

Masks, Markups, and COVID-19: How the Competition Authorities Struck Down on Inflated Prices

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INTRODUCTION

*"In the economic conditions of the Covid-19 outbreak surgical masks are considered as essential to consumers as water in a drought."*¹

In response to government regulations requiring masks to be worn in public during the COVID-19 pandemic, Babelegi Workwear and Industrial Supplies ('Babelegi') and Dis-chem Pharmaceuticals ('Dis-chem') appeared to have seen an opportunity to increase their profits by charging consumers allegedly excessive prices for face masks. During 2020, as the prices of masks soared, this issue fell under the Competition Commission's radar.

The Competition Tribunal, (*the Tribunal*), in *Competition Commission of South Africa v Babelegi Workwear and Industrial Supplies CC*² (*Babelegi*), and *Competition Commission v Dis-chem Pharmacies*³ (*Dis-chem*), was tasked with determining whether Babelegi's and Dis-chem's high prices of face masks contravened Section 8(1)(a) of the Competition Act, 89 of 1998, (*the Act*).

THE COMPETITION ACT 89 OF 1998

Section 8(1)(a) of the Act prohibits dominant firms from charging excessive prices to the detriment of consumers.

Section 8(2) of the Act states that *'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.'*

Section 8(3) of the Act states that *'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.'*

This is determined by considering all relevant factors, which may include the *'relevant comparator firm's prices and level of profits for the goods or services in a competitive market'*, and *'the structural characteristics*

of the relevant market, including the extent of the respondent's market share'.

In both cases, the Tribunal considered the exceptional circumstances created by the pandemic in analysing whether the firms' conduct contravened Section 8(1)(a) of the Act.

COMPETITION COMMISSION OF SOUTH AFRICA V BABELEGI WORKWEAR AND INDUSTRIAL SUPPLIES CC

Although not a dominant firm, with less than 5% of the market share, the Tribunal noted that Babelegi's pricing conduct must be viewed through the 'prism' of COVID-19. Babelegi was nevertheless considered a 'lucky monopolist', as it behaved independently of its competitors as consumers were desperate, and the surge in demand and supply removed normal competitive constraints. Thus, it was established that Babelegi was a dominant firm for the purposes of section 7 and section 8 of the Act.

Section 8(3) of the Competition Act requires a competitive price to be established as a benchmark to determine if a price is excessive. The Tribunal used Babelegi's own mark-ups before distortion due to the extraordinary market conditions.

The company was found to have increased their prices by 888% from December 2019 to December 2020 and had mark-ups averaging over 500% (a far cry from the usual 23%) from a 35-day complaint period in 2020. These increases were found to have no rational correlation to cost expectations, or historical competitive prices or costs, and were seen to be taking advantage of vulnerable consumers. Babelegi could not prove its prices were reasonable in accordance with section 8(2) of the Act, and consequently, the Tribunal found that Babelegi contravened section 8(1)(a) of the Competition Act. A penalty of R76 040.00 was imposed, calculated using the six-step method developed in the *Aveng*⁴ case.

The Competition Appeal Court confirmed Babelegi's contravention but set aside the penalty, finding, *inter alia*, the contravention *de minimis* as only 76 boxes of masks were sold to customers at the inflated price.⁵

COMPETITION COMMISSION V DIS-CHEM PHARMACIES

Similarly, Dis-chem's price increases on three different types of masks were 261%, 43% and 25%, respectively. These increases occurred over one month in early 2020, without any increase in costs. The Tribunal, noted the firm's high market share and dominance. As in *Babelegi*, a *prima facie* case of excessive pricing was established as the firm raised its prices without a corresponding increase in its own costs. Also, the competitive price was represented by the firm's own mark-ups for the purposes of section 8(3) of the Act. The Tribunal rejected Dis-chem's argument that its prices were lower than that of competitors like Clicks, as Dis-chem was not constrained by their pricing. Dis-chem was held to have breached section 8(1)(a) of the Act. Despite the short period, the Tribunal noted that waiting for the market to correct itself during a national disaster would be a 'dereliction of duty'.

With 165 stores nationwide, the price increases had a wide reach and impact and were held to be exploitative of vulnerable consumers. Therefore, the penalty charged on Dis-chem was R1 200 000.00 calculated using a discretionary approach.

Significantly, the Tribunal reaffirmed that detrimental prices charged to even just a single customer would constitute sufficient grounds to find a breach of section 8(1)(a) of the Act.

CONCLUSION

The approaches of the Competition Tribunal and Appeal Court in finding the Section 8(1)(a) contraventions were context-sensitive and flexible. The courts considered the unique economic circumstances that the global pandemic brought and used a pragmatic approach; as seen, for example, in the analysis when establishing Babelegi's dominance in the market. The authorities swiftly intervened and called for corrective action, ultimately protecting consumers during both a psychologically and economically strained period.



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¹Competition Commission v Dis-chem Pharmacies CR008Apr20 para 160.

²Commission of South Africa v Babelegi Workwear and Industrial Supplies CC CR 003Apr20.

³Supra note 1.

⁴Competition Commission and Aveng (Africa) Limited T/A Steeledale, Reinforcing Mesh Solutions (Pty) Ltd, Vulcania Reinforcing (Pty) Limited, and BRC Mesh Reinforcing (Pty) Limited (CR057Dec09).

⁵Babelegi Workwear and Industrial Supplies CC v Competition Commission of South Africa 2021 (6) SA 446 (CAC).