, Chair?

CHAIRPERSON: Yes.

PROF VALODIA: So, what I understand the Chair's essential question to be is kind of these issues on whether or not someone is making a decision about a price. On your argument, Ms Le Roux, we would look at that when someone increases or decreases a price. I think what the Chair is kind of suggesting is that perhaps that it should come out a decision when someone decides to draft to change a price.

So, let's kind of assume we are in a world where that regulation is not answered. Dis-Chem doesn't know that that regulation is going to come, but Dis-Chem does know that it has charged its prices in the reference period when the regulation comes out. Is it not required to make a decision about whether or not it maintains that price of whether it reduces the price to conform with the regulation on the day that the regulation comes out? So, the kind of debate is, is that the decision or not?

ADV LE ROUX: Chair, let me … can I think about this and come back after Mr Smith? It clearly is a very important question. I have an answer, but I think I would like to do some WhatsApp consulting while Mr Smith takes the stage, if that's acceptable.

CHAIRPERSON: Yes, you can think about it. Let's hear from Mr Smith.

ADV LE ROUX: Thank you Chair and members of the Tribunal.

MR SMITH: Thank you very much, Chair. Can you see me and hear me?

PROF VALODIA: Chair, can I suggest that we take a quick comfort break before Mr Smith starts?

CHAIRPERSON: Alright, let's take a 5-minute adjournment.

A d j o u r n m e n t

On resumption:

[The recordings does not start right at the beginning of the session]

MR SMITH: … the general matter. I think there's very little divergence on arithmetic amongst us and number three, we can provide those summaries to you at very, very short notice. I will present what we have, the available data and then I'm over to you for questions. Thanks very much Chair.

I will say I anticipate I'm presenting as an expert witness today. I understand my duty is to you and to assist in your determinations and I will certainly defer to you on all the areas more of fact. I will of course refer to where I've seen facts or been provided with facts by

Dis-Chem, but the facts remain there. So, the economics is what I'm trying to present to you.

I wonder if I could also have reference to a slide show. Really it's to make some of the data in particular more clear in the presentation and I hope you can see that slide show now. It's just a continuation of the exhibit that Adv Le Roux has started. Can you see that, Chair?

CHAIRPERSON: Yes.

MR SMITH: Fantastic. So, I'm first going to make some comments on the economics of excessive pricing. As I say in my report, I have been instructed that there are maybe three requirements legally that have some economic input in them potentially and that is dominance and secondly whether or not prices are unreasonably higher than a competitive price and thirdly some detriment to customers or consumers.

I really want to comment on the economic necessity and important role of these requirements with reference to the literature and I will first do that as a general matter and then in the Covid land or the context of a national disaster.

I discuss this at paragraphs 25 to 52 of my report and this really goes to the literature that is not new and I know this Tribunal and our courts have talked about these authors for more than a decade now

and really from paragraph 28 the key economic consideration is why would we have requirements in a case like this? It's to avoid unintended consequences.

The first unintended consequence or general class of consequences spoken about in the economic literature is that prices have value. They drive markets. They provide information. They provide incentives and therefore there should be some threshold to intervening and affecting that price setting and price delivery process.

This notion of prices as providing a signal I expand on further to encourage competitors, potential entrants. They provide incentives for expansion and finally, over-enforcement may reduce the incentives for dominant firms or other firms to expand output, to really invest in changing their supply chain or other investments. I know that we think that in this context and I believe the fact to you that I think Dis-Chem was described as yet another intermediary, however, they have changed their supply chain and they have involved some investment and some substantially higher costs, as I will show you in the confidential section and that was a risky decision of theirs that required an incentive.

I will leave the rest of these general comments, but I will come back one to specifically on dominance. I think dominance is a sensible economic requirement for an excessive pricing case and it's

because, and I and many of the other authors that I've referred to here think that the market economy and competition as a whole is a beneficial process that leads to better outcomes for consumers. That's why we are in a competition tribunal, not just a price regulating tribunal and that's why in the vast majority of economic interactions firms, buyers and sellers set prices or negotiate prices amongst one another and that's an efficient way in which competition normally takes place.

