



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CR003Apr20

In the matter between:

The Competition Commission

Complainant

And

Babelegi Workwear and Industrial Supplies CC

Respondent

Panel:	Ms Mondo Mazwai (Presiding Member) Mr Enver Daniels (Tribunal Member) Mr AW Wessels (Tribunal Member)
Heard on:	24 April 2020
Last submission received on:	1 May 2020
Order and Reasons Issued on:	1 June 2020

ORDER AND REASONS FOR DECISION

Introduction

1. On 09 April 2020, the Competition Commission (“Commission”) referred a complaint to the Competition Tribunal (“Tribunal”) against Babelegi Workwear and Industrial Supplies CC¹ (“Babelegi”), in terms of section 50(2)(a) of the Competition Act No 89 of 1998, as amended (“the Act”); alleging that Babelegi contravened section 8(1)(a) of the Act during the period 31 January 2020 to 5 March 2020 (“the Complaint Referral”).

¹ The Commission initially referred its complaint against Babelegi Workwear Overall Manufacturers & Industrial Supplies CC. The Respondent clarified in its Answering Affidavit that the correct name of the entity is Babelegi Workwear and Industrial Supplies CC (registered on 18 March 1998) 1998/014474/23 (Answering Affidavit, paragraph 38.2).

2. The alleged excessive pricing contravention relates to Babelegi's sale of face masks, specifically Dust Mask FFP1 Pioneer ("FFP1 masks") during the period 31 January to 5 March 2020 ("the Complaint Period"). The Commission alleges that Babelegi, taking advantage of increased demand for FFP1 masks in the context of Covid-19 (discussed below), charged excessive prices for masks not corresponding to any cost increase that it faced.
3. The Commission seeks an order that declares that Babelegi's pricing conduct during the Complaint Period constitutes a contravention of section 8(1)(a) of the Act and consequential relief that interdicts and restrains Babelegi from engaging in any further conduct in contravention of section 8(1)(a) of the Act; and imposes an administrative penalty of 10% of Babelegi's turnover in the Republic and its exports from the Republic during its preceding financial year.
4. Babelegi denies that it contravened section 8(1)(a) of the Act during the Complaint Period. It disputes that it was a dominant firm in the market during the Complaint Period. In its Answering Affidavit it accepts the Commission's factual allegations on its price increases for masks during the Complaint Period, but it contends that its adjustments to its selling prices of FFP1 masks during this period were effected since it was warned by its suppliers of impending price increases.

Background information

5. Babelegi operates from premises in Rosslyn, Pretoria. Its principal business is the manufacture, distribution, import and export of overalls and allied products. As stated above, the alleged excessive pricing conduct relates to Babelegi's sale of FFP1 masks, which is a type of dust mask. Babelegi purchases these masks from suppliers, including Sicuro Safety CC ("Sicuro")² and then on-sells the masks to customers. In relation to masks, Babelegi thus can be described as a reseller. That the alleged conduct takes place in a reseller environment during a period when Covid-19 has emerged, is important for the economic analysis that will follow.
6. The Commission emphasises that the Complaint Referral must be considered within the context of the Covid-19 outbreak and its impact on the world, in general, and on South Africa, in particular. It says that Babelegi's pricing conduct during the Complaint Period is a direct response to, and a result of the exceptional Covid-19 health crisis,

² Sicuro was Babelegi's supplier of masks during the Complaint Period.

which had brought about an increased demand for FFP1 masks. The Commission further contends that masks are being used by members of the South African public, and worldwide, in an attempt to try and protect themselves and others against the spread of the Covid-19 virus and that this has led to the panic buying of face masks, including FFP1 masks as sold by Babelegi.

7. Procedurally, the Commission, in its Complaint Referral, invokes urgency as well as the filing procedure outlined in the Regulations on Competition Tribunal Rules for COVID-19 Excessive Pricing Complaint Referrals³ (“Tribunal COVID-19 Rules”) as published by the Minister of Trade, Industry and Competition (“the Minister”). These rules, in the context of Covid-19, provide for shortened time periods for proceedings in excessive pricing matters.
8. Babelegi disputes the urgency of the matter. It submits that the Consumer and Customer Protection and National Disaster Management Regulations and Directions as published by the Minister on 19 March 2020⁴ (“Consumer Protection Regulations”) do not apply to the Complaint Period; and, therefore, the Tribunal COVID-19 Rules do not apply. Nevertheless, from a procedural perspective, Babelegi complied with the timeframes stipulated in the Tribunal COVID-19 Rules when filing its Answering Affidavit.

Covid-19

9. When assessing alleged excessive pricing conduct in terms of section 8 of the Act, regard must be had to the economic and other conditions at the time of the alleged conduct. These conditions in this case, as we shall demonstrate below, include the Covid-19 health crisis.
10. In December 2019, Chinese authorities announced the emergence of a virus known as the severe acute respiratory syndrome coronavirus 2 (“SARS-CoV-2”). The disease it causes is called coronavirus disease 2019 (“COVID-19”). Since then Covid-19 has been a prominent issue internationally and in South Africa. The symptoms of Covid-19 are largely respiratory and can range from mild upper respiratory tract

³ Published under Government Notice No R 448 in Government Gazette No 43205 of 3 April 2020.

⁴ Published under Government Notice No R 350 in Government Gazette No 43116 of 19 March 2020.

manifestations to respiratory failure, multi-organ failure and death.⁵ Whilst there are ongoing studies, there is currently no proven cure and there is no vaccine.⁶

11. We provide a timeline highlighting the major events that took place since December 2019 in relation to Covid-19:⁷

11.1. On 31 December 2019, the World Health Organisation (“WHO”) becomes aware of a respiratory disease of unknown cause.

11.2. On 7 January 2020, a positive pathogen is identified which is known as the Novel Coronavirus (2019-nCoV).

11.3. On 10 January 2020, the WHO issued a comprehensive package of technical guidance online with advice to all countries on how to detect, test and manage potential cases, based on what was known about the virus at the time. This guidance was shared with WHO’s regional emergency directors to share with WHO representatives in countries.⁸

11.4. On 22 and 23 January 2020, a meeting of the Emergency Committee was convened by the WHO under the International Health Regulations (2005) (“IHR”) in order to advise the WHO on whether a Public Health Emergency of International Concern (“PHEIC”)⁹ exists in respect of Covid-2019. The WHO at that time indicated that it was expected that further international exportation of cases may appear in any country and that all countries should be prepared for the outbreak to reach them.

11.5. On 22 January 2020, in anticipation of the outcome of the WHO’s Emergency Committee meeting and a potential PHEIC declaration, the South African Government establishes an Emergency Operation Centre to deal with Covid-19.

⁵ *Inter alia* “Health Department outlines SA’s preparedness for COVID-19” (14 March 2020) *MedicalBrief* (citing Health Minister Dr Zweli Mkhize’s statement made at a press conference held on Sunday, 1 March 2020 accessed at <https://www.medicalbrief.co.za/archives/health-department-outlines-sas-preparedness-for-covid-19/>).

⁶ Founding Affidavit deposited to by Itumeleng Lesofe, “Founding Affidavit” at paragraph 11.

⁷ Factual allegations are as alleged by the Commission (and not disputed by the Respondent) in its Founding Affidavit at paragraphs 11 to 29, unless otherwise specified.

⁸ WHO Statement “WHO Timeline – COVID-19” (last updated 27 April 2020) accessed at <https://www.who.int/news-room/detail/27-04-2020-who-timeline---covid-19> (“WHO Timeline”).

⁹ A PHEIC is a formal declaration by the WHO of an extraordinary event that constitutes a public health risk through the international spread of disease and potentially requires a coordinated international response.

- 11.6. On 27 January 2020, South Africa improves its border security measures to detect, manage and contain Covid-19 cases.
- 11.7. On 28 January 2020, the National Institute for Communicable Diseases starts testing people in South Africa for Covid-19.
- 11.8. On 29 January 2020, parliament meets to discuss the impact of Covid-19 in South Africa and the country's ability to detect, manage and contain the virus.
- 11.9. On 30 January 2020, the second meeting of the WHO Emergency Committee results in its Director-General declaring Covid-19 a PHEIC.¹⁰ The WHO's situation report for 30 January reports 7 818 total confirmed cases worldwide, with the majority of these in China, and 82 cases reported in 18 countries outside China. The WHO gives a risk assessment of "very high" for China, and "high" at the global level.¹¹
- 11.10. On 30 January 2020, following the PHEIC declaration, the South African Emergency Operation Centre that was established on 22 January 2020 is activated, and an Inter-Ministerial Committee is formed to co-ordinate collaboration across different departments to deal with the global outbreak of the Coronavirus. The Health Minister on 31 January 2020 details South Africa's response to the outbreak. In addition to the abovementioned operation centre, the department announces a number of hospitals across the country as centres for isolation and treatment of people infected with Covid-19.
- 11.11. On 27 February 2020, *Eyewitness News* reported that face masks are selling out.¹²
- 11.12. On 5 March 2020, South Africa announces its first confirmed Covid-19 case.
- 11.13. On 15 March 2020 the Head of the National Disaster Management Centre, after assessing the potential magnitude and severity of Covid-19 in the country, gives

¹⁰ Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV) 30 January 2020 Statement Geneva, Switzerland accessed at [https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)).

¹¹ WHO Timeline.

¹² Founding Affidavit, annexure marked IL1. (Ayanda Nyathi "Dis-Chem Running Out of Face Masks as South Africans Prep for Coronavirus" *Eyewitness News*, accessible at <https://ewn.co.za/2020/01/31/surgical-face-masks-fly-off-shelves-at-dis-chem-stores-in-wake-of-coronavirus>).

Non-confidential version

notice,¹³ classifying Covid-19 as a national disaster; and the Minister of Cooperative Governance and Traditional Affairs declares a national state of disaster.¹⁴ That same day, the State President declares the outbreak of Covid-19 a national state of disaster; accordingly, he shuts designated ports of entry as well as schools.¹⁵

- 11.14. On 18 March 2020, the Disaster Management Regulations¹⁶ are published.
- 11.15. On 19 March 2020, the Consumer Protection Regulations are published.
- 11.16. On 23 March 2020, the President announces a 21-day national lockdown that would take effect from midnight on 26 March 2020.¹⁷
12. It is clear from the above events that Covid-19 is an ongoing health-related crisis with both economic and social consequences for South Africa. In an excessive pricing conduct context, the economic effects of Covid-19 are relevant. These include the crisis' effects on markets, including demand and supply disruptions, and other potential distortions to the way in which markets would normally function, absent the crisis situation. An international or global spike in demand for products such as masks could mean that import channels are no longer available for the importation of masks into South Africa, or that masks are not available in South Africa for local use because they are being exported from South Africa due to the increased international demand for masks. In other words, a twofold challenge may present itself: a surging domestic and global demand for masks and a major disruption to the global supply of masks.
13. We highlight three aspects of Covid-19 that are important to the assessment that will follow:
 - 13.1. First, it is a global health-related crisis. Since first detected in China in December 2019, it has been widely reported on in mainstream media, including in

¹³ In terms of section 23(1)(b) of the Disaster Management Act 57 of 2002 (Classification of a National Disaster published under Government Notice No. 312 in Government Gazette No. 43096 of 15 March 2020).

¹⁴ In terms of section 27(1) of the Disaster Management Act (Declaration of a National State of Disaster published under Government Notice No. 313 in Government Gazette No. 43096 of 15 March 2020).

¹⁵ Competition Tribunal: Covid-19 Procedures – 17 March 2020 Announcement accessible at <https://www.comptrib.co.za/Content/Documents/Tribunal%20COVID-19%20Procedures.pdf>.

¹⁶ Regulations issued in terms of section 27(2) of the Disaster Management Act, 2002 published under Government Notice No. 318 in Government Gazette No. 43107 of 18 March 2020.

¹⁷ South African Government Speeches “President Cyril Ramaphosa: Escalation of measures to combat Coronavirus Covid-19 pandemic” (23 March 2020) *South African Government* (www.gov.za) accessed at <https://www.gov.za/speeches/president-cyril-ramaphosa-escalation-measures-combat-coronavirus-covid-19-pandemic-23-mar>.

South Africa. Mr James Hodge (“Hodge”), the Commission’s expert economist in this matter, describes Covid-19 as “*a unique disaster insofar as it's a global pandemic, not a localised disaster.*”¹⁸

- 13.2. Second, an event related to Covid-19, or a step taken to combat Covid-19, may trigger a number of other steps or effects, and this is ongoing.
- 13.3. Third, it has significant economic effects globally including in South Africa. Given its global scale and effects, many markets may have been affected or distorted.
14. It is common knowledge that the global spread of Covid-19 increased the demand for personal protective equipment and gear, which include face masks. Importantly, this increase in global demand occurred prior to the announcement of a state of disaster in South Africa on 15 March 2020. Babelegi, in relation to the effects of Covid-19 on the sale of masks, admits that there has been an increase in demand for FFP1 masks and ‘face masks in general’ since the advent of COVID-19¹⁹ and “*that the outbreak of COVID-19 did lead to greater demand for face masks in a general sense*”.²⁰ It further admits that increased sales of masks and hand sanitisers were reported by late February 2020 and up to the end of March 2020.²¹
15. Later, we refer to evidence relating to the demand for masks during the Complaint Period. This evidence shows that the supply chains for masks were affected during the Complaint Period because of increasing demand globally for these products.
16. As already mentioned, Babelegi’s defence for its admitted increase in prices for FFP1 masks during the Complaint Period in light of the heightened demand, is that it anticipated higher purchase prices for face masks to be imposed upon it by its suppliers as demand started to challenge and outstrip supply.²² We shall assess this aspect below.
17. Potential pricing and other abuses related to the Covid-19 crisis are receiving international attention by competition authorities, including in South Africa. For example, on 23 March 2020 the European Competition Network, comprising the European Commission (“EC”) and Member States’ national competition authorities,

¹⁸ Transcript, page 35, lines 16 to 18.

¹⁹ Answering Affidavit, paragraph 50.5.

²⁰ Answering Affidavit, paragraph 65.1.

