A NEW DISPENSATION FOR EXCESSIVE PRICING IN THE SOUTH AFRICAN COMPETITION AMENDMENT ACT

by

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DECLARATION

I, 319073, declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through TurnItIn and have attached the report to my submission.

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ABSTRACT

The Competition Act, 89 of 1998 (‘the 1998 Act’) was enacted as the law governing competition law in South Africa. Prior to its amendment, the provisions on excessive pricing were contained in section 8(a) of the 1998 Act which prohibited ‘dominant firms from charging excessive prices to the detriment of consumers’. The 1998 Act was amended by the Competition Act 18 of 2018 (‘the Amendment Act’). Central to these amendments was a change in approach to excessive pricing. In particular, the Amendment Act introduced a new test for excessive pricing and added new provisions to determine cases of excessive pricing. The purpose of this research report is to evaluate the new provisions of excessive pricing and to assess whether the newly introduced test for determining excessive pricing provides a clearer framework for competition authorities. The Report further discusses some of the seminal cases on excessive pricing decided pre and post the Amendment Act.

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I. INTRODUCTION

Excessive pricing is disputably one of the most controversial areas of competition enforcement in many jurisdictions.[1] In South Africa, the provisions on excessive pricing were previously found in section 8(a) of the Competition Act 89 of 1998 (1998 Act) which prohibited a dominant firm[2] from charging an excessive price 'to the detriment of consumers'. Prior to the Amendment Act, the term 'excessive price' was defined in section 1(ix) of the 1998 Act, as 'a price for a good or service which bears no reasonable relation to the economic value of that good or service'; and is higher than the economic value of that good or service.[3] The 1998 Act did not define the term 'economic value', leaving its meaning in the hands of competition authorities to determine.[4]

Before the enactment of the Amendment Act, the competition authorities had, on numerous occasions, faced challenges of inconsistencies in approach when interpreting the excessive pricing provision contained in section 8(a) of the 1998 Act. More specifically, and of concern in the context of this report, the most problematic aspect of the definition of excessive pricing under the 1998 Act was the fact that the Act did not define economic value, thus becoming a key area of debate in the South African case law.[5]

To counter the challenges encountered with the enforcement of the provisions on excessive pricing as previously incorporated under the 1998 Act, the excessive pricing provision was amended in the Competition Amendment Act 2018 (Amendment Act)[6]. The Amendment Act provides for a shift in the burden of proof on the dominant firm to show that a price is 'reasonable', if there is a prima facie case of excessive pricing.[7] In terms of the new

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[1] R das Nair & P Mondliwa. 2017. 'Excessive pricing under the spotlight: What is a competitive price?' in J Klaaren, S Roberts & I Valodia (eds) *Competition Law and Economic Regulation in Southern Africa* 97.

[2] Section 7 of the Competition Act 89 of 1998 provides that 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.'

[3] The Competition Act, 89 of 1998 (as amended), section 1(vii).

[4] S Roberts. 2008 'Assessing Excessive Pricing: The case of Flat Steel in South Africa' *Journal of Competition Law and Economics*, 2.

[5] Note 1 above 98.

[6] The Competition Amendment Act, 18 of 2018.

[7] Ibid, section 8(2).

framework, the assessment for excessive pricing as found in section 8(3) requires the competition authorities to determine whether a price is higher than a 'competitive price' and whether the difference is 'unreasonable' by taking into consideration ''all relevant factors'.[8]

Since the coming into effect of the Amendment Act, the competition authorities have analysed the excessive pricing provisions contained in the Amendment Act, in the cases of *Competition Commission of South Africa v Dis-Chem Pharmacies Limited*[9] and *Competition Commission of South Africa and Babelegi Workwear Overall Manufacturers and Industrial Supplies CC,*[10] hereinafter referred to as 'the *Dis-Chem* case' and '*Babelegi* case', respectively. The provisions were analysed in light of the COVID-19 pandemic and the Competition Tribunal considered the effects of the pandemic on the consumers in their analysis. The aim of this Report is to assess and evaluate the newly amended provisions on excessive pricing and investigate whether the amendments provide the competition authorities with a clearer direction for adjudicating excessive pricing cases.

II. PRE-AMENDMENT EXCESSIVE PRICING PROVISIONS UNDER THE COMPETITION ACT, 89 OF 1998

Previously, section 8*(a)* of the 1998 Act provided that it is prohibited for a dominant firm to charge an excessive price to the 'detriment of consumers'.[11] In terms of the 1998 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.[12] Market power is defined as 'the power of a firm to control prices, to exclude competition, or to behave to an appreciable extent independently of its competitors, customers, or suppliers'.[13]

The implication of the old definition of excessive pricing is that a dominant firm could not put up any arguments to justify charging an excessive price, and the Commission was only

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[8] Ibid, section 8(3).

[9] *Competition Commission of South Africa v Dis-Chem Pharmacies Limited* (CR008Apr20) [2020] (7 July 2020).

[10] *Babelegi Workwear and Industrial Supplies CC v Competition Commission of South Africa*

[2020] 2 CPLR 470 (CAC).

[11] Note 3 above, section 8*(a).*

[12] Section 7 of the 1998 Act.