Dominance then provides a threshold. There's a materiality and, as I discussed, some persistence to getting into some sort of intervention. I think this is required to balance against the risk of these unintended consequences, these costs of false positives, if you like.

Now, in my report in a general matter I talk about the long run or having market power over time. Various authors talk about the importance of only apply excessive pricing where markets are unlikely that normal competitive forces will eliminate that market power over time.

Now, I think Mr Hodge mentioned this and Adv Le Roux as well. I think this dominance assessment must be content-specific. I think it's a sensible economic requirement for a test such as this, but obviously within Covid land or the context of a national disaster more

generally persistent market power may be different. It's certainly up to you and hopefully some of the facts and data I will show you in a moment will assist in your consideration, but whereas in a Sasol-like case you might think, well, they've been dominant or they've had that market power position for more than 10 years, I don't for a moment suggest that that same persistence is required in a state of a national disaster, but I think there still must be that persistence, but this is not something that is going to be normally sorted out by the workings of the market and indeed price signals are efficient in sorting out how competition actually works.

The second requirement here we talk about a competitive price. I think and I'm instructed that it's jurisprudence that goes in a similar direction. The competitive prices is that price that would pertain under conditions of, I think, long-run competitive equilibrium and which is free entry and exit and firms are able to recover all of their efficient total cost of operation, including a fair return on capital commensurate with risk.

Again, I think that competitive price is within a context. I think in the extremist, if we were to take away dominance and the consideration of a competitive price, will it be reasonable to intrude on every single interaction between one buyer and one seller for one year's of goods at one moment in time? I don't think so. That will be

wildly inefficient and that would intrude or even eliminate competition.

So, I think we are in a realistic competition world here. There's reasonably effective competition. Markets are not perfectly frictionist and we even, within the state of a national disaster, I think competition can be a huge force for good and consumer welfare, but markets are never going to be perfect and again it's for you to decide whether a couple of weeks of adjustment is the normal frictions you would expect in a reasonably competitive market as opposed to persistent market power.

Finally, there's this discussion of detriment to consumers. I think the one point on detriment to consumers that does perhaps merit an economic commentary is we talk about the context of a national disaster and I think the quote was made this morning that what could more clearly insure to the detriment of consumers? I think what would even more clearly than higher prices during a national disaster is lack of supply, suppliers having stunted that competitive process that leads to a huge number of different suppliers globally fulfilling the increased demand in South Africa, and I will come to some data that goes towards that.

Then let me just move on quickly. The next slide I've really raised this point in my report and that's at paragraph 23 and 24 and I

talk about the literature on Amartya Sen and I thought it was relevant here, because Sen you probably know is the Noble Prize winner from 1998. My own master's degree was in development economics. So, I'm very enthusiastic about this literature, but I won't go into all of it now, but he does talk about optimal … well, he talks really about causation of acute depravation in times of famine and reasons for poverty.

He actually raises the point of demand side responses and actually says that some supply side interventions, some overly burdensome supply side responses actually cause shortages in local areas or can cause shortages and actually if the supply side was left to work effectively and the demand side such as subsidies, grants to people, which I know happens in this country to an extent and will be required in the coming months, might be a more efficient way of addressing these challenges.

I only raise this as a general literature, just to the extent that you are performing this balancing. There is a huge discussion out there over whether or not supply side friction such as over burdensome regulation might actually make things worse.

The next slide just very briefly, in response to my report, if I understand the Commission's affidavit, mentioned two further papers. They mention the CMA paper. Now, I just wanted to point out in

passing the CMA paper is not actually about unilateral pricing. It's not about using excessive pricing regulations. Yes, they do mention it in passing, but the whole paper, as you can see on this slide, is about the CMA's approach to business cooperation, effectively being more careful in its pursuit of anti-cartel laws in a time in which more coordination might be required.

The next paper I wanted to briefly to talk about Motta. Now, I have mentioned Motta. I've mentioned Motta and others in peer review journals. I've mentioned papers that have come out of symposiums and discussions amongst academics. The way the economic literature typically moves forward is through peer review journals. Journals come out in draft and they are commented on and they are debated on and then they go into the public domain.