²¹ Answering Affidavit, paragraph 41.3.

²² Answering Affidavit, paragraph 65.2.

issued a joint statement on the application of antitrust law during the Covid-19 outbreak. The statement identifies potential excessive pricing as a particular area of concern, stressing that: *“it is of utmost importance to ensure that products considered essential to protect the health of consumers in the current situation (e.g. face masks and sanitising gel) remain available at competitive prices.”*²³ Commissioner Vestager has stated that the EU Commission *“will stay even more vigilant than in normal times if there is a risk of virus-profiteering.”* In the USA, the White House, State Attorneys General, Federal Trade Commission (“FTC”) and Department of Justice have also made announcements about potential ‘price gouging’ issues in response to Covid-19.²⁴

18. In relation to South Africa, it has been widely reported that the Commission has been inundated with complaints from the public of firms allegedly unjustifiably inflating prices in the context of Covid-19. By the end of March 2020, the Commission had already confirmed more than 500 complaints; and, by 19 May 2020, it had received more than 1 300 complaints.²⁵ These complaints relate to a variety of products such as hand sanitisers, face masks and basic food items.

Procedural issues and urgency

19. From a procedural point of view, the Commission when filing the Complaint Referral on 9 April 2020 invoked urgency due to the nature of the product involved, face masks, in the context of Covid-19. The Commission’s Complaint Referral was filed with a Founding Affidavit deposed to by Mr Itumeleng Lesofe, a principal analyst in the market conduct division of the Commission, dealing with the Commission’s factual and legal arguments; and a Supporting Affidavit deposed to by Ms Thembaletu Buthelezi, a principal economist in the economic research bureau division of the Commission, dealing with the Commission’s economic assessment of Babelegi’s pricing conduct in the context of Covid-19.
20. Babelegi, in accordance with the time periods provided for in the Tribunal COVID-19 Rules, filed its Answering Affidavit on 12 April 2020. Babelegi, however, at the time raised a concern that, in this limited time frame, it had not had the opportunity to brief

²³ The European Competition Network issued a general joint statement on the application of competition rules during the Covid-19 outbreak on 23 March 2020, e-Competitions, Art. No 93952.

²⁴ The US Price Gouging Framework following the Covid-19 pandemic, 23 March 2020, e-Competitions, Art. No 94258.

²⁵ Competition Commissioner Bonakele’s address to Parliament’s Trade and Industry Committee, 19 May 2020.

or consult with an expert economist. In accordance with the principles of natural justice, the Tribunal gave Babelegi the opportunity to file an expert economic report responsive to the Commission's economic analysis. We further gave the Commission an opportunity to respond to this.

21. The Commission filed its Reply on 13 April 2020.

Urgency

22. In terms of procedure, the Commission's urgent complaint referral, in its Notice of Motion, sought an order that the matter be conducted in terms of the Tribunal COVID-19 Rules, that it be dealt with on an urgent basis and that it be determined on the evidence in the affidavits exchanged.²⁶ The Commission also submitted, in the Founding Affidavit, that it would be appropriate, given the facts and context of this case, for the Tribunal to direct that the matter be heard on an urgent basis, and for the Tribunal to condone the departure from the ordinary rules, time limits, forms and service provided for in the Rules for the Conduct of Proceedings of the Competition Tribunal ("Tribunal Rules").²⁷
23. Babelegi argued that the Consumer Protection Regulations and the Tribunal COVID-19 Rules do not find application in this case. It furthermore disputed that the Commission made out a case for urgency.
24. Procedurally, both parties complied with the Tribunal COVID-19 Rules' shortened time frames for pleadings when filing the Answering Affidavit on 12 April 2020 and the Reply on 13 April 2020.
25. The Act provides for the Tribunal to determine its own proceedings and to use its discretion to hear matters expeditiously. The Tribunal has the authority, in terms of section 27 of the Act and the Tribunal Rules, to condone non-compliance with the usual processes and procedures, to reduce time periods and to determine the manner in which a hearing will take place and how the Tribunal will exercise its functions.
26. Having considered the Complaint Referral filed by the Commission, Babelegi's Answer and the Commission's Reply, the Tribunal, with regards to procedure,

²⁶ Commission's Notice of Motion, paragraph 2.

²⁷ Founding Affidavit, paragraph 70.

determined in terms of section 27 of the Act read with Tribunal Rule 55 that it will hear this matter on an urgent basis. The reasons for this are that alleged excessive pricing within the context of the exceptional Covid-19 circumstances is a matter of significant public interest and requires timely determination by the Tribunal. The interests of consumers must be protected during this extraordinary crisis where markets may be distorted. Furthermore, businesses in South Africa will benefit from quickly knowing the decisions of the Tribunal in matters relating to excessive pricing in the context of Covid-19.

Further submissions and proceedings

27. On 14 April 2020, the Tribunal issued a Directive requiring the parties to make additional written submissions.
28. The Tribunal gave Babelegi time until 20 April 2020, if it so wished, to file a rebuttal expert economic report in response to the Supporting Affidavit filed by the Commission's economic expert of 9 April 2020 and gave the Commission until 22 April 2020 to file a response to that. On 20 April 2020 Babelegi filed an expert economist report prepared by *inter alia* Professors Liberty Mncube ("Mncube") and Nicola Theron ("Theron") of FTI Consulting ("FTI Report"). The Commission filed a Supplementary Economic Submission on 22 April 2020, dealing *inter alia* with an estimation of the excess profits earned by Babelegi during the Complaint Period.
29. The Tribunal furthermore requested Babelegi to supply by 17 April 2020, to the extent not already provided, certain additional financial information that could be relevant to a penalty determination. Babelegi filed the requested financial information on 17 April 2020. The Tribunal also requested both the Commission and Babelegi to make further submissions by 22 April 2020 on potential remedies, for purposes of calculating any administrative penalty (in the event that an excessive pricing contravention is found). This had to include motivations for appropriate remedies, including an administrative penalty and how it should be calculated. Babelegi made its further submissions on 22 April 2020. The Commission's Supplementary Economic Submissions of 22 April 2020 were answerable to this request and the Commission also dealt with remedies in its Heads of Argument filed on 23 April 2020.
30. Babelegi further made submissions regarding the application of the Consumer Protection Regulations to this case on 22 April 2020 and the Tribunal received Babelegi's Heads of Argument on 24 April 2020.

31. The matter was set down for hearing via video conference on 24 April 2020. At the hearing Hodge dealt with the Commission's economic arguments and Mncube and Theron dealt with Babelegi's economic arguments.
32. Babelegi disputed *inter alia* the accuracy of the Commission's estimation of its excess profit earned as a result of its alleged conduct during the Complaint Period and its counsel tendered to provide further information in this regard.²⁸ However, this information was not forthcoming. On 29 April 2020, the Tribunal issued a further directive requesting Babelegi to make submissions, in terms of section 59(3)(e) of the Act, on the level of profit derived from the alleged contravention during the Complaint Period, by 1 May 2020. The Commission could file a response to Babelegi's submissions by 3 May 2020, but it declined to do so. In the remedies section below, we shall have regard to the estimated excess profit of Babelegi as a result of its alleged conduct during the Complaint Period.

Consumer Protection Regulations

33. In relation to the substantive issues, Babelegi's first point of contention with the Commission's case is the applicability of the Consumer Protection Regulations. This is because the Complaint Period (31 January to 5 March 2020) precedes the date on which the Consumer Protection Regulations came into force (being 19 March 2020).
34. That being the case, Babelegi submits that the Consumer Protection Regulations and Tribunal COVID-19 Rules do not find application in this case. It argues that in our law there is a strong presumption that legislation is not intended to be retroactive or retrospective. Babelegi further submits that the presumption against retrospective or retroactive application is not unsettled by the wording of the Consumer Protection Regulations. It also points out that the Commission's Notice of Motion seeks relief in respect of a contravention of section 8(1)(a) of the Act, without any reference to Consumer Protection Regulation 4.²⁹
35. However, from a procedural perspective Babelegi's position, by 22 April 2020, was that, even though the Consumer Protection Regulations and the Tribunal COVID-19 Rules do not apply, the Complaint Referral must be heard by the Tribunal on 24 April 2020 and determined. It pointed out that Babelegi had complied with the stringent

²⁸ Transcript, pages 159 to 161.

²⁹ Regulation 4 prohibits a dominant firm in terms of section 8(1) of the Act from charging an excessive price to the detriment of consumers or customers.

time frames and submitted that the Tribunal must entertain the Complaint Referral that serves before it, so that the matter may be disposed of.³⁰

36. Indeed, the Commission's papers include references to the Consumer Protection Regulations. However, the Commission's Notice of Motion states that it is a referral for an alleged contravention of section 8(1)(a) of the Act.³¹ This is repeated in the Commission's Founding Affidavit.³² The Commission further at the hearing confirmed that it brought the Complaint Referral in terms of section 8(1)(a) of the Act and said that in terms of substantive law the case before the Tribunal relates to a contravention of section 8(1)(a).³³ The Commission submitted that the Consumer Protection Regulations do not detract from the Tribunal's ability to determine the merits of the matter i.e. the substantive issue of whether Babelegi charged excessive prices for its masks during the Complaint Period in contravention of section 8(1)(a) of the Act.
37. It is common cause that the Complaint Period in this matter, 31 January to 5 March 2020, precedes the publication of the Consumer Protection Regulations which were published on 19 March 2020³⁴ and we shall have no regard to the Consumer Protection Regulations for the assessment of the merits of this case.
38. Regarding Babelegi's argument that it could not during the Complaint Period have known that it was a dominant firm in terms of the Act (also see paragraph 91 below), potential market power of a firm and thus dominance in terms of section 7(c) of the Act exists independently of the Consumer Protection Regulations. Market power as defined in the Act may for example be influenced by disruptions to the functioning of competitive forces (as we discuss later).
39. We proceed to consider the complaint under section 8(1)(a) of the Act.

Legal framework of section 8 of the Act

40. The excessive pricing provisions of the Act were amended with effect from 12 July 2019. This is the first case to come before the Tribunal under section 8 after the

³⁰ See Babelegi's submissions on the application of the Consumer Protection Regulations dated 22 April 2020, paragraph 48.

³¹ Notice of Motion, paragraphs 2, 3, 4 and 6.

³² Founding Affidavit, paragraphs 8 and 67.

³³ Transcript page 14, lines 8 to 10.

³⁴ Respondent's Heads of Argument, paragraph 22.

amendments in the Competition Amendment Act, 18 of 2018, came into effect (“the 2018 Amendments”).

41. Sections 8(1)(a), 8(2) and 8(3) of the amended Act read as follows:

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

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

...

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

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

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

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

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

(ii) to customers in other geographic markets;

(iii) for similar products in other markets; and

(iv) historically;

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

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

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

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

42. Section 8 of the Act applies if the dominance requirements of sections 6 and 7 of the Act are met.³⁵ Section 6 empowers the Minister to determine a minimum threshold

³⁵ Section 6 of the Act read with *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another* (70/CAC/Apr07) [2009] ZACAC 1 (29 May 2009) (“*Mittal*”) at paragraph 30.

firm size above which the abuse of dominance provisions can apply to such firm.³⁶ Most relevant for this case is the test for dominance at section 7(c) of the Act, applicable to firms with less than 35% of the relevant market, but with market power. Section 7 of the Act will be discussed under the dominance section below.

43. The 2018 Amendments brought about a number of changes to section 8 of the Act, notably: (i) the definition of an ‘excessive price’ previously contained in section 1(1)(ix) of the Act³⁷ was removed and replaced by the broader, more discretionary approach provided for in section 8(3); and (ii) the amendments provide for a reverse onus in section 8(2) if there is a *prima facie* case of an excessive price.
44. The Background Note on the Competition Amendment Bill, 2017 and an Explanatory Memorandum, explain what the legislator intended with the shifting of the evidentiary burden after a *prima facie* case has been established by the Commission:³⁸ “Cases involving the abuse of dominance through charging excessive pricing have not to date been successfully prosecuted and this may continue to be the case unless the allocation of evidentiary burdens between the Commission and the dominant firm is addressed. Therefore, a new subsection (2) is proposed to place the burden on the dominant firm to show that the price it charges is reasonable after a *prima facie* case against it has been established by the Commission.”³⁹ This, read with the plain phrasing of section 8(2) – “if there is a *prima facie* case of abuse of dominance because the dominant firm charged an excessive price, the *dominant firm must show that the price was reasonable*”⁴⁰ – shows the reverse onus.
45. The construction of section 8(3) of the Act demands, (i) a determination of whether the price charged is higher than a competitive price; and (ii) whether such difference is unreasonable. These are the fundamental considerations under section 8(3). The basic test of “*whether the price charged is higher than a competitive price*” is whether the price exceeds what the firm would have obtained in the counterfactual world of normal and sufficiently effective competition. The second step is to assess if this difference is unreasonable.

³⁶ *Mittal* at paragraph 30.

³⁷ “A price for a good or service which – (aa) bears no reasonable relation to the economic value of that good or service; and (bb) is higher than the value referred to in subparagraph (aa)”.

³⁸ Published on 1 December 2017; Government Notice No. 1345 of Government Gazette No. 41294.

³⁹ Explanatory Memorandum, page 16.

⁴⁰ Emphasis added.