[13] Section 1(xiv) of the 1998 Act.

required to prove that the dominant firm in question charged an excessive price.[14] It was not a requirement to demonstrate that the conduct of charging an excessive price produced an anti-competitive effect.[15]

The first seminal case that considered an excessive pricing contravention in South Africa was the *Mittal* case (*Mittal* Tribunal case).[16] Harmony Gold Mining Company Ltd and Durban Roodepoort Deep Ltd ('the Complainants') filed a complaint with the Commission of a contravention of sub-sections 8(a) and 8(d)(i) of the 1998 Act against Mittal Steel South Africa Ltd ('Mittal'). The question before the Tribunal was whether Mittal charged excessive prices for its flat steel products. The pricing strategy that Mittal used domestically was import parity pricing, a price charged for goods that includes a notional price for transport costs, insurance and other costs that would be incurred by a local consumer purchasing goods in the international market.[17]

The Complainants' approach in determining excessive prices was based on a comparison of prices in different markets.[18] The Complainants argued this aspect by comparing the prices that Mittal charged for steel with the price that the Complainants themselves, as well as other consumers of steel products, were charged in South Africa.[19] Mittal on the other hand argued that excessive pricing could only be proven if the Complainants could demonstrate that the excessive pricing was reflected in excessive profits.[20] However, the Tribunal noted that these approaches may lead to it adopting a price regulatory approach,[21] which approach it was disinclined to adopt.

In considering how to determine an excessive price, the Tribunal adopted a two-stage test that included a structural test, and a conduct test.[22] The structural test is an enquiry into whether the 'structure of the market in question enables those who participate in it to charge

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[14] L Kelly et al *Principles of Competition Law in South Africa* (2016) 14.

[15] Ibid.

[16] *Harmony Gold Mining Company Ltd and Another v Mittal Steel South Africa and Another* [2007] 1 CPLR 37 (CT)

[17] David Lewis *Thieves at the Dinner Table: Enforcing the Competition Act* 2 ed (2012) 174.

[18] Note 16 above para 32.

[19] Ibid.

[20] Ibid para 34.

[21] Ibid para 37.

[22] Ibid para 84.

excessive prices'.[23] The Tribunal held that this determination requires that a firm allegedly charging excessive prices should not only acquire mere dominance within the relevant market, but they ought to be 'super-dominant' within the relevant market.[24] The Tribunal identified the South African market for flat steel products as one such market.[25]

In assessing the relevant market, the determination of market shares and market power, the Tribunal found that the power to charge excessive prices is usually found in markets where there are exceptionally high barriers to entry, with no reasonable prospect of entry. It termed this level of dominance as 'super dominance'.[26] In this light, the Tribunal established that Mittal could unilaterally determine its prices, as it has a substantial share in the market and the barriers to entry in the South African flat steel market are high, with no prospect of a new entrant in that market.[27] It is noteworthy to state that Mittal was a state-owned enterprise and had received substantial tax subsidies when it built its plant.[28] The Tribunal recognised that Mittal continued to enjoy these same benefits and advantages,[29] and held that Mittal's position was super-dominant.[30]

The conduct test required a competition authority to assess whether the firm in question had engaged in conduct designed to abuse structural opportunities by imposing excessive prices on its consumers within the relevant market.[31] The Tribunal held that Mittal indeed charged its domestic customers import parity pricing, and furthermore, by Mittal withholding the supply of flat steel from the domestic market, it was engaging in monopolistic conduct. Therefore, according to the Tribunal, Mittal had satisfied the conduct test.

The Tribunal found Mittal's import parity pricing excessive,[32] and subsequently rejected the approach of using Mittal's cost or comparing its costs with that of similar products in its

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[23] Ibid para 84.

[24] Ibid.

[25] Ibid para 106.

[26] Ibid para 96.

[27] Ibid para 107.

[28] Note 17 above 174.

[29] Ibid.

[30] Ibid.

[31] Ibid paras 83-4.

[32] *Mittal Steel South Africa Ltd and Others v Harmony Gold Mining Company and Another* (70/CAC/Apr07) [2009] ZACAC 1 (29 May 2019) para 44.

industry[33] for flat steel products. However, import parity pricing cannot on its own be excessive under the 1998 Act, because the 1998 Act requires the establishment that the actual price is higher than the economic value.[34] 'Only when there is no reasonable relation between the price and the value can the price be regarded as being excessive.'[35] The Tribunal considered the fact that Mittal's market share was in excess of 80%, and continued to receive state support even after its state ownership was terminated.[36] Furthermore, Mittal has very few rivals in the market and the barriers to entry are so high that there is virtually no prospect of new entrants into the market.[37] The Tribunal further stated that as competition authorities are not price regulators, in conducting its enquiry, it is not the mathematical relationship between price and costs that is relevant, but rather the fundamental considerations that support the price level.[38] The Tribunal accordingly held that Mittal had contravened section 8*(a)* of the 1998 Act.[39]

It is submitted that the Tribunal's approach of setting a standard of super dominance deviates from the wording of the 1998 Act. The 1998 Act itself proscribes the dominance required for the purposes of applying section 8*(a)*. Section 7 sets out the level of dominance required in the assessment of section 8*(a)*. The wording of section 7 remains unchanged in the Amendment Act. 'Super dominance' is not defined nor required in determining dominance in terms of the 1998 Act. It is submitted that the Tribunal's explanation of super dominance is obstructive as it implies that half of the test for determining whether a firm has charged an excessive price lies in the structure of the market itself and the other half lies in the conduct of the firm. It is submitted, that the Tribunal's requirement of super dominance sets too high a standard for adjudicating cases dealing with excessive pricing, as in terms of section 7, only 'mere dominance' is required in applying section 8*(a)*. It is further submitted that by requiring a firm to be super dominant in a market to be capable of practising excessive pricing, the structural test narrows the prospect of successfully prosecuting firms capable of excessive pricing as it would require them to be super dominant. Although the Tribunal did

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[33] Ibid para 68.

[34] Ibid para 44.

[35] Ibid.

[36] Ibid paras 107 and 121

[37] Note 16 above paras 142-7.

[38] Ibid paras 159-160.