I understand this paper by Motta a couple of weeks ago, it's not really a paper, it's an article and I respect him. He is a clever guy, but let's not read too much into what an Italian living in Brussels and then Barcelona can tell us specifically factually about the supply and manufacture of masks in South Africa. I had thought that the first time that this was read it was slightly selective.

If we look at this, it's a Daily Maverick article and just very quickly there were no comments on this article. This is not a peer reviewed article. This hasn't gone through academic discourse.

Second, Prof Motta himself, in the title, says price regulation in times of crisis can be tricky.

He then says the Covid 19 outbreak is certainly not the first case of these excess demand situations. So, he is saying these things have happened, this type of situation has happened in other contexts and he also says that instruments for temporary price ceilings include, and then he goes on list other ways of addressing pricing complaints. Let's talk broadly and I know Adv Le Roux has talked about other potential interventions.

He then says regulating prices using competition law is unusual and at first excessive pricing actions may appear an odd instrument. They require the finding of dominance. Again he goes through possible adverse effects, the price regulation and he key point is if you are too quick to regulate prices, you prevent the efficient mechanism through which prices signal, that supply response, that expansion, that investment, that entry into the market.

Again, under the current circumstances objection one will not apply if supply is unlikely to respond in the short run. Now, I think that supply did respond in the short run and I will show you some data on that in a moment. Finally he says excessive pricing actions may also create legal uncertainty. Again, this is a disincentive for other firms in a similar position saying shall we go or are we, when

we haven't been dominant in the past in a particular sector, are we free to just move in this market or do we have to get complicated legal advice on compliance every time we set a price or cost?

Finally he says hopefully they will not be enforced so strictly, these excessive pricing regulations, but rather in line with the jurisprudence. Now, I certainly leave that to you, but his final comment is an economic one. When supply is responsive, and I think here at these much higher prices you did get expanded sources and volumes of supply, a strict enforcement of price ceiling would kill any badly needed production increase.

This is some other aspects of that article that I saw were not perhaps as clear in the way the Commission used it in their affidavit, but I will move on.

On market definition and dominance, Prof Tregenna, I know you asked Mr Hodge about market shares and I think Adv Le Roux as well. Mr Hodge said there were enormous volumes. I haven't seen more market share information than there is in paragraph 10 of Mr Govender's affidavit. Also, I haven't seen enough data to conclude which products compete with which. Yes, we may talk surgical masks. Are you talking all of the SKUs, the Dis-Chem sales that everyone else sells? Are they cloth masks? We simply don't know these aspects and I will come back to Mr Hodge saying, well, they

had a large amount of stock, because I think we have some data on that shortly.

So, there are these confounding changes. I deal with this at paragraph 112, but I will leave that where it lies. It's not enough to say, well, prices went up and volumes went up and therefore you have market power. No, there was something else going on, which is a big part of the Commission's case, is that demand obviously increased.

On the product markets, I deal with this at 116 in my report, I think demand substitution is an open question, which masks competed with which. More generally supply substitution, Adv Le Roux mentioned a lot of other people that started selling masks, but effectively what do masks require? Shelf space. For a multiproduct retail this is critical for supply substitution and expansion and Mr Hodge again said that Dis-Chem is just yet another intermediary.

On the geographic market I will very briefly go through some observations here. Firstly, the timing, Mr Aproskie's first affidavit, I think it was, mentions oh well, Covid restrictions and lockdown mean that you have a smaller geographic area to go to, but that's only from 27 March. Now, I will certainly leave to all of you who are much cleverer on these things about what this complaint is, but if it's about lockdown restrictions, that's potentially the last four days of the period Adv Le Roux has pointed me to.

Secondly, there is still scope for competition under these restrictions and I had deal with this at paragraphs 117 and 118 of my report, but I will very briefly go through what the top ten Dis-Chem stores look like and these are the top ten Dis-Chem stores by sales of masks. You can see even if we are in that period post 27 March when people may or may not, I can't tell you factually, drive to their local Dis-Chem, these are the ten biggest Dis-Chems.