46. The above must be determined in terms of section 8(3) by “*taking into account all relevant factors, which may include*” (emphasis added) a list of factors from (a) to (f). We note the following about this section:
- 46.1. It provides for an open, non-exhaustive list of factors to be taken into account in the determination.
- 46.2. “*All relevant*” factors need to be considered when the determination is made and therefore the Tribunal has a discretion in relation to relevance. When a functionary is entrusted with a discretion, the weight to be attached to a particular factor, or if and the extent to which a particular factor affects the eventual determination of the issue, is a matter for the functionary to decide. In other words, the weight or lack of it to be attached to the various considerations that go to making up a decision, is that of the decision-maker i.e. the Tribunal.⁴¹
- 46.3. What factors are considered relevant, and the weight attached to each relevant factor, depend on the nature and facts of each case and therefore this must be determined on a case-by-case basis.
47. To illustrate that not all of the factors listed in section 8(3)(a) to (f) will be relevant in every matter, we give the following examples: the list of factors under section 8(3)(b) includes the respondent’s prices for the goods or services- “*to customers in other geographic markets*” and “*for similar products in other markets*”. The firm in question however may not sell the relevant good or service to customers in other geographic markets in South Africa (if the market is narrower than national from a geographic market perspective) or in other countries, and further the firm may not sell any “*similar products in other markets*”. Not all factors mentioned in section 8(3) will be relevant in every case, a further real example, is the common cause fact that Babelegi has not benefitted from “*direct or indirect state support for a firm or firms in the market*” as provided for under section 8(3)(e). Clearly the relevant factors to be considered depend on the nature and the facts of each case, as well as on the available data.
48. It was common cause between the Commission and Babelegi that the essential elements of a contravention of section 8 of the Act are: (i) dominance; (ii) an

⁴¹ *MEC for Environmental Affairs and Development Planning v Clairison’s CC* (408/2012) [2013] ZASCA 82; [2013] 3 All SA 491 (SCA); 2013 (6) SA 235 (SCA) (31 May 2013) at [20] - [22].

excessive price; and (iii) detriment to consumers or customers.⁴² We next consider the issue of dominance, followed by the other considerations.

Dominance

49. The first requirement for a contravention of section 8 of the Act is that the firm in question must be dominant in the market.
50. The first requirement for a firm to be considered dominant, is that its annual turnover or assets in the Republic must meet a certain threshold. Currently this threshold is that the firm's annual turnover or assets must be valued at or exceed R5 million.⁴³ For the purposes of section 6, it is common cause that Babelegi's annual turnover in the Republic meets this threshold.
51. Dominance is defined as follows in section 7 of the Act:
- "A firm is dominant in a market if—*
- (a) it has at least 45% of that market;*
- (b) it has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or*
- (c) it has less than 35% of that market, but has market power."*
52. We note that this section does not put any time frame or limit on dominance, it defines dominance on the basis of either certain market share thresholds in a market or in terms of market power.
53. Sections 7(a) and (b) are not relevant for current purposes since the Commission relies only on section 7(c) of the Act, which provides that "[a] firm is dominant in a market if - ... it has less than 35% of that market, but has market power" (emphasis added). The Commission argues that the Covid-19 circumstances have conferred market power upon Babelegi during the Complaint Period, which has afforded it the opportunity to exploit customers and consumers by charging an excessive price for its FFP1 masks.
54. The core concept behind dominance from both an economics perspective and in terms of the Act (as can be seen from the wording of sections 7(b) and (c)) is whether a firm holds market power, which the Act in section 1 defines in economic terms as

⁴² Transcript, page 33, lines 15 to 20.

⁴³ Section 6 of the Act.

“the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers”.

55. The Commission argues that Babelegi’s ability to effect material price increases during the Complaint Period, suddenly, over a short period of time confirms that it can be regarded as a dominant firm as contemplated in section 7(c) of the Act, by virtue of the fact that it exerted market power by behaving to an appreciable extent independently of its competitors, customers or suppliers.
56. Babelegi argues that the Commission has not made out a case for dominance in this instance and says that the Commission conflates pricing in a particular period with a consideration of (temporary) dominance.
57. Babelegi further submits, in relation to its relative size, that by virtue of its turnover in its most recent financial year it is considered under the Act as a “small business” insofar as it is treated as a wholesaler, or a “medium business” insofar as it is treated as a manufacturer. However, as indicated above, it is common cause that Babelegi meets the set threshold to be considered a potential dominant firm (see paragraph 50 above).
58. Babelegi agrees that the market power test for dominance (in terms of section 7(c) of the Act) finds general application to section 8 contraventions.
59. However, Babelegi avers that the excessive pricing prohibition in section 8 specifically demands the consideration of market share since section 8(3)(e) lists market share as one of the relevant factors. (As we have pointed out above in terms of section 8(3) this is one of the factors that ‘may’ be taken into account in the determination of whether or not a price is excessive.) That, Babelegi avers, in turn, requires market definition. It submits that its market share – even when grossly overestimated – is less than 5%.⁴⁴ Babelegi further submits that in terms of sales to “external” customers, it sold only 76 boxes (1 520 masks) to third parties in the Complaint Period. Babelegi sold 496 boxes of 20-piece FFP1 masks from 31 January to 5 March 2020 (inclusive). It argues that at that time, a single dust mask manufacturer in Centurion was producing at least two million masks a month, that is at least 64 500 masks per day. It further submits that when imports are brought into

⁴⁴ This calculation by FTI is based on the imports of masks into South Africa by 14 suppliers as identified by Babelegi.

account, the number of masks available in the market must be taken to be significantly more.

60. Babelegi further argues that the Commission cannot rely on the state of national disaster to argue for dominance by a firm with a “tiny” market share, because the Complaint Period precedes the coming into effect of the Consumer Protection Regulations. As indicated above, we have no regard to the Consumer Protection Regulations in this matter.
61. Babelegi alleges that all firms have some degree of market power and that a small degree of (or temporary) market power is very common and understood not to warrant competition intervention. It argues that market power is “*the ability to raise prices consistently and profitably over competitive levels*”⁴⁵ and says that this is also the economic test recognised by the CAC in *Sasol*.⁴⁶ It further refers to Bishop and Walker quoting that “[a]ny firm can choose to raise price at any time, but this does not mean that every firm has market power”.⁴⁷ It contends that a firm can only be found guilty of excessive pricing if prices are set significantly and persistently above the competitive level as a result of market power. This means that sufficient time needs to pass to observe if price increases persist and in this case the Complaint Period is just over a month.
62. According to Babelegi the relevant question is not whether market power is present or temporary, but whether it is important i.e. substantial. It argues that the concept of market power must be understood to mean substantial market power that is durable. It states that to behave independently to an appreciable extent is similar to the ability to significantly, profitably and durably increase prices. That is, a firm has substantial market power if its decisions are fairly insensitive to reactions of competitors and customers. The extent to which a firm can behave independently of its competitors relates to the degree of competitive constraints exerted on the firm and these constraints include those imposed by actual competitors, by the threat of expansion and entry of potential competitors and by the bargaining strength of customers. Babelegi argues that market power (whether temporary or not) cannot exist in a

⁴⁵ Paragraph 1.2 of *Assessment of Market Power* OFT415 1999.

⁴⁶ *Sasol Chemical Industries Limited v Competition Commission*, Case No 131/CAC/Jun14, judgment of 17 June 2015, at paragraph 2.

⁴⁷ Simon Bishop & Mike Walker, *The Economic of EC Competition Law: Concepts Application and Measurement* 2ed Thomson Sweet & Maxwell 2002 at paragraph 3.06, page 45.

market where supply responses are immediate and avers that in this case the supply responses are immediate.

63. As evidence that one cannot assume that Babelegi was able to price higher without constraint by consumers or customers, Babelegi submits that its sales to customers in the period from 1 January to 31 March 2020 dropped, excluding sales to Belegi Workwear and Industrial Supplies (Pty) Ltd⁴⁸ (“Belegi”), an affiliated firm to Babelegi⁴⁹. Babelegi argues that it was only able to sell high volumes at high prices after 16 March 2020, around the time when its supplier increased its prices.⁵⁰

Assessment

64. The central question that we have to answer in this matter in relation to dominance, is if Babelegi can be considered dominant in terms of section 7(c) of the Act i.e. if it has market power.
65. Throughout the papers and in the hearing, the parties refer to “temporary” market power of a firm. When referring to market power in these reasons we mean market power (as contemplated in the Act) during the Complaint Period, defined as 31 January 2020 to 5 March 2020.
66. FTI concedes that the sudden increase or surge in the demand for masks is related to Covid-19 and takes place during an abnormal period. It states: “[t]he surge in demand for FFP1 masks is therefore directly related to Covid-19 ...” and “[t]he surge period is an abnormal period where demand was driven by panic buying ...”⁵¹ (emphasis added).
67. The Commission’s case is not about market power in ordinary times but about market power under non-ordinary market circumstances in the context of Covid-19. We agree that this context is the prism through which Babelegi’s pricing conduct must be assessed. This context is largely lacking in the FTI Report, as we shall discuss below.
68. However despite the above description of the context of this case as an abnormal period, FTI then nevertheless contends that one has to consider the small but

⁴⁸ With registration number 2011/112383/07, trading from a shop in Centurion Gauteng (Answering Affidavit, paragraph 47.3).

⁴⁹ The sole member of Babelegi is also a director of Belegi.

⁵⁰ See paragraph 51 of the Respondent’s Heads of Argument.

⁵¹ FTI Report, paragraph 48.

significant non-transitory increase in price (“SSNIP”) test “*as it applies under normal circumstances*.”⁵² This in our view is an incorrect approach in the context that we have set out. As said above, an excessive pricing assessment must be done with due regard to context including the economic and other conditions and FTI concedes that this is an abnormal period.

69. The rapid spread of the Covid-19 virus across the globe resulted in a surge in demand for certain products such as masks, disrupting normal local and international supply channels. The current context therefore is pricing conduct during a health crisis with all of its economic consequences. Furthermore, Babelegi admits that the sudden increase in the demand for masks is due to Covid-19. This is further held by the evidence put up by Babelegi in relation to what its suppliers communicated to it about the demand for face masks during the Complaint Period (see paragraphs 119.3, 119.4 and 135).
70. With the above context in mind, we shall consider the economic test for excessive pricing when markets have been disrupted, for example by a crisis such as Covid-19.
71. Price hikes by firms during periods such as a crisis or a disaster is commonly referred to as ‘price gouging’. Price gouging occurs in a situation where firms take advantage of a crisis situation, civil emergency, disaster, or impending disaster to charge excessive prices for products that are used by citizens to cope with that situation.
72. Babelegi does not dispute that conduct described as price gouging can be regarded as a form or species of excessive pricing.⁵³
73. In crisis situations such as the Covid-19 health crisis, there are typically abnormal disruptions to certain markets, such as a disruption to the supply of, or a spike in demand for, certain products utilised by consumers in an attempt to cope with, or as a response to, the challenges of that crisis. These disruptions, from an economic perspective, remove the ordinary competitive constraints faced by firms. This may confer upon the firms, for example retailers or distributors holding stock, or local producers of relevant items, market power which enables them to increase prices without constraint until normal competitive conditions or supply channels resume. In the context of this health crisis, Babelegi’s FFP1 dust mask became a product for

⁵² FTI Report, paragraph 48.

⁵³ Transcript page 128, lines 2 to 8.

people to use in trying to cope with Covid-19. The increase in demand for these masks is related to Covid-19, as admitted by Babelegi.

74. Pricing abuses in periods of abnormal disruptions to markets typically occur under the following conditions:
- (i) in periods of a crisis, pandemic, emergency, disaster or impending disaster;
 - (ii) it typically applies to goods and services that customers and consumers use in coping with or in reaction to the crisis, pandemic, emergency, disaster or impending disaster; and
 - (iii) it is an increase in prices above what would prevail in an undisrupted market (having regard to actual increases in supplier costs).
75. In the context of a health crisis such as Covid-19, customers in certain markets typically do not have the ability to defer their consumption (of items such as masks), which might under normal economic conditions have placed limits on any market power of the seller. In other words, in the context of a crisis such as Covid-19, firms may be able to exercise market power due to the disruption to normal market conditions and the inability of consumers to defer consumption.
76. FTI contends that “temporary” or episodic market power is very common and does not warrant competition intervention.⁵⁴ Whilst that may be so in a traditional sense under normal conditions of competition where markets are not disrupted by a crisis, the current case must be seen through the prism of the disrupted market conditions occasioned by the Covid-19 health crisis. In this case Babelegi may have market power in the Complaint Period and we shall consider this below.
77. A recent statement of the Competition & Markets Authority (“CMA”) in the UK⁵⁵ makes it clear that the current crisis may create conditions to confer dominance on a firm allowing it to price excessively. In discussing business conduct that may harm consumers in the midst of the Covid-19 crisis, the CMA⁵⁶ includes the following: “*a business abusing its dominant position in a market (which might be a dominant position conferred by the particular circumstances of this crisis) to raise prices significantly above normal competitive levels*” (emphasis added).

⁵⁴ Transcript, page 129, lines 21 to 24.

⁵⁵ Previously the OFT.

⁵⁶ CMA Guidance Note “CMA approach to business cooperation in response to COVID-19” (25 March 2020) accessible at <https://www.gov.uk/government/publications/cma-approach-to-business-cooperation-in-response-to-covid-19/cma-approach-to-business-cooperation-in-response-to-covid-19#fn:5>.

78. FTI's contention,⁵⁷ based on a 2004 OFT document, that a firm must price consistently above an appropriate measure of costs, or persistently earn an excessive rate of profit to infer that it possesses market power, takes no account of the abovementioned "*particular circumstances of this crisis*". This 2004 OFT document is written in the normal course and does not deal with circumstances such as the current Covid-19 crisis. However, at a level of general principle even this OFT document makes it clear that a firm's own conduct or its financial performance may be used as evidence of market power. It states: "*An undertaking's conduct in a market or its financial performance may provide evidence that it possesses market power*".⁵⁸
79. Both the Commission and Babelegi refer us to the views of Professor Massimo Motta ("Motta") expressed in a recent *Daily Maverick* opinion piece.⁵⁹ Motta, with specific reference to the South African prosecution of excessive pricing cases in the context of Covid-19 states:

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

⁵⁷ FTI Report, paragraph 40.

⁵⁸ FTI Report, paragraph 40.

⁵⁹ Massimo Motta "Price regulation in times of crisis can be tricky" *Daily Maverick* (22 April 2020) accessed at <https://www.dailymaverick.co.za/opinionista/2020-04-22-price-regulation-in-times-of-crisis-can-be-tricky/> ("Motta 2020").

even “small” firms may be endowed with significant market power, that is, they may be dominant” (emphasis added).