[39] Ibid para 198.

not deal with the phrase 'to the detriment of consumers' as required by the 1998 Act.[40] It is submitted that 'detriment to consumers' is an express qualification in the 1998 Act and requires determination.

The Tribunal's decision was appealed in the CAC. The CAC criticised the Tribunal for their reasoning and findings, the crux thereof being that the Tribunal did not follow the wording of the 1998 Act in making its determination. The Tribunal was criticised for adopting the structural approach,[41] and further stated that 'super dominance' is a concept that is not recognised in South Africa.[42]

The CAC noted the difficulty in establishing an excessive price,[43] and that different methods may be used to determine the 'economic value' of a good or service.[44] The CAC held that Mittal's dominance, together with its case as pleaded, provided a *prima facie* case that it had breached section 8*(a)* of the 1998 Act.[45] It held that what it required was for the Tribunal to analyse whether the evidence put forward by Mittal was sufficient to rebut this presumption,[46] for which the CAC set up a framework for the analysis.[47]

The CAC devised a four-stage enquiry into determining whether the conduct complained of constituted excessive pricing in terms of section 8*(a)*. The four enquiries are: first, determining the actual price of a good or service which is the subject matter of the alleged excessive price; secondly, determining the 'economic value' of the good or service in monetary value; thirdly, 'if the actual price is higher than the economic value of the good or service, is the difference unreasonable' or 'is there "no reasonable relation" between the actual price and the economic value'; and lastly, determining whether the excessive price is 'to the detriment of consumers'.[48] The four enquiries will be discussed in turn.

Although 'economic value' is not defined, the CAC advised that it must be 'interpreted to give it a definite meaning corresponding to the intention of the legislature – a meaning

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[40] Ibid para 71.

[41] Note 32 paras 30-2.

[42] Ibid paras 30-2.

[43] Ibid para 48.

[44] Ibid para 49.

[45] Ibid para 80.

[46] Ibid.

[47] Ibid.

[48] Ibid para 32.

capable, moreover, of practical application.'[49] The CAC held that 'economic value' refers to an amount of money[50] and a notional price charged in circumstances of 'long-run competitive equilibrium.'[51] It further held that 'economic value' must be determined on an objective standard, as opposed to a subjective standard based on the circumstances of each case.[52] Accordingly, if the firm's prices are no higher than economic value, no contravention of s 8*(a)* can arise.[53]

The CAC noted the following factors for the Tribunal to take into account when considering the relationship between the price and economic value: production costs, profitability, the value of the product to the customer,[54] ancillary conduct aimed at enforcing its high prices, prices of comparable products in similar market, reward for risk or innovation, as well as the interest characteristics of the market.[55] Current or special advantages granted to the alleged dominant firm which result in cost savings are not considered at this stage.[56] After a determination of the first and second enquiries, the four-stage enquiry proceeds to the third and fourth enquiries.

If it is found that the price charged exceeds economic value, an assessment must be made whether the price bears a reasonable relation to the economic value.[57] The competition authorities bear this onus. Should this question be answered in the negative, the alleged dominant firm must adduce evidence to prove that the price does bear a reasonable relation to the economic value. [58] The CAC held that if the Tribunal still determines that the price bears no reasonable relation to the economic value of the product in question, a determination must

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[49] Ibid 34.

[50] Ibid.

[51] Ibid paras 40 and 43. The concept of a long-run competitive equilibrium entails an assessment of the actual cost of the dominant firm, including economic costs such as raw material costs, operating expenses and a fair return on capital investments, provided that normal costs in long-run competitive market conditions are also included. Also see note 12 above 128.

[52] Ibid para 43.

[53] Ibid para 43.

[54] Assessing the value of the product to the customer is indicative of the demand in the market.

[55] Note 32 above para 81, footnote 138 thereto.

[56] Ibid para 43.

[57] Ibid paras 43 and 46.

[58] Ibid para 77.

still be made as to whether the alleged excessive price is 'to the detriment of consumers'.[59] This is the final step of the enquiry. The firm accused of charging an excessive price must 'enjoy sufficient market power' and there should be high barriers to entry in the relevant market in order to enable the price to be sustained for a significant period.[60] A firm may have difficulty sustaining a price that is 'to the detriment of consumers' where the firm in question does not enjoy significant market power, or where a market easily attracts new entrants.[61] The history of state ownership may be a factor worth considering in this stage as it may evidence power protection in a market.[62] The characteristics of the market will therefore play a role in assessing whether a price can be sustainable and whether it can be 'to the detriment of consumers'.

The CAC held that the Tribunal did not apply the correct test, and remitted the matter back to the Tribunal,[63] with an instruction that the Tribunal re-determine the matter based on the test favoured by the CAC.[64] However, the parties settled the dispute on terms which remain confidential. [65]

It is submitted that the four-stage enquiry accords with the wording of the 1998 Act. The CAC rightly did away with the concept of 'super dominance' and confirmed that it is only 'dominance' as set out in section 7 of the 1998 Act that is required when determining a case of excessive pricing. On the other hand, the second enquiry of determining the 'economic value' of the good or service in monetary value appears problematic in that it necessitates the determination of 'economic value', which is not defined in the 1998 Act. However, the CAC provided guidance on how 'economic value' ought to be interpreted and proposed criteria to use in assessing 'economic value'.

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[59] Ibid para 32.

[60] Ibid.

[61] Ibid.

[62] Ibid.

[63] Ibid para 84.

[64] Ibid .

[65] Note 22 above 175.