You see this Dis-Chem in Lynwood Road, there's a Clicks I understand from Google Maps literally within the same shopping centre. Likewise Greenstone Mall has a Clicks pharmacy and a Pick n Pay pharmacy and a Medi-rite pharmacy in the bottom left hand corner of slide 11 here. Dainfern Square, again there is a Clicks in the same mall. Lynwood Lane, there's a Dis-Chem in the bottom right of the screen. There's a fragrance boutique. I don't know why it is highlighted and there is a Clicks pharmacy in the Grove, literally across the road. In Raslouw there's a Dis-Chem pharmacy in the top of the slide. Then there is a Clicks pharmacy, a Medicare pharmacy, a Medi-rite and an Alpha Pharm within a very short distance.

Brooklyn mall, again Dis-Chem and Clicks are both in the same mall and Arrie Nel Brooklyn seems to be across the road. Lynwood Manor right in the middle of the screen, just above the M6 you see the relevant Dis-Chem store and again within relative close

proximity a large number of other pharmacies. Centurion Mall, again if we are going down this list, Dis-Chem pharmacy Centurion Lake Mall and a Clicks pharmacy in Centurion in the same mall.

So, I don't know, I have not got data on accurate geographic markets. I understand that Dis-Chem's prices are largely set on a national basis, but even if lockdown, even for the last four days of this period that we might be talking about, even if that did reduce the geographic scope of the relevant market, these are other pharmacies in the same mall, South Coast Mall near Durban, again there's a Dis-Chem and a Clicks in the same mall and again Montana Dis-Chem and Clicks.

A final slide on this, in Montana, the local area, you will see that Dis-Chem is actually not labelled there just under this R513, I think it is and Clicks pharmacy Kolonnade was the one in the same mall and you see a large number of pharmacies in the local area.

So, I don't think, I haven't seen any evidence that Dis-Chem is dominant locally, nor from this period of the 27th onwards, nor why that dominance, if it did happen from the 27th onwards, would give Dis-Chem economic dominance in the period January or February or early March.

So, I will leave those points with you on this market definition. I think Mr Hodge raised a couple of curious points in regard to

dominance. He mentioned for dominance we might look *ex post*, but of course, that's not the case in many dominance enquiries. We do define markets in all dominance enquiries that I'm aware of. I mean, the cellophane fallacy is one example where you obviously think about a competitive price in market definition in regard to a dominance enquiry, even *ex post.*

He mentioned looking at stable margins, but I will come to some data on that in a moment, but let me briefly address you on the importance of this competitive benchmark and really qualitatively before we get into the confidential data what might be important to look at.

So, firstly we are looking at prices and costs and what might we expect? I've set out in my report why I think the competitive benchmark is so important and it's simply to avoid these massive unintended consequences and costs and inefficiencies to the economy of trying to regulate every single minute interaction between every single seller and every single buyer.

So, even dominant firms, well, all firms are told there it is in the Act. If you are dominant, go and read Section 8. If you read Section 8, you find there is a competitive price. So, firms go about their business and they say, well, if I'm not dominant, competition applies. Then what does that competition look like? Even dominant

firms know that if they don't deviate from the competitive price, they are okay under Section 8.

So, here we look at what would you expect the relationship between prices and costs to be in a competitive market. I know the discussion of cost categories, I won't go through it now, but it's paragraph 70 to 74 in my report. I also talk about the complexities of Dis-Chem as a multiproduct retailer and I don't know of an excessive pricing case involving a multiproduct retailer just selling one product, but I talk (a) of the challenges of allocating common costs and (b) multiproduct, the fact that Dis-Chem is a multiproduct retailer and its competitors are too is relevant because of the supply substitution point I made. Entry and expansion in any one category is relatively easy if you can shift shelf space from one product to another.

I did want to somewhat less briefly talk about the importance of historical and replacement procurement costs. I think in the Commission's answering affidavit or their Heads they've mentioned that I speculate. I don't speculate at all. I provide some economic evidence and this is at paragraphs 85 to 87 in particular of my report. In particular in 86 and 87 I talk about why might you expect replacement procurement costs to feature in the pricing of firms under a competitive benchmark?

I first raised the point that if other competitors hold little or less or no stock, of course, replacement costs are immediately relevant to their pricing and even in a competitive market, if there's one firm with a big warehouse and three competitive firms with small warehouses and there's effective competition amongst them, the market price is going to tend towards immediately passing through or very quickly passing through those replacement costs.