80. The above view makes it clear that one must have regard to context – in the circumstances of Covid-19 even small firms may have market power. FTI’s argument that a firm the size of Babelegi can never be considered dominant (in terms of the Act) is thus incorrect when regard is had to the proper context i.e. the “exceptional times” of the Covid-19 health crisis, as Motta puts it. FTI’s contention that market power or dominance must be sustained for a significant period of time and not a short term,⁶⁰ is again based on the assumption of normal well-functioning markets and ignores the current context i.e. market disruptions during the Covid-19 health crisis.
81. Babelegi refers us to Motta's statement in his article that *“[f]ace masks ... can be produced easily, and in most countries affected by the crisis, production has indeed increased substantially. Here, price regulation would likely be counterproductive”*. As the Commission however points out, with reference to this Complaint Referral, Motta⁶¹ opines that if the facts (a seller allegedly increasing the price of facial masks by more than eight times, earning mark-ups in excess of 500%) were confirmed, this would indeed be the type of case that merits intervention by a competition authority.
82. Despite admitting that a surge in the demand for FFP1 masks occurred, FTI contends⁶² that the extraordinary circumstance which led to surge buying cannot be used to determine market dominance under normal circumstances (the test that it contends is applicable in this matter). This approach is untenable. It is not apparent why context should be ignored, and the market be defined “in a normal period” as FTI asserts, when the firm’s conduct that is the subject of an abuse assessment occurs in a crisis. The correct approach in both law and economics is to consider the context including market circumstances in order to determine market power and dominance. In this case the market for masks is disrupted and not ‘ordinary times’ as put forward in the FTI analysis.
83. Babelegi also contends that market delineation is essential in an excessive pricing enquiry. However, this is not the case. Market delineation is merely a means to an end. It establishes the market in which the firm’s market share is determined to see if the set thresholds under sections 7(a) and (b) for assumed dominance have been

⁶⁰ FTI Report, paragraph 42.

⁶¹ Motta 2020.

⁶² FTI Report, paragraph 50.

met. Market power is the ultimate consideration for dominance and section 7(c), which is relevant in this case, has market power at its core.

84. Theron agrees that one can infer market power from conduct, but says that other factors must be included in the analysis:

“[O]n a theoretical level I would agree, so theoretically yes, you can infer market power from an abuse, there’s no doubt about it the theory tells us that and potentially this would be the case one, could be one of that cases where you can actually look at the conduct, I agree in principle. But that unfortunately leads one away from the facts of the case and so I think the conduct is important to examine and you can do that first, but then I think you also need to think about your supplier responses which makes you think about the relevant market. So, I think it doesn’t matter whether you start with your market definition or you start with examining the conduct, you still have to think about these other relevant factors, you can’t simply exclude them”⁶³ (emphasis added).

85. There is no compelling reason to engage in market delineation if other means exist to determine market power. Recent developments in the literature and competition economics practice offer means for measuring market power directly, dispensing with the need for market delineation.⁶⁴

86. Moreover, market delineation becomes problematic and impractical in crisis situations such as Covid-19 if the market in question has been disrupted or distorted by that crisis. FTI itself states that the SSNIP test *“is made complex by the fact that panic buying in the face of the Covid-19 pandemic obscures the general function of the specific FFP1 dust mask.”*⁶⁵ In the context of abnormal market conditions amid the Covid-19 crisis, a firm’s own conduct therefore is the best available proxy for market power if the market is distorted by the crisis. Babelegi admits that there is a surge in the demand for masks due to Covid-19. Other relevant factors however need to be considered in the analysis and we shall consider FTI’s other arguments.

87. FTI also raises the issue that the FFP1 masks sold by Babelegi are not suitable for medical purposes and therefore cannot be seen as essential products for the period of disaster in South Africa. This however from an economics perspective is not the

⁶³ Transcript, page 149, line 20, to page 150, line 8.

⁶⁴ For example, in the UK, in *Arriva The Shires Ltd vs London Luton Airport Operations Ltd*, Case No. HC13d01784, abuse was found without a specific market definition being provided, as competitive concerns existed irrespective of the specific market definition.

⁶⁵ FTI Report, paragraph 44.

relevant issue in the current context. The relevant question is if the sudden increase or surge in the demand for FFP1 masks during the Complaint Period, is related to Covid-19. The common cause evidence is that the increased demand for FFP1 masks during the Complaint Period can be directly attributed to the Covid-19 health crisis. Babelegi offers no other explanation for the sudden increase or surge in the demand for dust masks and in fact admits that the increase in the demand for FFP1 masks is Covid-19 related (also see paragraphs 14 and 66).

88. Babelegi's contention that its masks offer no - effective - protection against Covid-19 is also not the relevant consideration for purposes of our determination in terms of section 8 of the Act. Dust masks such as sold by Babelegi as a product bought by consumers and customers since the outbreak of Covid-19 in December 2019 in an attempt to try and protect themselves and to cope with the outbreak, qualify as a good that may be considered within the context of the Covid-19 crisis. As indicated, Babelegi offers no other explanation for the sudden increase or surge in the demand for FFP1 masks other than Covid-19, which confirms that customers and consumers saw value in using dust masks in the context of Covid-19.
89. We conclude that the circumstances of the Covid-19 crisis can provide the conditions for market power to be conferred to firms that may not otherwise have market power under normal competitive conditions. From an economics perspective, due to the crisis, the normal competitive constraints that would otherwise constrain firms' pricing conduct may be removed leading to an abnormal functioning of the market allowing firms to exercise market power and potential abuse.
90. In relation to face masks more specifically, the outbreak of Covid-19 in December 2019 and its global spread and ramifications, together with the WHO's declaration of a PHEIC at the end of January 2020 and other events, coupled with increased international and local demand for all types of face masks, and surge buying of face masks, provided conditions for potential market power that may not otherwise have existed under normal competitive conditions.
91. Counsel for Babelegi argues from a rule of law perspective that Babelegi "*a small firm, Mr and Mrs Van Niekerk sitting in their little office in Rosslyn deciding to increase their prices. At the time that they couldn't have guessed that they would be treated as a dominant firm under the Competition Act at all.*"⁶⁶ This ignores the market

⁶⁶ Transcript page 105, lines 14 to 18.

conditions within the context of Covid-19. We have analysed the construction of section 7, specifically section 7(c), and section 8 of the Act (as amended) and nothing in the construction of those sections excludes a finding of market power under market conditions such as the Covid-19 health crisis. The contention that Mr and Mrs Van Niekerk could not have guessed that Babelegi would be treated as a dominant firm cannot avail them as ignorance of the law is not an excuse but may be relevant in the determination of remedies. We shall further deal with the abovementioned argument of counsel when we consider an appropriate remedy.

92. Furthermore, as is clear from the above, as a matter of economics, in a crisis period such as Covid-19, the actual conduct of a firm can be used as a proxy to assess its market power. This will be done below by having regard to the factual evidence relating to Babelegi's pricing conduct during the Complaint Period, as well as a comparative period.
93. Before we consider the factual evidence relating to market power and excessive pricing, we first consider what the appropriate economic test is for assessing excessive pricing in times of a crisis such as Covid-19.

Economic test

94. As indicated, the construction of section 8(3) demands as a first step the determination of whether the price charged by the firm in question is higher than a 'competitive price'.
95. As we have stressed throughout these reasons, one must have regard to the proper context including the economic conditions when assessing pricing conduct. As we have also noted, in the present case it is common cause that the increase or surge experienced in the demand for face masks is directly related to Covid-19; Babelegi offers no other explanation for the sudden increase in the demand for dust masks. Furthermore, it is common cause that Babelegi's pricing conduct takes place in a crisis period. FTI confirms this: "*The surge period is an abnormal period where demand was driven by panic buying ...*"⁶⁷ (emphasis added).
96. We shall next explain what we regard as the appropriate economic test to be applied to Babelegi's pricing conduct in the context of the Covid-19 health crisis.

⁶⁷ FTI Report, paragraph 48.

97. In relation to the complexity of the appropriate economic test that has to be applied to excessive pricing assessments in a crisis situation such as Covid-19, Theron disagrees with Hodge⁶⁸. Hodge says that economically it is a simple test: *“there is indeed a simple test because one is looking at situations where the costs have not changed and yet prices have increased”*.⁶⁹
98. Theron agrees that *“price gouging might be a specific form excessive pricing”*.⁷⁰ In relation to Hodge’s evidence she also agrees that in *“price gouging the test becomes very simple and you only compare the price and the cost in order to get a mark-up. So, I think while [Hodge] is correct if you look, if you read the price gouging regulations in the different states in the US then they talk about a simple comparison between price and cost but importantly then they also talk about a 10% mark-up ..”*.⁷¹ She however maintained *“... [b]ut in my view, if this is a case under [section 8] then we can’t jump or replace the relevant factors in [section 8] with a simple test ...”*.⁷²
99. We find that in the context of disrupted competitive conditions such as the Covid-19 health crisis, the relevant economic test for determining whether or not a firm’s price charged is excessive, is a relatively simple yet instructive economic test. In such a scenario one can determine whether the firm’s price or markup or margin increased materially relative to what was previously charged or applied, and if so, whether that increase is justified by any cost increases from a supplier further up the value chain. Motta⁷³ very succinctly explains what evidence can be used in a crisis situation to determine what the competitive price to be used in the assessment is: *“[u]sing the pre-crisis price as a benchmark is sensible because demand and supply conditions at that time were presumably “normal”* (emphasis added). We agree that this is a sensible approach in the current context.
100. We stress that the CAC in *Sasol* (referencing paragraph 49-50 of *Mittal*⁷⁴) indicated that excessive pricing may involve a simple test to establish a *prima facie* case: *“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*

⁶⁸ Transcript, page 35, lines 4 to 18; page 47, lines 13 to 22; page 156, lines 15 to 20.

⁶⁹ Transcript, page 156, lines 16 to 20; also see Transcript pages 47 and 49.

⁷⁰ Transcript, page 142, lines 2 and 3.

⁷¹ Transcript, page 142, lines 6 to 15.

⁷² Transcript, page 142, lines 15 to 20.

⁷³ Motta 2020.

⁷⁴ *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another* (70/CAC/Apr07) [2009] ZACAC 1 (29 May 2009) (“Mittal”).

price is higher than economic value without the need to quantify the latter more precisely⁷⁵ (emphasis added). Although the relevant comparator after the recent amendments to section 8 of the Act is a “competitive price”⁷⁶ and no longer “economic value”,⁷⁷ the same principle applies as articulated by the CAC.⁷⁸

101. As indicated above, the basic test of “*whether the price charged is higher than a competitive price*” is whether the price exceeds what the firm would have obtained in the counterfactual world of normal and sufficiently effective competition. There is no reason in this case not to accept that Babelegi’s pre-crisis price (and associated mark-up) i.e. its price (and mark-up) for masks in December 2019, are sensible and appropriate benchmarks for the competitive price (and mark-up) since that price (and mark-up) were determined under normal competitive conditions, as Motta puts it “*demand and supply conditions at that time were presumably ‘normal’*”. Babelegi adduces no evidence that normal competitive conditions in relation to the sale of masks did not prevail in December 2019, when its admitted markup on masks was approximately 23%⁷⁹ (see Table 2, paragraph 118, as well as paragraph 122.3 below). This approach is also consistent with section 8(3)(b)(iv) of the Act that states that the respondent’s prices for the goods or services historically is a relevant factor to consider.
102. The approach taken by many USA States to price gouging also gives a reference to how and what evidence can be used to assess potential excessive pricing abuses in circumstances such as a crisis. An OECD document confirms that in a period of crisis or disaster the comparative or “normal” price for the product may be determined by having regard to the prices charged for the product in the period before the crisis or disaster. The OECD 2011 Excessive Pricing: Policy Roundtables⁸⁰ report records the approach of various States of the USA⁸¹ to the economic test for price gouging as “The basic methodology employed is based on a comparison of a (fictitious) “normal” price with the potentially excessive price in periods of abnormal supply disruptions. In determining the “normal” supply price a variety of definitions are used. While some US States do not define the normal price at all, others use the average price over a

⁷⁵ Mittal, paragraph 102.

⁷⁶ Section 8(3) of the Act.

⁷⁷ As per the definition of an excessive price prior to the 2018 Amendments.

⁷⁸ See also *United Brands Company and United Brands Continental BV v The Commission of the European Communities* [1978] 1 CMLR 429 at [250].

⁷⁹ The 23% is confirmed in Babelegi’s Answering Affidavit, paragraph 110.2.

⁸⁰ OECD. 2011. Excessive Pricing: Policy Roundtables: <https://www.oecd.org/competition/abuse/49604207.pdf> at paragraph 5.3.1 on page 61.

⁸¹ In the USA, many individual states have laws that specifically prohibit ‘price gouging’.

specified period or the price immediately prior to the supply disruption or the emergency declaration" (emphasis added).

103. The following excerpt from the Californian Penal Code PEN § 396 is illustrative of an economic test for price gouging; it explains what data are required for the pricing assessment, as well as what threshold could be used to assess the differences in price:

"(b) ... a price of more than 10 percent greater than the price charged by that person for those goods or services immediately prior to the proclamation or declaration of emergency. However, a greater price increase is not unlawful if that person can prove that the increase in price was directly attributable to additional costs imposed on it by the supplier of the goods, or directly attributable to additional costs for labor or materials used to provide the services, during the state of emergency or local emergency, and the price is no more than 10 percent greater⁸² than the total of the cost to the seller plus the markup customarily applied by the seller for that good or service in the usual course of business immediately prior to the onset of the state of emergency or local emergency." (emphasis added).

104. Competition authorities are, at times of crisis and instances of exploitative price abuse, duty-bound to act. This intervention is to address market dysfunction. During such market disruption firms with stock of goods in high demand or who have the ability to provide services in high demand, may be conferred market power by the malfunctioning of competitive forces and can therefore behave abusively. The intervention by authorities is to regulate market conduct until such time as competitive market forces return.