III. EXCESSIVE PRICING UNDER THE COMPETITION AMENDMENT ACT 18 OF 2018

In his State of the Nation Address on 7 February 2019, President Cyril Ramaphosa noted that one of the factors that impedes economic growth in South Africa is the high level of economic concentration.[66] He noted that structurally, the South African economy was designed to keep assets concentrated, thereby keeping many entrepreneurs and enterprises out of the economic parameters in certain markets.[67] The intended purpose of the Amendment Act thereby is to give competition authorities the ability to address the issue of concentration and to create more opportunities for entrepreneurs and enterprises to participate in, and compete.[68] The preamble of the Amendment Act provides that it seeks to introduce provisions that 'clarify and improve the determination of prohibited practices' relating to inter alia abuse of dominance. Among the amended provisions is the excessive pricing provision.

In the first instance, the Amendment Act removed the definition of excessive pricing. Section 8(1) of the Amendment Act prohibits a dominant firm from charging an excessive price, but extends the detriment element to consumers and customers.[69] The Amendment Act continues with the excessive pricing enquiry by including new sub-sections 8(2) and (3). Section 8(2) 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. Furthermore, the determination on whether a price is reasonable must be assessed by taking into account the factors listed in section 8(3) of the Amendment Act, which factors will be addressed in more detail below. The effect of subsections 8(2) and 8(3) is that the onus of proving whether an excessive price charged by a dominant firm was reasonable now shifts from the Commission to the dominant firm itself.

Section 8(3) of the Amendment 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, determined by taking into account all relevant factors, which may include--

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[66] https://www.gov.za/speeches/president-cyril-ramaphosa-2019-state-nation-address-7-feb-2019-0000.

[67] Ibid.

[68] Note 6 above.

[69] Section 8(1)*(a)* of the Competition Amendment Act 18 of 2018 states that '[I]t is prohibited for a dominant firm to charge an excessive price to the detriment of consumers or customers.'

(a) the respondent's price-cost margin, internal rate of return, return of 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 Minster in terms of section 78 regarding the calculation and determination of an excessive price.'

Section 8(1) of the Amendment Act largely reflects section 8*(a)* of the 1998 Act, but there is an addition of the words 'or customers'. At first glance, it may seem that these concepts overlap, however, it is submitted that the fact that both are specifically mentioned in this sub-section suggests that they are distinct concepts in the Amendment Act. A customer includes 'intermediate buyers of product'.[70] The definition of customer is wider than that of a consumer.

Section 8(2) of the Amendment Act is a new provision and introduces a reverse onus whereby the dominant firm bears the onus of proving that a price was reasonable if there is a prima facie case of abuse of dominance by charging an excessive price. The onus was previously on the Commission. The implication of the previous definition of excessive pricing is that a dominant firm could not put up any arguments to justify charging an excessive price, and the Commission was only required to prove that the dominant firm in question charged

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[70] Lerisha Naidu and Siphesihle Nxumalo *'South Africa: Certain Provisions of the Competition Act come into Force'* available at *https://www.bakermckenzie.com/en/insight/publications/2019/07/competition-amendment-act* accessed on 12 June 2021.

an excessive price.[71] It is submitted that the Amendment Act attempts to make it easier for the Commission to prosecute prohibited practices by imposing this reverse onus.

Section 8(3) is an enquiry entered into after a prima facie case of excessive pricing has been established. It effectively replaced the benchmark of 'economic value' with the notion of a 'competitive price'.[72] Section 8(3) requires an assessment on whether the price in question is higher than a competitive price and whether that difference is unreasonable, using the factors set out in section 8(3). [73] These factors are not ranked in any order of importance, weight, or criticality,[74] nor are they exhaustive, as evidenced by the words 'may include '.

IV. EXCESSIVE PRICING REGULATIONS DURING THE COVID-19 OUTBREAK

On 19 March 2020, the South African Minister of Trade and Industry issued the Consumer and Customer Protection and National Disaster Management Regulations ('the Regulations'), which were applied during the COVID-19 national disaster.[75] The Regulations came into effect on 19 March 2020 and ceased to be of any force and effect on 5 April 2022.[76] The Regulations were applicable for the supply of certain goods and services during the period of the national disaster, namely; goods and services which relate to basic food and consumer items, and medical and hygiene supplies.[77] The specific goods and services were listed in Annexure B of the Regulations and included facial masks and surgical masks. The purpose of the Regulations was inter alia to 'protect consumers and customers from unconscionable, unfair, unreasonable, unjust or improper commercial practices during the national disaster'.[78]

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[71] Note 14 above 14.

[72] Note 10 above para 61.

[73] Ibid para 62.

[74] Ibid.

[75] The Regulations were issued in terms of section 27(2) of the Disaster Management Act, 1957 (Act No. 57 of 2002) and published in Government Notice No. R350 *Government Gazette* 43116 of 19 March 2020.

[76] Section 2 of the Regulations. 5 April 2022 is the date of the end of South Africa's state of disaster brought about by the coronavirus pandemic. Refer to 'Statement by President Cyril Ramaphosa on the termination of the National State of Disaster in response to the Covid-19 pandemic' available at *https://www.thepresidency.gov.za/speeches/statement-president-cyril-ramaphosa-termination-national-state-disaster-response-covid-19-pandemic*, accessed on 3 May 2022.

[77] Section 2 of the Regulations, read with Annexure A thereto.

[78] Section 3 of the Regulations.

Section 4 of the Regulations dealt with excessive pricing and Regulation 4.2 provided the following:

> 'in terms of section 8(3)(f) of the Competition Act during any period of the national disaster, a material price increase of a good or service contemplated in Annexure A which –
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> (4.2.1) does not correspond to or is not equivalent to the increase in the cost of proving that good or service; or
>
> (4.2.2) increases the net margin or mark-up on that good or service above the average margin or mark-up for that good or service in the three-month period prior to 1 March 2020, is a relevant and critical factor for determining whether the price is excessive or unfair and indicates prima facie that the price is excessive or unfair.'