Likewise, at the end of a shortage the one with the big warehouse is going to have to follow the market down on pricing before its replacement costs, sorry his warehouse costs have reflected that. I mention that at paragraph 86.

Secondly, there is an economic reason, because the cost of you selling out of your warehouse is the opportunity cost of replacing that stock. Yes, you can think, well, I bought this for 10. The current market price is 20. Why don't I sell for 10? Well, because I'm going to have to keep my business running. Businesses don't start and stop in a day. So, I'm going to have to keep my business running at 20. I'm going to have to replace that. The opportunity cost of selling out is 20. So, let me think at least of 20.

Thirdly, and this I understand has some factual support, but I certainly defer to you on those facts. A firm may fear that retail prices might need to be set to cover those high replacement costs might not

be … there may be some incentive for firms or some rationale for firms to test these high retail prices in the market. I understand that would need to happen over a short period of time and it comes back to the persistence point we've made just now.

But the fourth point really goes back to what is this competitive benchmark? Now, clearly the competitive benchmark is context-specific, but in this case what would free entrants and free … if there were free entrants and exists in this market, what would their cost be and they would be replacement costs? That is what the competitive benchmark tells you pricing would be guided by.

Now, I point out in paragraph 87 some examples of this, farmers, miners, anyone with a traded commodity obviously follows the market price on the way out of their warehouse, virtual or not, whatever cost it came in at, but I know that Prof Tregenna, I think you raised a point to Mr Hodge, what if there were two prices of stock? Really what my first part of 86.1 deals with is what if there are two competitors with two different costs in a reasonable competitive market? The one has procured, maybe with a smaller warehouse, at the replacement cost, at a higher cost, sets his price and the second one has no incentive, even competing effectively, to undercut by more than a small margin in order to win those sales.

I think again it's artificial to say that firms should not be allowed to have any regard to replacement costs, because we know the risk, volatility, what's happened to the forex markets, what happened to the stock markets are likely to feed into business people's decision making.

Very briefly prices and demand is the last point on this slide and that's even in a competitive market. If demand increases massively, prices with anyone with an even slightly downward slope in demand curve will take that increase in demand as some combination of higher volumes and higher prices. That's what will happen in your competitive benchmark.

I want to leave it there on the non-confidential. I'm acutely aware of time, but I had some data points I would really like to take you to, if that's alright to switch across to the other session. Chair, I'm in your hands.

CHAIRPERSON: Yes, thank you Mr Smith. We are going to switch across to the confidential session. Those of you who have permission to access that link, will you find your way there now and then we will come back into the public session when we are done there?

Competition Commission and
Dis-Chem Pharmacies Ltd

CONFIDENTIALITY STARTS

END OF CONFIDENTIALITY

Confidential

CHAIRPERSON: We are out of the confidential session. We would just like to put on record that we have decided to adjourn for the day, given the lateness of the hour and it has been quite an intense day. We will resume and reconvene our proceedings on Wednesday the 6th of May at 9 am for 2 hours and we will then, in that time, do all the final submissions from the respondents, both Mr Smith and Ms Le Roux and any questions that the panel may have for them and then we will do a reply from the Commission, which would include both legal submissions and Mr Hodge's reply and any questions that the panel may have for Mr Hodge.

We will try to complete our proceedings before the 2 hours, but we just wanted to not put ourselves under pressure for whatever important technical issues that we have to go through. So, I want to thank you all for your participation today and to say that we will be back in a hearing on Wednesday at 9 am. We might start with a confidential session, but you will be advised by Alistair where things stand in the morning.

So, I wish you a good afternoon and see you on Wednesday.

ADV NGCUKAITOBI: Thank you Chair.

ADV LE ROUX: Thank you Chair.

CHAIRPERSON: Don't forget the request that we made to you both in terms of that joint minute and the slide presentation.

ADV LE ROUX: Yes, Chair, absolutely.

CHAIRPERSON: Thank you. Okay, bye-bye.

A D J O U R N M E N T

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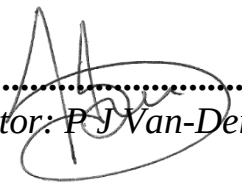

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