105. Whilst FTI contends that making assessments of market power and excess profits based on costs and margins is complex and requires interrogating replacement cost for assets and other economic costs,⁸³ this ignores the current context and the simple yet instructive economic test that can be utilised to assess conduct in a crisis period such as Covid-19. There is no evidence that Babelegi's actual supplier costs have changed during the Complaint Period (discussed below) or that the period preceding

⁸² Many states in the USA, including for example New Jersey and Oklahoma, use the abovementioned 10% increase from previous prices as the relevant threshold. Other states, like Florida, rely on more qualitative language, such as prices that "grossly" exceed the average.

⁸³ FTI Report, paragraphs 37 and 38.

the Complaint Period would not be an appropriate benchmark for the competitive price and markup (also see paragraph 101 above).

106. Furthermore, given that potential excessive pricing in periods of a crisis often occurs at a reseller or retail level of the value chain, whether or not there is a cost justification for the increase in the firm's price is readily identifiable by whether the firm's mark-ups under competitive conditions prior to the crisis increased following the market disruption (i.e. actual supplier cost increases are taken into account). Hodge explains that the economic test in such situations "*does take account [of] potential increases in costs and as a result the test looks at the seller's mark-up that is customary (sic.) applied for that good or service in the usual course of business immediately prior to the onset.*"⁸⁴

107. In the context of abnormal market conditions such as the Covid-19 health crisis the following factors, in terms of the simple yet instructive economic test as outlined, are most relevant in determining whether or not the prices charged by Babelegi for FFP1 masks during the Complaint Period could be regarded as excessive:

107.1. Babelegi's mask prices charged to customers in the Complaint Period, compared to the prices charged by it prior to that period (as a benchmark for the competitive price);

107.2. the number and size of Babelegi's price hikes;

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

107.4. Babelegi's mark-ups on masks sold in the Complaint Period, compared to its mark-ups prior to that period (as a benchmark for the markup under normal competitive conditions), with specific regard to the magnitude of the difference between the mark-ups in these periods;

107.5. cost increases faced by Babelegi during the relevant period, specifically actual increases in prices by the suppliers of the masks to it; and

⁸⁴ Transcript, page 35, lines 11 to 15.

- 107.6. whether or not any potential advantage by Babelegi in the sale of the relevant product during the relevant period is due to its own commercial efficiency or investment.
108. Babelegi does not dispute that its prices and mark-ups are relevant considerations in terms of section 8 of the Act.⁸⁵
109. Babelegi however argues that two further factors must be considered. First, that it does not manufacture masks itself, but purchases them from suppliers. Second, that cost increases by Babelegi's suppliers must be taken into account - even if Babelegi was not yet making purchases at that higher price during the Complaint Period. In this regard FTI refers to a document of the OECD⁸⁶ that refers to a 2006 report by the US FTC, stating that several factors were proposed that should be considered if Congress was to pass federal price gouging legislation including that "*[a] price gouging bill also should account for increased costs, including anticipated costs, that businesses face in the marketplace. Enterprises that do not recover their costs cannot long remain in business, and exiting businesses would only exacerbate the supply problem. Furthermore, cost increases should not be limited to historic costs, because such a limitation could make retailers unable to purchase new product at the higher wholesale prices.*"⁸⁷ We deal with this issue in more detail below and consider the facts of this case.
110. Babelegi also does not dispute that its prices for masks historically is a relevant consideration in terms of section 8(3)(b)(iv) of the Act. It however repeats that the consideration of the reasonableness of its prices must include anticipated higher supplier prices for masks.⁸⁸ Our assessment shall include an analysis of Babelegi's supplier price increases, as well as the evidence in relation to anticipated increases.
111. It is furthermore common cause between the Commission and the Respondent that "*the length of time the prices have been charged at that level*" (section 8(3)(d) of the Act) is a relevant consideration. Babelegi argues that the Complaint Period in this case is a short period. However, the Commission argues that this period is significant in the context of the Covid-19 crisis. The Complaint Period in this case is the period from 31 January to 5 March 2020, and we shall below indicate how Babelegi's price increases during this

⁸⁵ Respondent's Heads of Argument, paragraph 61. FTI Report, paragraphs 70 to 78.

⁸⁶ OECD 2011 Excessive Pricing Policy Roundtables:
<https://www.oecd.org/competition/abuse/49604207.pdf>

⁸⁷ FTI Report, paragraph 80.

⁸⁸ Respondent's Heads of Argument, paragraph 62.

period relate to certain Covid-19 events, as well as to correspondence received from a competitor (that is, also a potential supplier of masks to Babelegi).

112. Babelegi further submits that whatever reliance the Commission wishes to place on international authority regarding price gouging, it must live with the recognition that the test is generally expressed by reference to pricing ‘over a specified period or the price immediately prior to the supply disruption or the emergency declaration’. It submits that in the South African case, the Minister specifically elected to assume that the price in the period prior to the declaration of disaster (three months prior to 1 March 2020) was the normal price. It alleges that the Commission cannot get away from the fact that the Minister did not elect to treat a period from 31 January 2020 as a period of disruption. As we have indicated above, we assess this case on the basis of section 8 of the Act without regard to the Consumer Protection Regulations. It is not open for Babelegi to reach forward to the Consumer Protection Regulations, passed by the Minister after the Complaint Period, having argued that the Consumer Protection Regulations do not apply.

113. Under a section 8 matter due regard must still be had to the proper context including the economic circumstances or market conditions and those include the Covid-19 health crisis. There is nothing in the framework of section 8(1)(a) to suggest that it would not find application in a period of crisis, even if of a short duration. Furthermore, the relevant factors to consider in terms of the appropriate economic test in the circumstances of a health crisis such as Covid-19, as outlined above, are contained in section 8(3) of the Act. Moreover, in terms of the timeline that we have presented, the economic effects of Covid-19 on certain markets were in existence well before the publication of the Consumer Protection Regulations and Babelegi in fact concedes that the increase or surge in the demand for masks - before the publication of the Consumer Protection Regulations - is related to Covid-19. As we have shown, the WHO declared Covid-19 a PHEIC on 30 January 2020 and as we shall show below, Babelegi increased its prices for face masks dramatically the day after the PHEIC on 31 January 2020. Hodge accurately summarises this as “*the conditions for an economic abuse called prior to the declaration of a state of emergency and in fact called from the end of January which by no small coincidence is when the respondent started increasing prices.*”⁸⁹ Put differently, the Consumer Protection Regulations are responsive to an existing health crisis situation and how to best manage that and does not create it (see timeline in paragraph 11 above).

⁸⁹ Transcript, page 36, lines 1 to 5.

114. We next consider, in terms of the appropriate economic test, the factual evidence relating to Babelegi's conduct. This includes the size, duration and timing of Babelegi's price increases, as well as Babelegi's mark-ups and other relevant factors including cost increases faced by Babelegi during the relevant period.

Factual evidence relating to market power and excessive pricing

Babelegi's increases in price and mark-ups

115. According to the Commission, Babelegi's prices for FFP1 masks increased by 888% from the price charged on 9 December 2019 (prior to the Complaint Period) to the price charged on 5 March 2020 (the last day of the Complaint Period). The Commission's calculation of Babelegi's price increases are contained in Table 1 below.

Table 1 Commission's calculation of Babelegi's price increases on FFP1 masks (December 2019 – March 2020)

Date	Selling price/box (R')	Percentage price increase (relative difference) (%)	Cumulative price increase (%)
9-Dec	50.60	-	-
31-Jan	91.00	79.84	80
4-Feb	85.00	-6.59	68
10-Feb	350.00	311.76	592
5-Mar	500.00	42.86	888
18-Mar	550.00	10.00	987

116. FTI concedes that there is indeed a large increase in Babelegi's prices for FFP1 masks.⁹⁰

117. The Commission further submits that Babelegi independently increased its mark-up earned on FFP1 masks during the Complaint Period by effecting material increases to its

⁹⁰ FTI Report, paragraph 17.

price. It furthermore submits that this conduct continued until its actual costs increased with the supply of masks received on 19 March 2020.

118. The Commission, based on information supplied by Babelegi, calculated its mark-ups on FFP1 masks as follows:⁹¹

Table 2 Commission’s calculation of Babelegi’s mark-ups in the period 9 December 2019 to March 2020

	Cost box	Cost/mask	Selling/box	Selling/mask	Profit (R)	GP (%)	Mark-up (%)
9 Dec	41.00	2.05	50.60	2.53	9.60	18.97	23 ⁹²
31 Jan⁹³	41.00	2.05	91.00	4.55	50.00	54.94	122
4 Feb	41.00	2.05	85.00	4.25	44.00	51.76	107
10 Feb	41.00	2.05	350.00	17.50	309.00	88.28	753
5 Mar⁹⁴	41.00	2.05	500.00	25.00	459.00	91.80	1120
18 Mar⁹⁵	440.00	22.00	550.00	27.50	110.00	20.00	25
26 Mar	440.00	22.00	550.00	27.50	110.00	20.00	25

119. We next consider the successive increases and the size of the increases in Babelegi’s prices and mark-ups, and contextualise that in relation to certain Covid-19 events, as well as correspondence received from what FTI refers to as one of Babelegi’s “main” competitors, Dromex,⁹⁶ who is also a potential supplier to Babelegi (but did not in fact supply Babelegi during the Complaint Period, as shall be seen below):

119.1. On 19 December 2019 (before Covid-19 is declared a PHEIC) Babelegi charges R2.53 per face mask; its mark-up on masks is 23%⁹⁷. As we have explained above, this is in this case the appropriate benchmark for the competitive price and mark-up under normal competitive conditions.

119.2. Babelegi’s first significant price increase is on 31 January 2020, the day after the WHO declares Covid-19 a PHEIC, when Babelegi increases its price to R4.55 per

⁹¹ Founding Affidavit, paragraph 40.

⁹² The 23% is confirmed in Babelegi’s Answering Affidavit, paragraph 110.2.

⁹³ The WHO declares Covid-19 a PHEIC on 30 January 2020.

⁹⁴ South Africa announces its first Covid-19 case.

⁹⁵ The Disaster Management Regulations are published.

⁹⁶ FTI Report, paragraph 59.

⁹⁷ The 23% is confirmed in Babelegi’s Answering Affidavit, paragraph 110.2.

mask; its mark-up increases to 122%. Babelegi, at this time, is not subjected to any actual increase in supplier cost.

119.3. On the same day, 31 January 2020, Babelegi receives communication from Dromex stating *inter alia* “[d]ue to the Coronavirus crisis, the global demand for approved disposable masks has drastically increased and [REDACTED] our dust mask range”⁹⁸ (emphasis added). This communication thus confirms that there are supply disruptions experienced in South Africa in the sale of dust masks at the end of January 2020 and that it is due to Covid-19. This disruption provides Babelegi the opportunity to exploit that situation by significantly increasing its price. Thus, conditions already exist on 31 January 2020 for exploiting the sale of dust face masks and Babelegi’s conduct is consistent with such behaviour when it significantly increases its price on 31 January 2020.

119.4. On 2 February 2020, Babelegi receives a further letter from Dromex indicating *inter alia* “our disposable masks [REDACTED]” and “[REDACTED] until the situation is back to normal”.⁹⁹

119.5. Babelegi’s price increases get progressively bolder in February 2020. On 10 February 2020, Babelegi again increases its price – this time to R17.50 per mask (this increases its mark-up to 753%). Babelegi, at this time, is not subjected to any actual increase in supplier cost.

119.6. On the day that South Africa announces its first Covid-19 case, 5 March 2020, Babelegi again raises its price – this time to R25.00 per mask (this increases its mark-up to 1120%). Babelegi, at this time, is not subjected to any actual increase in supplier cost.

119.7. On 18 March 2020, Babelegi again increases its price to R27.50 per mask. However, the evidence shows that on the same day it places an order for FFP1 masks with Sicuro and is quoted an increased supplier price for FFP1 masks. It receives its order of masks from Sicuro the next day, 19 March 2020. Babelegi’s mark-up returns to “normal” levels, slightly above the December 2019 level.

120. Many of the facts relating to Babelegi’s pricing and mark-ups are common cause. We next consider Babelegi’s admission of facts in its Answering Affidavit.

⁹⁸ See Appendix 2 to FTI Report.

⁹⁹ See Appendix 2 to FTI Report.

Admitted facts

121. In relation to the increases in Babelegi's mark-ups, the Commission in its Founding Affidavit states that in the Complaint Period, Babelegi's average mark-up for masks was in excess of 500%. It also says that Babelegi's mark-up dropped to 25% from 18 March 2020 (when its supplier, Sicuro, increased its price) and remained at that level (as of 26 March 2020).¹⁰⁰

122. Babelegi in its Answering Affidavit does not dispute its significant price increases for masks during the Complaint Period and its increases in mark-ups.¹⁰¹

122.1. It categorically accepts that the Commission's calculations of its average mark-up for masks during the Complaint Period is correct: *"For purposes of this answer, I shall accept as correct the Commission's calculations of Babelegi's average mark-up for masks between 31 January and 5 March 2020 as being 'in excess of 500%'"*¹⁰² (emphasis added).

122.2. It furthermore accepts as correct the Commission's calculation of its mark-up from 18 March 2020: *"For purposes of this answer, I shall also accept as correct the Commission's allegation that Babelegi employed a mark-up of 25% since 18 March 2020."*¹⁰³ (emphasis added).

122.3. It also admits that its margin demanded from 18 March 2020 is comparable to the margin demanded in December 2019, before Covid-19.¹⁰⁴

123. The above admissions confirm the successive and stark increases by Babelegi in both its prices and mark-ups for masks during the Complaint Period.

124. Even on FTI's version of mark-ups in its Report based on weighted average sales prices, Babelegi's mark-ups¹⁰⁵ on masks increase from 15% in January 2020 to a 201% mark-up during the Complaint Period, a stark more than thirteen-fold increase.¹⁰⁶

¹⁰⁰ Founding Affidavit, paragraph 40.

¹⁰¹ Answering Affidavit, paragraph 55.

¹⁰² Answering Affidavit, paragraph 55.1.

¹⁰³ Answering Affidavit, paragraph 55.2.

¹⁰⁴ Answering Affidavit, paragraph 55.4.

¹⁰⁵ Weighted average for each period.

¹⁰⁶ FTI Report, paragraph 75, Table 4.