During periods of disaster, there may be a change in economic conditions, particularly with consumer goods.[79] The excessive-pricing regulations mentioned above signalled a policy concern that the consumer-welfare effects of exploitative conduct was greater during the disaster period.[80] The Regulations required the assessment of excessive pricing during the national disaster period to rely on an intertemporal comparison of prices.[81] Furthermore, the Regulations were not to be applied independently of the Amendment Act as the Regulations were drafted in accordance with section 8(3)(f) of the Amendment Act. Accordingly, the prerequisite of establishing dominance in a particular market needed to be established before the Regulations were to be applied and excessive pricing assessed and established. The Regulations therefore needed to be used in the determination of whether the price in question was higher than a competitive price and whether the difference was unreasonable. It is accordingly submitted that the Regulations were a useful codification of the excessive pricing prohibition.

V. JUDICIAL APPROACH TO THE EXCESSIVE PRICING PROHIBITION UNDER THE AMENDMENT ACT

(a) *Competition Commission of South Africa v Dis-Chem Pharmacies Limited* (CR008Apr20) [2020] (7 July 2020)

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[79] WH Boshoff 'South African competition policy on excessive pricing and its relation to price gouging during the Covid-19 disaster period' (2020) *Centre for Competition Law and Economics* 112.

[80] Ibid.

[81] Ibid 112.

The COVID-19 outbreak has been described as a 'health disaster of global proportions'.[82] Face masks became critical to public health as the virus was highly contagious[83] and there was no imminent cure or vaccine. After the first case of COVID-19 was identified in Wuhan in December 2019,[84] cases rapidly rose thereafter throughout the world and there was an increased demand for surgical masks, including in South Africa.[85]

Surgical face masks were considered essential in the prevention of contracting the COVID-19 virus and Dis-Chem, a large South African retail pharmacy, was accused of charging excessive prices for these masks during 1 to 31 March 2020 (the complaint period). The Commission laid a complaint against Dis-Chem, alleging that Dis-Chem had contravened section 8(1)(a) of the Competition Amendment Act, read with the Regulations; by charging excessive prices for surgical face masks, particularly surgical Face mask Blue 50pc (SFM50); Surgical Face mask Blue 5pc (SFM5) and Surgical Face mask Foliodress Blue 50pc (Folio50).[86]

The Commission contended that Dis-Chem increased its prices for SFM50, SFM5 and Folio50 by 261%, 43% and 25% respectively during the complaint period, without a corresponding increase in costs.[87] It contended that this is tantamount to excessive pricing to the detriment of consumers.[88]

The Commission argued that the Regulations should apply because Dis-Chem increased its prices prior to the declaration of the National Disaster and continued to charge these increased prices, therefore arguing that this was 'ongoing conduct'.[89] Dis-Chem did not contest the price increases during the complaint period, however; their disputes were two-fold. Firstly, it disputed that the Regulations were not applicable in this case since its price increases were implemented on 9 March 2020, before the promulgation of the Regulations on 19 March 2020.[90] Secondly, Dis-Chem argued that as the Tribunal could not consider the relevant

[82] Note 9 above para 150.

[83] Ibid.

[84] Ibid para 28.

[85] Ibid para 39.4 and 39.6.

[86] Ibid para 6.

[87] Ibid para 7.

[88] Ibid.

[89] Ibid para 47.

[90] Ibid para 8.

factors set out in the Regulations, it had to consider all of the factors listed in section 8(3).[91] Dis-Chem also argued that the Commission could not rely on section 8 as Dis-Chem is not dominant in its supply of surgical face masks.[92]

The Tribunal held that since the National Disaster was proclaimed on 15 March 2020, post Dis-Chem's price increases, the Regulations could not be applied retrospectively.[93] In assessing a case for excessive pricing, the Tribunal conceded that Dis-Chem's prices charged in March 2020 could still be evaluated under section 8(1)(a) of the Amendment Act.[94] To do this, the Commission contended that the test that the Tribunal ought to use is to 'compare Dis-Chem's prices or margins before and after the March increases to find a prima facie case of excessive pricing.'[95] Dis-Chem would then bare the onus of proving that the prices were reasonable.[96]

On the question of market power, the Commission alleged that Dis-Chem was able to increase its prices and its margins to the degree that it did without corresponding costs , which evidenced market power.[97] According to the Commission, states of disaster often present opportunities for firms to exercise market power, in circumstances where they would not ordinarily have such opportunities.[98] It provided that there were various ways in which states of disaster could provide conditions for increased market power: first states of disaster may bring about shortages which are coupled with spikes in demand; as was the case with the outbreak of COVID-19 and face masks.[99] Secondly, states of disaster may limit the movements of customers and consumers and 'thus remove or dampen the constraints imposed from even close geographic conditions'.[100] That was indeed the case in March 2020 as consumers started limiting the shops that they bought goods from as a way of maintaining

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[91] Ibid.

[92] Ibid.

[93] Ibid para 51.

[94] Ibid para 55.

[95] Ibid para 56.

[96] Ibid para 56.

[97] Ibid para 82.

[98] Ibid para 82.

[99] Ibid para 83-4.

[100] Ibid para 86.

social distance.[101] The Commission therefore argued that Dis-Chem used its market power by increasing its prices independently from its competitors when consumers were most vulnerable.