125. However, we note that FTI's calculation based on weighted averages of all Babelegi's sales distorts and underscores Babelegi's mark-ups to its external customers during the Complaint Period.¹⁰⁷ The reason for this is that relatively large volumes of sales are made in February 2020 to sister company depots, namely Belegi (see paragraph 63 above) at a lower mark-up than on external customer sales. Babelegi supplies masks to Belegi for on-sale to clients. FTI's analysis thus distorts the picture of the true mark-ups on sales to external customers i.e. customers not affiliated to Babelegi. If these transfer sales are excluded from the analysis of weighted average prices and costs, the weighted average mark-up charged by Babelegi is more than 500% for the Complaint Period.¹⁰⁸

126. FTI's assertion that the correct approach to the assessment is to take a weighted average of the Complaint Period as well as the months around it, i.e. the full period from 1 January to 31 March 2020 - which are not subject to the complaint - does not pass muster. On this basis, FTI submits that Babelegi's mark-ups were in the region of 11%.¹⁰⁹ This approach to the analysis however misses the point about Babelegi's significant price increases from 31 January 2020 (coinciding with the PHEIC declaration of 30 January 2020) as a result of Covid-19. We highlight that FTI's analysis is particularly unhelpful since the increased pricing as a result of Covid-19 was effected by Babelegi on 31 January 2020, the day after the WHO declared Covid-19 a PHEIC. The period prior to the Complaint Period and the period thereafter, as per the correct economic test in the context of a crisis such as Covid-19, serve as appropriate comparators on mark-ups and cannot be used to dilute the mark-ups during the Complaint Period.

127. Furthermore, when Babelegi's conduct is considered in the proper context i.e. taking advantage of a crisis period, when customers and consumers are at their most vulnerable, to massively increase its prices and mark-ups for masks, the conduct is durable in the sense that it effected transactions at those high prices from 31 January to 5 March 2020 (see Tables 1 and 2 above).

128. We next consider the evidence in relation to Babelegi's defence of anticipated supplier price increases.

Alleged anticipated increases in suppliers' prices

¹⁰⁷ Babelegi sold 496 boxes of 20-piece FFP1 masks from 31 January to 5 March 2020 (inclusive). Of these sales 76 boxes were to external customers.

¹⁰⁸ Commission's Supplementary Economic Submission, paragraph 4, Table 2.

¹⁰⁹ FTI Report, paragraph 75.

129. The economic test for potential exploitative pricing behaviour in the context of a crisis such as Covid-19 includes the assessment of whether a material price increase is substantiated by a corresponding increase in cost.
130. Babelegi admits that it increased its prices for masks to its customers from 31 January 2020 and that its supplier of masks (Sicuro) did not effect any actual price increase before 18 March 2020. The Commission's investigation confirms that Babelegi's supplier of masks in the relevant period, Sicuro, in fact only increased its prices on 18 March 2020. Babelegi however, despite not being subjected to any actual supplier cost increase before 18 March 2020, began to increase its selling price of FFP1 masks successively and drastically from 31 January 2020.¹¹⁰
131. Babelegi gives the following reason for its price increases to its customers prior to actual price increases from its supplier: "*Babelegi had received notice of the impending price increases of its supplier, and adjusted its selling prices to ensure that it would be able to replenish stock at the significantly higher prices that we knew were due to be imposed in respect of further purchases*"¹¹¹ (emphasis added).

Assessment

132. As indicated, it is common cause that Babelegi faced no actual increase in its costs to procure FFP1 masks from its supplier during the Complaint Period and prior to 18 March 2020. FTI confirms that an invoice from Sicuro indicates that on 5 December 2019, FFP1 dust masks were quoted at R2.05 per mask (R41.00 for a box of 20 masks).¹¹² Prices are only again quoted by Sicuro on 18 and 23 March 2020, where invoices show a quoted price of R22.00 per mask (R440.00 for a box of 20 masks).¹¹³ We also note that Babelegi on 18 March 2020 sold stock at R550.00 a box from stock that it had still purchased at the usual supplier price of R41.00 a box.
133. Furthermore, Babelegi tenders no evidence of any actual price increases effected by any other supplier than Sicuro. While the FTI Report mentions that another supplier, Dromex (as we have already indicated, according to FTI, a "major" competitor of Babelegi and a potential supplier¹¹⁴) intended increasing its price, no evidence is presented showing that any FFP1 masks were sourced from Dromex at any increased price or at all.

¹¹⁰ Founding Affidavit, paragraph 41.

¹¹¹ Answering Affidavit, paragraph 56.1.

¹¹² Letter from Babelegi to the Commission dated 30 March 2020, Record page 69.

¹¹³ Letter from Babelegi to the Commission dated 30 March 2020, Record page 70.

¹¹⁴ FTI Report, paragraph 59.

134. It is important in this assessment to consider the number and the level of price increases by Babelegi over the Complaint Period. We have shown these figures above. The first issue to note is that Babelegi imposes successive price increases, and second that the price increases are huge: starting from a price of R50.60 for a box of 20 FFP1 masks (the price on 9 December 2019) to R500.00 for the same box of 20 FFP1 masks (the price on 5 March 2020). If Babelegi's price increase was motivated by an anticipated supplier price increase, as alleged in its letter of 30 March 2020 to the Commission, one would expect a single price increase to be effected. In contrast, and inexplicably, a number of significant price increases were effected before the actual increase in supplier costs on 18 March 2020. Babelegi in its letter of 30 March 2020 to the Commission states "*[l]ater during February 2020 the supplier indicated that the price per mask would increase to approximately double the December 2019 price of R2,05 (exclusive of VAT)*"¹¹⁵ (emphasis added). This does not explain the abovementioned successive and much larger price increases actually effected by Babelegi during the Complaint Period - its prices for masks increase multiple fold higher than doubling.

135. No documentary evidence is presented by Babelegi as to the extent or quantum by which any supplier was anticipated to be increasing prices before the actual price increase by Sicuro on 18 March 2020. None of the letters that Babelegi received from Dromex during January and February 2020 (as relied on by FTI in its Report) quantify any anticipated price increase. These letters refer to the following issues: [REDACTED] dust mask range due to the Coronavirus crisis; future pricing being affected by the fluctuation in the Rand/Dollar exchange rate (Dromex's letter of 31 January 2020); an overwhelming number of requests from around the world for millions and millions of these products; an indication that disposable masks [REDACTED]; [REDACTED] respiratory products until the situation is back to normal (Dromex's letter of 2 February 2020); and an indication that 'flat fold' respiratory masks will [REDACTED] [REDACTED] (Dromex's letter of 9 February 2020).¹¹⁶

136. FTI further avers that Babelegi may have to fill back orders with new stock sourced at higher prices. This is however inconsistent with the submissions made by Babelegi in its Answering Affidavit. There is no evidence that Babelegi fills back orders with new stock bought at a higher price. Rather, the common cause evidence is that for the period of 31

¹¹⁵ Letter from Babelegi to the Commission dated 30 March 2020, Record page 70, paragraph 2.1.8.

¹¹⁶ See Appendix 2 of FTI Report.

January 2020 onwards Babelegi sold stock sourced at the lower price and only took possession of new stock with a higher price on 19 March 2020.

137. Babelegi also has presented no evidence in support of FTI's contention that cashflow or stock management issues warranted the price increases. The evidence shows that FFP1 masks during the past 12 months (up to March 2020), contributed a small percentage of Babelegi overall revenue and there is no evidence that it faced cash flow issues during the Complaint Period or that it could not fund purchases from working capital.¹¹⁷

138. The data show that Babelegi had a quick turnover of stock in the Complaint Period. This indicates that there was no risk that the FFP1 masks would be sold at below cost. In fact, as the Commission shows, Babelegi which normally made roughly R6 336 profit per month off the relevant face masks, saw profits increase approximately eight-fold to R51 487 in February 2020 and then a further approximately nine-fold in March 2020 to R475 381. This is not consistent with the claim that Babelegi had to fill back orders with higher priced new stock or that it needed the cash to purchase new stock. Furthermore, on 18 and 23 March 2020 Babelegi, five days apart, orders masks at a value multiple times even the profit that is put up for February 2020. Clearly on the evidence, Babelegi could fund stock purchases and this therefore is no justification for its pricing conduct.

139. A further factor to consider is how fast new stock will likely be sold at the higher price with an added margin. In the context of high demand products like face masks during Covid-19 there is no reason to believe that stock turn is not going to be fast.

140. No substantiation is provided for FTI's allegation that "*It is standard practice for firms to increase their prices in anticipation of supply disruptions and subsequent cost increases*". As per our above analysis, regard must be had to the number as well as the quantum of Babelegi's price increases. This allegation in our view is not a proper defence when viewed through the lens of Covid-19's impact on South African consumers and the economy, as well as the number and quantum of Babelegi's price increases (without any cost justification as we have found). As Hodge explains "*as we know from the price gouging laws, that's not something that's factored in and that's because state[s] subject to disaster appreciate that the exploitation takes place immediately, that there is a supply response lag to a disaster area and that retailers in fact shouldn't be abusing that position and should be selling at their normal mark-ups. So, the mark-up test is your customary*

¹¹⁷ FTI Report, paragraph 21.

mark-up. There's nothing in any of those price gouging laws about anticipated cost increases and that's the test that is set up because that is the test that is fair in these sort of circumstances¹¹⁸ (emphasis added).

141. We conclude that Babelegi has not put up a rational and valid explanation for its successive and massive price increases during the Complaint Period since these price increases are not substantiated by any corresponding increase in cost. Although Babelegi alleges that a supplier signalled prices potentially doubling in February 2020, this does not explain the behaviour of Babelegi to increase prices during the Complaint Period successively and at levels multiple fold higher than double.

Other arguments of Babelegi

142. Mncube argues that market power, whether temporary or not, cannot exist in a market where supply responses are immediate and that supply responses in this case are immediate. He further argues that there is the potential threat of entry and that there is customer response since Babelegi's sales of masks in February 2020 are lower indicating some type of switching of customers.¹¹⁹

143. However, the evidence before us shows that Babelegi does not respond to any potential threat of entry or any other response during the Complaint Period. As is clear from the pricing evidence that we have shown, Babelegi in fact pushes prices up initially (not by a small amount, say 5 to 10%, but by almost 80%), then gets bolder, and pushes them up even further and by the end of February 2020 it is extremely bold in terms of how far it pushes up its prices. Babelegi's price increases are not only successive and massive, but also endure for a significant period of time in the context of the Covid-19 crisis i.e. from 31 January, the day after the PHEIC, to at least 5 March 2020, the day of South Africa's first Covid-19 case. The factual evidence furthermore shows that these price increases, without any supplier cost justification as shown above, earn Babelegi far more profit than it would in ordinary times. Babelegi's excess profit during the Complaint Period has been calculated and will be dealt with below under remedies (see paragraphs 182 and 187.5.8 below).

144. Furthermore, Babelegi's mask sales volumes for February 2020 are still substantial. Belegi should not be left out of the equation since it bought masks from Babelegi and on-sells these masks bought at Babelegi's increased price and then adds a further margin of

¹¹⁸ Transcript, page 155, line 22, to page 156, line 9.

¹¹⁹ Transcript, page 130, line 14, to page 135, line 18.

its own. Significant volumes of sales are made by Babelegi to Belegi depots during February 2020, and as we have shown above Babelegi's mark-up during the Complaint Period is considerably higher than normal even when sales to Belegi are included in the analysis (a 201% markup, see paragraph 124 above). In other words, the sales onward to Belegi at the transfer pricing during the Complaint Period already include a much higher price than previous months from the same stock at the same cost to Babelegi.

145. Babelegi's conduct of successively and dramatically increasing its prices and mark-ups for masks during the Complaint Period, exploiting the opportunities created by the crisis situation, is not consistent with FTI's assertions that there were immediate constraints on Babelegi's pricing. As Babelegi itself states (see paragraph 62 above), a firm has substantial market power if its decisions are fairly insensitive to reactions of competitors and customers.¹²⁰ Babelegi successively and boldly increases its mask prices during this period, thus behaving to an appreciable extent independently of its competitors, customers or suppliers.

146. Babelegi further criticises the Commission for not considering "*relevant comparator firm's prices and level of profits for the goods or services in a competitive market for those goods or services*" in terms of section 8(3)(c) of the Act. FTI contends that there is evidence of competitors pricing similarly,¹²¹ since prices quoted for FFP1 masks range from R30.00 to R42.50 per mask. However, as FTI concedes, these examples all fall outside of the Complaint Period i.e. they apply to the period mid-March 2020 onwards.¹²² No evidence is put up that Babelegi's price increases mimicked competitors' prices during the Complaint Period.

147. Not only is the above evidence put up by FTI irrelevant because it does not fall within the Complaint Period, in the context of abnormal market conditions such as these, it is not the most appropriate economic test to apply. The appropriate economic test under disrupted conditions during a crisis such as Covid-19 focusses on a comparison of the Respondent's prices and mark-ups or margins when advantage is taken of the crisis situation and the situation before (as the sensible benchmark for competitive conditions prior to the market disruption),¹²³ whilst allowing for actual cost increases, specifically by suppliers. As we have indicated, in this case the successive and massive increases in prices and mark-ups by Babelegi are not disputed and even on FTI's own figures

¹²⁰ Respondent's Heads of Argument, paragraph 50.

¹²¹ FTI report, paragraph 68.

¹²² FTI report, paragraph 68.

¹²³ See Hodge, Transcript, page 53, lines 11 to 22.

Babelegi's mark-up during the Complaint Period is significantly above the figure pre that period, as the appropriate benchmark (see paragraph 124 above).

148. Moreover, typically in a crisis situation such as Covid-19 multiple retailers, resellers or wholesalers operating in the market affected by the crisis, say masks, could be exploiting and profiteering from the crisis situation. Therefore, during a crisis period such as Covid-19, the prices of other suppliers are not the appropriate benchmark of what the competitive price would be under the counterfactual. A comparison of mark-ups or margins pre- and during the Complaint Period avoids this problem.

149. It is well documented in the public domain through the media that the Commission has received hundreds of complaints from the public of alleged Covid-19-related exploitative pricing behaviour by numerous firms. These complaints cover a wide variety of retailers or resellers and other firms (also see paragraph 18 above). As mentioned, in situations of market disruption, firms with stock of goods in high demand or who have the ability to provide services in high demand, may be conferred with market power by the malfunctioning of competitive forces and can behave abusively. Competition regulators are duty-bound to intervene to regulate the conduct of market participants under such conditions.

150. FTI further advocates that true economic cost must be considered to determine if Babelegi was earning economic profits, taking into account depreciation and the replacement cost of the assets that the firm is using to generate its income. This contention is without merit in the current context given that Babelegi is a reseller of masks and the basis on which the economic analysis is performed. There is no evidence to suggest that Babelegi's mark-ups prior to the Complaint Period (which is the appropriate and sensible benchmark for competitive conditions) did not take these factors into account or that any costs changed during the Complaint Period, other than the costs of supply, which we have already analysed.¹²⁴

Conclusion on market power / dominance and *prima facie* case

151. Having regard to the above evidence including the concessions of Babelegi and FTI, from an economics perspective, conditions for exploitation of the crisis situation and market power existed from the end of January 2020 due to the Covid-19 health crisis. As is clear from its pricing conduct, Babelegi exploited this crisis situation, when it

¹²⁴ See Hodge, Transcript, page 49, line 6, to page 50, line 4.

successively and massively increased both its prices and mark-ups for masks during the Complaint Period. Babelegi and FTI do not dispute these dramatic increases in its prices. FTI's own calculations show a stark difference between Babelegi's mark-up (of 201%) during the Complaint Period (see paragraph 124 above) and prior to that (15%), which is the appropriate and sensible benchmark for a mark-up under competitive conditions.¹²⁵

152. The above evidence of Babelegi's conduct shows that it had the ability to effect material price and mark-up increases, suddenly from 31 January 2020 and successively for the remainder of the Complaint Period, without providing any cost justification for these increases. Based on the evidence of its own conduct, and considering the context of Covid-19, one can reasonably infer that Babelegi had market power during the Complaint Period since it behaved to an appreciable extent independently of its competitors, customers or suppliers. Babelegi is therefore a dominant firm during the Complaint Period in terms of section 7(c) of the Act.

153. In light of the above evidence, including Babelegi's admissions regarding its pricing conduct and mark-ups during the Complaint Period compared to before, and FTI's own figures, the successive nature of the increases in both price and mark-ups and the significant levels thereof, together with Babelegi's failure to provide any credible justification on the facts for the increased prices charged, as well as the failure of FTI to provide any economic justification for the pricing conduct, we conclude that the Commission has established a *prima facie* case of abuse of dominance because Babelegi charged excessive prices for FFP1 masks during the Complaint Period in breach of section 8(1)(a) of the Act.

154. Given that the Commission has on the above evidence discharged the onus of showing a *prima facie* case of abuse of dominance, in terms of section 8(2) of the Act the onus shifts to Babelegi to show that its mask prices during the Complaint Period were reasonable.

155. We next deal with reasonableness.

Reasonableness

156. Section 8(3) of the Act provides that the determination of whether a price is excessive requires a determination of whether or not the difference between the price and the competitive price is unreasonable. In the context of this case this means that we consider,

¹²⁵ Commission's Supplementary Economic Submission, paragraph 4, Table 2. FTI Report, Table 4.

in terms of section 8(3) of the Act, if the differences between Babelegi's prices and mark-ups during the Complaint Period and its prices and mark-ups prior to the Complaint Period, as the appropriate and sensible benchmark of competitive prices and mark-ups, are unreasonable.

157. The Commission, in the context of Covid-19 and relying on precedent through price gouging laws elsewhere¹²⁶ submits that a low threshold is appropriate for the difference between the price charged by the firm and the competitive price. It suggests that a 10% threshold for a price (or mark-up) increase would be indicative of an unreasonable difference to the normal competitive price (or mark-up) that prevailed historically.¹²⁷

158. We have above already dealt with the successive nature and the substantial levels of increases both in Babelegi's prices and mark-ups during the Complaint Period compared to the situation before the Complaint Period. These differences in Babelegi's case are so blatantly stark that there can be no question about there being no reasonable relation between them. To recap on those differences: See Table 1, paragraph 115 where the Commission calculates that Babelegi's prices for FFP1 masks increased by 888% from the price charged on 9 December 2019 (prior to the Complaint Period) to the price charged on 5 March 2020 (the last day of the Complaint Period). These price increases are not disputed by Babelegi in its Answering Affidavit. In terms of the increases in mark-ups, it is common cause that Babelegi's mark-up prior to the Complaint Period is below 25%. Babelegi admits in its Answering Affidavit that its average mark-up for masks in the Complaint Period is 'in excess of 500%' (see paragraphs 121 and 122.1 above). Even on FTI's version of mark-ups in its Report based on the weighted average sales prices, Babelegi's mark-up¹²⁸ increased from 15% in January 2020 to a 201% mark-up during the Complaint Period, a more than thirteen-fold increase (see paragraph 124 above).¹²⁹

159. We conclude that Babelegi's prices charged for FFP1 masks and its mark-ups during the Complaint Period bear no reasonable relation to the prices charged and mark-ups prior the Complaint Period as the appropriate and sensible benchmark of what competitive prices and mark-ups would be under conditions of normal and effective competition. Babelegi's price increases effected during the Complaint Period therefore are unreasonable.

¹²⁶ See Price Gouging Laws by State, available at <https://consumer.findlaw.com/consumer-transactions/price-gouging-laws-by-state.html>.

¹²⁷ Supporting Affidavit, paragraph 32.

¹²⁸ Weighted average for each period.

¹²⁹ FTI Report, paragraph 75, Table 4.

160. We next consider detriment.

Detriment

161. Section 8(1)(a) of the Act states that it is prohibited for a dominant firm to charge an excessive price “*to the detriment of consumers or customers*”. We note that the Act prior to the 2018 Amendments referred to detriment only to consumers¹³⁰ but now refers to both consumers and customers.

162. The Commission submits that price increases applied during Covid-19 have the most detrimental impact on poor individuals and families, as well as small businesses, who are already the most vulnerable during such crisis. Such price increases can put basic necessities and products needed to cope with the challenges of the health crisis out of the reach of poor people who need them or impose high costs on small and other businesses seeking to protect their employees.

163. Babelegi argues that during the Complaint Period it had no cash sales and that all of its sales were to its “ordinary” customers. However, we lack evidence regarding whether or not the customers, as per the customer list provided by Babelegi for the Complaint Period, can be regarded as small businesses or not. Babelegi does not show that these customers are not small businesses.

164. Babelegi also argues that it did not sell enough masks during the Complaint Period to amount to a significant adverse effect on consumers or customers.¹³¹ Babelegi sold 496 boxes of 20-piece FFP1 masks from 31 January to 5 March 2020 (inclusive).

165. Babelegi and FTI also raise some further arguments that we discuss below under our assessment.

Assessment

166. FTI makes the claim that because consumers were willing to pay more for face masks during the Complaint Period there can be no detriment to consumers. This is a remarkable contention because if held to be the case, then there would be no role for excessive pricing

¹³⁰ Section 8(a) of the Act prior to the 2018 Amendments.

¹³¹ Excluding sales to Belegi, Babelegi’s affiliated company. However, a significant number of masks are sold during the Complaint Period to the affiliated Belegi who is charged the increased price by Babelegi and will on-sell the masks and add a further margin. Babelegi sold 496 boxes of 20-piece FFP1 masks from 31 January to 5 March 2020 (inclusive).

in our law - an excessive pricing enquiry concerns a price charged and paid by a customer. Rather than a willingness to pay, in a crisis situation customers and consumers are often desperate and forced to pay an inflated or exorbitant price because their choices are limited. They do not do this willingly but because they have no viable alternatives.

167. The CAC in *Mittal* confirms that the assessment of detriment requires a value judgment.¹³² Regarding the establishment of detriment, the CAC in *Mittal* further says “*it does not appear to be in dispute that, if the prices complained of are held to be excessive, detriment to consumers will have resulted*”.¹³³ This is not at all surprising since excessive pricing is an exploitative type of abuse. If an excessive price is found to have been charged, and an excess profit earned (as has been calculated in this case and will be dealt with under remedies), this must be at the expense of consumers or customers in the economy.

168. The CAC further states in *Mittal*, “*Competition proceedings involve the public interest, and under the Act, the Tribunal has an active role to play in protecting that interest.*”¹³⁴ Our Act has a wide ambit, it is charged with balancing the interests of workers, owners and consumers; while setting the rules for an efficient, competitive economic environment that focusses on development to the benefit all South Africans.¹³⁵ The purpose of the Act is *inter alia* to promote and maintain competition in the Republic in order to provide consumers with competitive prices and product choices¹³⁶ and to advance the social and economic welfare of South Africans.¹³⁷

169. The pricing conduct of Babelegi during a crisis must be considered in the context of the active role that the Tribunal has in protecting the public interest and the broader purpose of the Act. This means that one must have regard to context, including the nature of the conduct, or the theory of harm, as well as the economic and other circumstances, in this case the substantial hiking up of prices in the time of a health crisis. Such conduct by a firm at such time should from a public interest perspective be regarded as offensive.

170. Babelegi’s other claim, referring to the OECD and the FTC, is that customers are well served by price hikes because this might provide market signals to bring in more supply. However, even in the United States where, prior to Covid-19, at a federal level there was

¹³² Mittal, paragraph 55.

¹³³ Mittal, paragraph 55.

¹³⁴ Mittal, paragraph 74.

¹³⁵ Act, preamble.

¹³⁶ Section 2(b) of the Act.

¹³⁷ Section 2(c) of the Act.

no excessive pricing intervention, more than 30 individual States have decided that the short-term abuse of market power is abhorrent. This argument of Babelegi does not pass muster when consideration is had to the successive and massive increases in its prices and mark-ups during the Complain Period. The massive levels of increases in both prices and mark-ups as effected by Babelegi go far beyond what may assist in attracting supply responses, these increases clearly are of an exploitative nature. If there is a known shortage of a product such as masks in the market, firms can take advantage of that and increase output.

171. Furthermore, included in the analysis as required by section 8 of the Act is an assessment of whether or not the difference between the price charged and the competitive price is unreasonable (see paragraphs 156 to 159 above). Therefore, some level of price increase (to attract entry) would be acceptable, and the Commission suggests that in the context of Covid-19 a 10% threshold should be utilised (see paragraph 157 above). Babelegi's increases in both prices and mark-ups are however so far above any acceptable level that they clearly are exploitative.

172. Babelegi's increased pricing during the Complaint Period is also not the result of some ingenuity or investment made by it. Rather, the evidence suggests that Babelegi could during the Complaint Period exploit the economic circumstances amid the Covid-19 health crisis and did so.

173. Motta¹³⁸ has expressed the view, in the context of Covid-19, that *“Excessive price actions in antitrust are often criticised because (i) they interfere with the regular functioning of the market, and (ii) they may “expropriate” firms of the fruits of their investment and innovation. However, under the current circumstances, objection (i) will not apply if supply is unlikely to respond in the short-run; as for (ii), price spikes are due to sudden increases in demand or captivity of consumers and bear little relation to firms’ investment or effort.”* This is indeed the case here as the above evidence and analysis show.

174. FTI further contends that there is negligible consumer harm in this case. However, no credible evidence is presented to support this. Babelegi cannot get around the fact that it increased its prices to customers successively and massively without any cost justification and that this must come as a cost to customers and consumers in the economy. As the CAC stated in *Mittal*¹³⁹ an *“excessive price may be charged to a single customer”* and

¹³⁸ Motta 2020.

¹³⁹ Mittal, paragraph 55.

accordingly detriment to that single customer constitutes sufficient grounds on which to find an excessive price in breach of section 8(1)(a) of the Act. As we have noted, taking advantage of a crisis situation to increase prices above competitive levels is often done by numerous firms at the retail, reseller or wholesale level of the supply chain. In the relevant context, Babelegi's conduct is reprehensible because its customers are exploited amidst a crisis when these customers are at their most vulnerable and their choices limited.

175. FTI further contends¹⁴⁰ that since FFP1 masks are not suitable for medical purposes, the detrimental effect on consumers (if any) can only apply to consumers in the dust particles sectors, and can have no effect on public health or healthcare workers; the FFP1 masks cannot be seen as essential products for the period of disaster. We have already dealt with this above. This is a misplaced argument. As we have indicated, Babelegi offers no explanation for the sudden increase or surge in the demand for dust masks other than Covid-19. The evidence is that the sudden and significant increase in the demand for dust masks is directly related to Covid-19. This confirms that customers and consumers at the time saw value in dust masks offering some use or benefit in the Covid-19 health crisis context. Furthermore, the prohibition against excessive pricing (under section 8 of the Act) is not of limited application only to items deemed essential but applies to any product or service.

176. We conclude that Babelegi's prices charged during the Complaint Period from a contextual and economic perspective were of an exploitative nature. Babelegi knew full well that there was a significant increase in the demand for masks during the Complaint Period and took advantage of customers and consumers amid the international Covid-19 health crisis. This leads us to conclude that Babelegi's prices charged during the Complaint Period were to the detriment of consumers and customers.

Conclusion

177. Given all of the above, we find that Babelegi has contravened section 8(1)(a) of the Act by charging excessive prices for FFP1 masks during the Complaint Period. While the Commission has presented evidence that warrants a finding of excessive pricing, Babelegi has failed to discharge its onus to rebut the Commission's case.

178. We next consider remedies.

¹⁴⁰ At paragraph 52.

Remedies

179. With regards to remedies the Commission submits that it would be appropriate for the Tribunal to grant an order:

179.1. interdicting and restraining Babelegi from engaging in any further conduct in contravention of section 8(1)(a) of the Act until the end of the national state of disaster;

179.2. directing Babelegi to pay an administrative penalty, in terms of section 58(1)(a)(iii) of the Act, in the amount of no less than R113 000 (one hundred and thirteen thousand Rand).¹⁴¹ In oral argument the Commission however persisted that an appropriate penalty would be 10% of Babelegi's turnover in its most recent financial year; and

179.3. addressing the Respondent's conduct in contravention of section 8(1)(a) of the Act in such further terms as the Tribunal may deem appropriate.