While the Commission argued that the Tribunal must conduct a comparative test of its prices before and after March 2020, Dis-Chem argued that in addition to this comparative test, the Tribunal ought to have regard to all of the factors set out in section 8(3).[102] In this case the relevant factors are the 'structural characteristics of the relevant market, the definition of the relevant market, Dis-Chem's market shares and the presence of competitors in the relevant market; Dis-Chem's prices for face masks (i) in markets in which there are competing products, (ii) to customers in other geographic markets, (iii) for similar products in other markets, and (iv) historically; comparator firms' prices and profit levels in a competitive market; as well as the length of time the prices have been charged at that level.'[103] Dis-Chem further argued that the Commission neglected to consider all these factors and accordingly, no prima facie case had been established.[104]

Dis-Chem continued to attack the Commission's arguments relating to market power by contending that although it is possible to consider market power by inferring to a firm's conduct or economic behaviour, the conduct must be assessed in the context of a relevant market, which the Commission had not identified.[105] Dis-Chem also argued that their consumers still enjoyed the ability to have access to a competitor and thus shop around during the complaint period. This is because Dis-Chem is usually located in shopping centres with its competitors in close proximity.[106] Therefore, Dis-Chem's customers would quite easily have access to a competitor. Furthermore Dis-Chem asserted that because cloth masks and face masks are substitutable,[107] there were numerous suppliers for both due to new avenues for suppliers, including members of the public, that made cloth masks.[108] Accordingly barriers

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[101] Ibid para 87.

[102] Ibid para 56-7.

[103] Ibid para 57.

[104] Ibid para 58.

[105] Ibid para 90.

[106] Ibid para 91, 93.

[107] Ibid para 94.

[108] Ibid.

to entry were low,[109] notwithstanding that as a matter of economic principle, competition regulators should be reluctant to intervene in cases of short-term pricing,[110] as markets would self-correct.

The Tribunal considered the question of dominance and set out section 7 of the Amendment Act.[111] A firm is considered dominant if it has less than 35 % of that market but has market power. The Amendment Act further defines 'market power' as 'the power of a firm to control prices or to exclude competition, or to behave to an appreciable extent independently of its competitors, customers or suppliers.' The Commission inferred market power from Dis-Chem's conduct without undertaking an analysis into market power.[112] Instead, in seeking to establish market power, the Tribunal postulated the following question: 'what advantages does this global health crisis confer on Dis-Chem, advantages that it would otherwise not enjoy in the counterfactual world of normal market conditions?'[113] The Tribunal emphasised that competition law enforcement is not concerned with the actual size of the firm, but rather with the 'ability of the firm to exercise that market power'.[114] So the consideration that the Tribunal concerns itself with in this enquiry is the ability of the firm in question to exercise market power by conduct such as controlling prices, excluding competition, or behaving in conduct independently of its customers or suppliers.[115]

The Commission considered Dis-Chem's 'price increases against a relevant benchmark', namely the competitive price, pricing and justifications.[116] The Commission also had regard to the nature and size of the price increases, Dis-Chem's actual costs and other justifications for its price increases, as well as its gross margin test.[117] The Tribunal dealt with pricing and justifications in this first leg of the enquiry, basing this on the 'unique' facts of this case.[118] The second leg of the enquiry is one of reasonableness and the Commission made a

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[109] Ibid.

[110] Ibid para 95.

[111] Ibid para 98.

[112] Ibid para 81.

[113] Ibid para 114.

[114] Ibid para 100.

[115] Ibid.

[116] Ibid para 73.

[117] Ibid.

[118] Ibid.

comparison of the 'magnitude of the price differences in the context of the COVID-19 health threat'.[119]

The Tribunal held that market power can be deduced from a firm's economic behaviour,[120] and that extraneous events such as natural disasters can bring about certain advantages which can be enjoyed by a firm, in circumstances where it would not have ordinarily enjoyed them.[121] Although Dis-Chem tried to argue that cloth face masks were a substitute for surgical masks, the Tribunal did not agree and therefore found that the relevant product market was surgical face masks.[122]

In order to establish a prima facie case, the Commission would have to show that the price increase was material and 'utterly exorbitant'.[123] Tied to this question is what evidence a respondent firm ought to adduce in order to show that the price which is the subject of the enquiry is reasonable.[124] Considering section 8(3), the structural characteristics of the market or economic conditions ought to be considered when the conduct complained of occurred. In this case, these were prompted by the outbreak of the COVID-19 pandemic.[125]

Regarding the applicable economic test to be employed, Dis-Chem argued that the Tribunal would need to consider all relevant factors as provided in section 8(3) in order to determine the competitive price.[126] With reference to the CAC's decision in Mittal, the Tribunal stated that 'there is ample precedent to conclude that where a dominant firm, in the context of a health crisis increases its prices significantly without any increases in costs, this could establish prima facie that its new prices are higher than the competitive benchmark, and there is no need to quantify this benchmark more precisely.[127] The Tribunal's primary consideration would be whether but for the COVID-19 pandemic during the complaint period, would Dis-Chem be able to increase its prices in the manner that it did.[128] Additionally, the

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[119] Ibid.

[120] Ibid para 106.

[121] Ibid para 108.

[122] Ibid paras 116 and 121.

[123] Ibid para 72.

[124] Ibid para 67.

[125] Ibid para 75.

[126] Ibid para 149.

[127] Ibid para 157.

[128] Ibid para 159.

Tribunal considered that pre-COVID-19, surgical face masks were an 'insignificant' product in Dis-Chem's overall business.[129] However, these were considered as an essential product during the complaint period. Accordingly, the Tribunal concluded that the relevant competitive price to consider would be Dis-Chem's pricing or margins prior to the increases effected in March 2020.[130] This comparator was also used to assess the excessiveness of the prices in question.[131] Dis-Chem did not dispute the Commission's contention that it had increased its prices, however, Dis-Chem justified its price increase by affording it to higher anticipated costs resulting from the high prices charged by suppliers, increased costs of procurement, and a net margins comparison test.[132]

The Tribunal acknowledged that a competition authority may be expected to act as a price regulator, for example, cases of natural disasters give rise to a temporary monopoly regarding a product that is essential to the lives of the affected communities.[133] Accordingly, a competition authority might be in dereliction of its duties to vulnerable consumers if it did not intervene timeously in states of disaster.[134] In the *SCI* case, the CAC found that a firm's anticipated costs of an input were permissible in the price cost test.[135] The Tribunal however found that the factual evidence did not support this submission in these circumstances.[136] Unlike with Mittal and SCI, Dis-Chem is not a producer or manufacturer of surgical face masks but merely a retailer. As a retailer, all it does is add a margin to whatever price it acquires the product from its suppliers, which is reflected in its mark-up. Hence there was no basis for the Tribunal to have regard to these anticipated higher costs, 'when Dis-Chem would already have factored these in its mark-up'.[137]

During the complaint period, Dis-Chem's gross margin on face masks more than doubled.[138] Dis-Chem had the relevant market power - it enjoyed and exerted it by

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[129] Ibid para 160.

[130] Ibid para 161.

[131] Ibid para 161.

[132] Ibid para 170.

[133] Ibid para 112.

[134] Ibid para 144.

[135] *Sasol Chemical Industries Ltd v Competition Commission* [2015] 1 CPLR 58 (CAC) paras 152-60.

[136] Note 12 above para 192.

[137] Ibid para 195.

[138] Ibid para 213.

significantly increasing its prices, without significant increases in costs.[139] The Tribunal thus found that the Commission had established a prima facie case of excessive pricing.[140]

As stated above, the section 8(3) enquiry on reasonableness requires an assessment on whether the difference between the prices and the competitive price is unreasonable. The enquiry in this case would be an assessment on whether the differences between Dis-Chem's prices and margins prior and during the complaint period are unreasonable.[141] The Tribunal however asked 'why should there be any allowance at all when we are concerned with pricing of an item considered to be essential in the fight against the pandemic of COVID-19 and crucial to public health?[142] The Tribunal therefore found that Dis-Chem's conduct of increasing the price of a product that was considered essential to the saving of lives, without any substantial increase in costs, was 'utterly unreasonable and reprehensible'.[143] The Tribunal found that Dis-Chem's conduct was unreasonable.

Detriment to consumers remains an essential enquiry in the context of a determination on excessive pricing. The Tribunal quoted the CAC in the *Mittal* case: '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.'[144] The Commission submitted that Dis-Chem's increase in surgical face masks left poor families and individuals vulnerable. Significant price increases, especially during a crisis, have the potential effect of denying poor consumers access to surgical face masks, which are products that are essential to their health.[145] The Tribunal agreed with the CAC's contention in the *Mittal* case that the Tribunal has an active role to play in protecting consumers against exploitation and excessive pricing.[146] The Tribunal concluded that Dis-Chem increasing its prices substantially without any corresponding increases in costs or justifications for the corresponding costs, during a pandemic, was detrimental to consumers.[147]

The Tribunal found that Dis-Chem charged excessive prices for surgical face masks 'to

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[139] Ibid para 214.

[140] Ibid para 217.

[141] Ibid para 219.

[142] Ibid para 221.

[143] Ibid para 221-2.

[144] Ibid para 225, quoting note 32 above para 55.

[145] Ibid para 226.

[146] Ibid para 227-8.

[147] Ibid para 228.

the detriment of consumers', thereby contravening section 8(1)(a) of the Amendment Act.[148]

It is submitted that the *Dis-Chem* case introduced a different aspect of dominance that we did not see in the *Mittal* and *SCI* cases. In the *Mittal* and *SCI* cases, Mittal and SCI were dominant as they each had over 45% of the relevant market, per section 7(a) of the 1998 Act (which section has remained unchanged in the Amendment Act). On the other hand, Dis-Chem's dominance arose out of market power which was brought about by the pandemic. The Tribunal inferred Dis-Chem's market power by Dis-Chem's conduct and used the opportunity to intervene as a competition authority to protect vulnerable consumers. The effect of the Tribunal's approach may be that the scope of dominance is broader and smaller firms may potentially be caught in contravention of section 8 under the Amendment Act.

The state of disaster hastened the Tribunal's intervention. It is submitted that the Tribunal's finding appears to have been based on the rationale that face masks were an essential item during the pandemic and there was no basis for an increase in the prices of the face masks in question, without any substantial increase in costs. It used this circumstance to establish that there was a prima facie case for excessive pricing. It is interesting to note that the Tribunal used a test which significantly mirrors the test provided for in the Regulations.[149] Although the Regulations ceased to be in force when the state of emergency was lifted, the Amendment Act continues to be in force regardless of the lifting of the state of emergency. Firms will therefore be judged on their pricing policies and practices in future.

(b) *Babelegi Workwear and Industrial Supplies CC v The Competition Commission of South Africa* 2021 (6) SA 446 (CAC) (18 November 2020)

Babelegi Workwear and Industrial Supplies CC, a leading manufacturer of industrial workwear[150] sold FFP1 facemasks during the COVID-19 pandemic.[151] On 5 December 2019,

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[148] Ibid para 229 and 258 (the order)

[149] Susan Mayer, Preanka Gounden and James Wewege Cliffe Dekker Hofmeyer Competition Alert 12 August 2022 "Excessive pricing during COVID-19 and beyond: The cautionary tale of Balelegi and Dis-Chem (Part 2)" available at *https://www.cliffedekkerhofmeyr.com/en/news/publications/2020/Competition/Competition-Alert-12-August-2020-Excessive-Pricing-during-COVID-19-and-beyond-The-cautionary-tale-of-Babelegi-and-Dis-Chem-Part-2-.html*, accessed on 21 May 2022.