180. Regarding the Commission's submissions on interdictory relief, we see no reason on the facts of this case to interdict Babelegi from engaging in any further conduct in contravention of section 8 of the Act. As we have noted, competition authorities are at times of crisis and instances of exploitative price abuse, duty-bound to act in regard to regulating the market conduct that occurred. It is common cause that Babelegi's market conduct in terms of section 8 is not ongoing. Furthermore, any potential future repeat conduct of a similar nature will attract larger sanctions.

181. We next deal with an appropriate administrative penalty.

182. The Commission and Babelegi have widely divergent views on an appropriate administrative penalty to be paid by Babelegi. As indicated, the Commission persists with its argument that the penalty should be an amount of 10% of Babelegi's annual turnover in its most recent financial year. The Commission further submits that for excessive pricing matters in relation to Covid-19, the principles outlined in the USA in relation to "treble damages" should be considered. The Commission calculated the excess profit earned by Babelegi on FFP1 masks over the Complaint Period as R37 817 and if this is multiplied by three the penalty amount would be R113 451.

¹⁴¹ Commission's Heads of Argument.

183. Babelegi submits that the penalty amount should be in the order of R5 000 using a base percentage of 10% of the affected (not total) turnover in its calculations. We explain the “base percentage” below.
184. The Tribunal in terms of section 58(1)(a)(iii) of the Act may make an appropriate order in relation to a prohibited practice and such order may include the imposition of an administrative penalty for section 8 cases in terms of section 59(1)(a) of the Act. In terms of section 59(2) of the Act such penalty may not exceed 10% of the firm’s annual turnover in the Republic and its exports from the Republic during the firm’s preceding financial year. The Tribunal has previously determined that the relevant turnover is turnover in the “affected” line of business.¹⁴²
185. The factors that the Tribunal must take into consideration when calculating the appropriate penalty in the circumstances of each case are provided for in section 59(3) of the Act. These are:
- (i) the nature, duration, gravity and extent of the contravention;
 - (ii) any loss or damage suffered as a result of the contravention;
 - (iii) the behaviour of the respondent;
 - (iv) the market circumstances in which the contravention took place;
 - (v) the level of profit derived from the contravention;
 - (vi) the degree to which the respondent has cooperated with the Commission and the Tribunal; and
 - (vii) whether the respondent has previously been found to have contravened the Act.
186. In accordance with the jurisprudence of the CAC, the penalty amount ought to be proportional in severity to the degree of blameworthiness of the offending party, the nature of the offence and its effect on the South African economy in general and consumers in particular.¹⁴³
187. In *Aveng*¹⁴⁴ the Tribunal developed a six-step methodology for the calculation of an appropriate penalty and this methodology has since become a common approach to determine the penalty based on the section 59(3) factors. We shall use this six-step methodology as a basis for the calculation of an appropriate penalty in this matter.

¹⁴² *Competition Commission And Aveng (Africa) Limited T/A Steeledale, Reinforcing Mesh Solutions (Pty) Ltd, Vulcania Reinforcing (Pty) Limited, And Brc Mesh Reinforcing (Pty) Limited* (CR057Dec09) decision of 7 May 2012 (“Aveng”), paragraph 134; *Southern Pipeline Contractors and Another v Competition Commission* [2011] 2 CPLR 239 (CAC) (“Southern Pipeline”), paragraph 60.

¹⁴³ See, for example, *Southern Pipeline*, paragraph 9.

¹⁴⁴ *Aveng*.

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- 187.1. Step 1: Determination of the affected turnover in the base year.
- 187.1.1. Babelegi's turnover for FFP1 masks in the period 1 March 2019 to 28 February 2020 is R606 137.
- 187.2. Step 2: Calculation of the base amount being that proportion of the affected turnover relied upon. This base amount can range from 0-30% of the affected turnover.
- 187.2.1.1. The practice in determining the base amount is to consider the infringement as a whole, including the nature, gravity and extent of the contravention and the market circumstances in which the contravention took place.
- 187.2.1.2. We consider 30% as an appropriate base amount since the exploitation of consumers or customers by charging excessive prices in a time of crisis such as Covid-19, must be considered as both grave and reprehensible conduct. Babelegi's extremely high increases in prices and mark-ups during the Complaint Period above competitive levels are clear evidence of consumers and customers being forced to pay materially increased prices.
- 187.2.1.3. Applying 30% to the affected turnover gives the following result: R606 137 X 30% = R181 841.
- 187.3. Step 3: "Multiplying" the amount obtained in step 2 by the duration of the contravention.
- 187.3.1. We consider the duration of Babelegi's conduct here. The Complaint Period in this case is 35 days out of a total of 366 days in the year, resulting in the following amount: R181 841 X 35/366 = R17 389.
- 187.4. Step 4: Rounding off the figure obtained in step 3 if it exceeds the cap provided for by section 59(2) of the Act.
- 187.4.1. No rounding off is required in this case and the amount remains at R17 389.
- 187.5. Step 5: Considering factors that might mitigate and/or aggravate the amount reached in step 4, by way of a discount or premium.
- 187.5.1. Under step 5 we consider the behaviour of Babelegi and the degree to which it has cooperated with the Commission and the Tribunal; whether it has previously been found to have contravened the Act, as well as the level of profit

that Babelegi derived from the contravention and the principle of deterrence in the context of pricing abuses amid the Covid-19 crisis.

187.5.2. Babelegi has not previously been found to have contravened the Act. It responded timeously to the Complaint Referral and requests by the Tribunal for additional information. The Commission however noted that Babelegi would not admit to a contravention, despite its admission in its Answering Affidavit that its mark-up on masks exceeded 500% on average during the Complaint Period, and on its own best economic case a 201% mark-up during the Complaint Period (see paragraph 124 above), requiring the Commission to focus its resources during the lockdown period towards the prosecution of this matter. Babelegi submits that it has cooperated with the Commission.

187.5.3. It is widely accepted that an appropriate penalty should take into account the benefit that will flow from the conduct to the Respondent (as per section 59(3)(e) of the Act that requires us to consider the level of profit derived from the contravention), and furthermore that the penalty should be sufficiently onerous to act as a deterrent.

187.5.4. Although in a cartel context, the CAC in *Southern Pipelines* deals with the issue of the expected benefit of the conduct and the principle of deterrence. The CAC states: *“It was noted in Federal-Mogul supra at 72 that the imposition of an administrative penalty should not only promote the important objective of deterrence but that sight should not be lost of fairness to the offending party. In particular, a penalty should not be imposed in order to destroy the business of the offending party, a point confirmed by s59(2) which places a cap on the amount of a penalty which may be imposed; that is it cannot exceed 10% of the offending firm’s annual turnover in the Republic and its exports during that firm’s preceeding financial year”*¹⁴⁵ (emphasis added). We note that we apply the appropriate cap in the six-step process.

187.5.5. The CAC quotes Motta: *“As Motta has noted (2008 (29) European Competition Law Review 209) a successful fine depends on a consideration of the expected benefit of the conduct and the possibility of being so discovered”*¹⁴⁶ (emphasis added). The CAC goes on to state: *“A calculation of the expected*

¹⁴⁵ At [9].

¹⁴⁶ At [58].

benefit will, of course, have to take into account not only the problem of discovery of the relevant documentation to support a justifiable finding but also the extent to which the competition institutions, in this case the Tribunal and ultimately this Court, are prepared to ensure that the benefit which flows directly or indirectly from participation in cartel activity will have to be disgorged by the appellant" (emphasis added).¹⁴⁷ The same principles apply here.

187.5.6. The EU Guidelines on the method of setting fines also stress the importance of administrative penalties having a deterrent effect both on the Respondent and other firms. These guidelines state: "*Fines should have a sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Articles 81 and 82 of the EC Treaty (general deterrence)*"¹⁴⁸ (emphasis added). We submit that the latter i.e. general deterrence, is highly relevant in the context of pricing abuses related to Covid-19 given its public interest importance.

187.5.7. The abovementioned guidelines also direct that fines will be increased to exceed the gains improperly made as a result of the infringement: "*The Commission will also take into account the need to increase the fine in order to exceed the amount of gains improperly made as a result of the infringement where it is possible to estimate that amount*" (emphasis added).¹⁴⁹ The gains improperly made by Babelegi from its infringement of the Act have been estimated and we deal with that next.

187.5.8. As indicate above, the level of profit derived by Babelegi from the contravention during the Complaint Period (as per section 59(3)(e) of the Act), or excess profit, is calculated by the Commission as R37 817.¹⁵⁰ This excess profit calculation is based on all sales made by Babelegi over the Complaint Period. FTI however calculated this amount as R30 416. Since there is not a significant difference between these two amounts, we shall for purposes of the calculation

¹⁴⁷ At [59].

¹⁴⁸ *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003* (2006/C 210/02), Official Journal of the European Union; paragraph 4.

¹⁴⁹ Paragraph 31 of the Guidelines.

¹⁵⁰ The Commission calculated this as follows: the excess margin is the absolute difference between the average price per box for the Complaint Period (R123.43) compared to January 1-30 (R47.19), or R76.25 excess profit per box. This is multiplied by the volume of sales i.e. 496 boxes.

of an appropriate administrative penalty use FTI's lower amount of R30 416.¹⁵¹ We take all sales into account since Babelegi's mark-ups are regarded as excessive even if sales to Belegi is included in the analysis (see paragraph 124 above). Given that the amount arrived at in step 4 above is lower than this amount of the excess profit, it means that that amount must be adjusted upwards.

187.5.9. In its submissions on remedy, Babelegi accepts that it took the benefit of market circumstances to actively increase its prices. It states that although a period of true scarcity did not yet exist, Babelegi anticipated that market conditions would allow it to demand higher prices, given the conduct of competing suppliers. It concedes that Babelegi may be said to have profiteered off those conditions (the Commission's case), but argues that it cannot be left out of account that the prices demanded were aligned with prices charged in the market.¹⁵² We have found that Babelegi's defence that its prices during the Complaint Period were aligned to that of competitors do not pass muster in this case.

187.5.10. The contravention took place amidst the Covid-19 health crisis – a time when the South African consumers and customers are specifically vulnerable – which factor Babelegi sought to profiteer from. This is a grossly aggravating factor.

187.5.11. Counsel for Babelegi argued that Mr Van Niekerk did not intentionally contravene the Act because he could not have known that Babelegi would be considered a dominant firm in terms of section 7 of the Act. However, Mr Van Niekerk knew that he was increasing prices and mark-ups dramatically amid an international health crisis that changed the market conditions, exploiting that crisis situation at the expense of his customers. He did not raise his prices and mark-ups negligently but intentionally - he raised prices repeatedly and multi-fold knowing full well that the increased prices are at the expense of its customers in a crisis situation. As we have said, Babelegi does not dispute that the sudden increase or surge in the demand for masks can be attributed to Covid-19 or that it repeatedly and dramatically increased its prices and mark-ups.

¹⁵¹ FTI includes in its calculation a proportion of operating expenses and allows for a mark-up on the unit cost paid by Babelegi that it deems appropriate.

¹⁵² Respondent's submissions on potential remedies, paragraph 30.1.

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187.5.12. Our approach in this matter is not based on a penalty of 10% of Babelegi's total turnover as the Commission argues we should do, but to follow the six-step process, with due regard to the excess profit made by Babelegi as a result of its conduct and the principle of deterrence. This in our view is fair to Babelegi. It would be wholly against the public interest if Babelegi were to financially benefit from its excessive pricing conduct. This means that the administrative penalty should exceed the excess profit made by Babelegi.

187.5.13. In the exceptional circumstances where the excessive pricing of Babelegi during the Complaint period is the result of it taking advantage of customers or consumers during the Covid-19 crisis, having regard to Babelegi's excess profit as a result of this conduct and given the consideration of deterrence to both Babelegi and others, we are of the view that an appropriate penalty should in this case be calculated as follows:

187.5.14. The excess profit that Babelegi earned from its excessive pricing conduct during the Complaint Period must be included in the fine i.e. R30 416. However, that amount alone would be improper since an appropriate penalty should exceed Babelegi's improper gains from the excessive pricing conduct and should furthermore act as a deterrent to itself and others to engage in such conduct. We therefore consider it reasonable in the context of this case to add 1.5 times the improper gains to the penalty that must be paid. This means that the penalty amount is R30 416 (the improper gains) plus an amount of R45 624 (1.5 times the improper gains), which gives a total penalty amount of R76 040. One must bear in mind that a significant portion of this amount, R30 416, represents improper profit that Babelegi earned.

187.5.15. If there were further aggravating circumstances such as non-cooperation or a second contravention of the Act, which is not the case here, the appropriate penalty would have been significantly higher.

187.6. Step 6: Rounding off this amount if it exceeds the cap provided for in section 59(2) of the Act.

No rounding off is required in this case. The final penalty amount thus is R76 040.

Order

188. Babelegi has contravened section 8(1)(a) of the Act for the Complaint Period.

189. Babelegi must pay an administrative penalty of R76 040 (seventy-six thousand and forty Rands) within 15 business days of the date of this order.

190. There is no order as to costs.

Andreas Wessel Wessels

Mr AW Wessels

1 June 2020

Date

Ms Mondo Mazwai

Ms Mondo Mazwai

Enver Daniels

Mr Enver Daniels

Tribunal Case Manager:	Ms Mpumelelo Tshabalala
Tribunal Economist:	Ms Karissa Moothoo Padayachie
For the Commission:	Mr Bukhosibakhe Majenge assisted by Ms Candice Slump and Mr James Hodge <i>for</i> the Commission
For the Respondent:	Adv Greta Engelbrecht SC <i>assisted</i> by Prof Nicola Theron and Prof Liberty Mncube <i>instructed</i> by Mr Danie Jacobs of Klagsbrun Edelstein Bosman Du Plessis Inc. <i>for</i> Babelegi