[150] Babelegi Workwear and Industrial Supplies CC website. https://www.babelegi.co.za/about-us. Accessed on 1 August 2022.

[151] Note 10 above para 12.

it sold a box of 20 FFP1 facemasks for R41 and this price had increased to R440 by 23 March 2020.[152] Following a series of complaints and investigations, the Commission launched an application against Babelegi for an order declaring that Babelegi's pricing conduct during 31 January 2020 to 5 March 2020 (the complaint period), contravened the provisions of section 8(1)(a) of the Amendment Act.[153]

The Commission alleged that the increase in facemasks allowed Babelegi to exploit customers by charging excessive prices for its facemasks, and further that this conduct ought to be assessed in light of the COVID-19 pandemic and the increase in demand of facemasks.[154] The dominance requirement was a critical dispute before the Tribunal, particularly in terms of section 7(c) of the Amendment Act, with Babelegi contending that the dramatic increase in the cost of acquiring the facemasks resulted in a significant change in its cost structure[155] The Tribunal found that Babelegi had the ability to affect material price and mark-up increases suddenly and independently of its suppliers, customers and competitors during the complaint period, without giving any cost justifications for such increases.[156] It therefore inferred that Babelegi had the requisite market power.[157] The Tribunal found that the prices charged by Babelegi bore no reasonable relation to the prices and mark-ups charged prior to the complaint period, [158] that prices charged by Babelegi were unreasonable,[159] that Babelegi failed to rebut the Commission's finding,[160] that there was a significant discrepancy between the prices charged before and during the complaint period, which was exploitative and 'took advantage of customers and consumers amid the international Covid-19 health crisis.'[161] Ultimately, it was held that Babelegi contravened section 8(1)(a) of the Amendment Act by charging

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[152] Ibid para 14 and 15. Prior to 31 January 2020, Babelegi achieved a markup of approximately 23% on facemasks and approximately 1120% by 5 March 2020.

[153] Ibid.

[154] Ibid para 17.

[155] Ibid paras 15 and 21. Recall that dominance in terms of section 7(c) occurs where a firm has less than 35% of the market but has market power.

[156] *Competition Commission v Babelegi Workwear and Industrial Supplies* CC [2020] 1 CPLR 152 (CT) para 152.

[157] Ibid para 152.

[158] Ibid para 159.

[159] Ibid.

[160] Ibid para 177.

[161] Ibid para 176.

excessive prices for FFP1 face masks during the complaint period.[162]

In an expedited appeal, Babelegi argued that the Tribunal failed to describe the relevant market and erred in the way it sought to apply the aspect of dominance in terms of section 7.[163] Babelegi was of the view that the Tribunal was required to examine 'the presence of constraints imposed by existing suppliers as well as the position in the market of competitors. In addition, the mandated inquiry requires an examination of the constraints imposed by way of a credible threat of future expansion by competitors, entry into the defined market by potential competitors and constraints imposed by the bargaining strength of customers.'[164] It alleged that the Commission had not entertained these aspects. Babelegi submitted that the Commission conflated the concepts of excessive pricing and market power.[165] Babelegi also submitted that the Tribunal did not apply itself to the requirements set out in section 8 and particularly the factors listed in section 8(3).[166] Furthermore, it submitted that the relevant economic test to determining whether a price is excessive is whether the relevant prices increased materially in comparison to what was previously charged, and whether that increase was justified by any increases in costs by suppliers.[167] Babelegi further alleged that it increased its prices prior to its suppliers price increases, which were inevitable.[168] Babelegi further contended that the Tribunal had ignored section 8(3)(d), which was a critical factor in the determination of the excessive pricing enquiry.[169]

The CAC noted that the following facts were common cause: Babelegi charged a series of significantly increased prices for FFP1 facemasks, without an increase in their cost of acquiring the facemasks, however, a future increase in procurement was however expected.[170] The CAC noted that the issues which require determination are 'the circumstances brought about by the Covid-19 pandemic which appeared to confer market power on the appellant as

[162] Ibid para 188.

[163] Note 10 above para 26.

[164] Ibid para 27.

[165] Ibid para 30.

[166] Ibid para 32.

[167] Ibid para 36.

[168] Ibid para 39.

[169] Ibid para 39-40.

[170] Ibid para 44. It must be noted that the masks sold by Babelegi during the complaint period, were acquired at pre-COVID-19 prices. Ibid para 51.

contemplated in s 7 of the Act.'[171] Consequently, it must be determined whether Babelegi was considered a dominant firm with market power.[172] Accordingly, it must be determined whether the in the context of Babelegi's conduct, its price increases were reasonable and whether its conduct was 'to the detriment of consumers'.[173] The CAC considered that entities which may not ordinarily be dominant in ordinary times may be dominant during a pandemic,[174] as this creates opportunity for smaller firms to be dominant in times of a crisis.[175]

If the applicable market is the supply of face masks nationally, then Babelegi enjoyed less than 5% share of the market.[176] Considering that Babelegi acquired its masks at pre-COVID-19 prices, the CAC advised that the only probable inference that can be drawn from Babelegi's conduct of charging high prices for FFP1 facemasks is that they had the ability to control prices independently of their competitors, suppliers and customers.[177] With reference to section 8(3), regard must be had to the length of time that prices are charged at the price in dispute as markets will catch up and rectify the firms conduct. The CAC found that Babelegi acted like a monopolist and charged monopolistic prices for six weeks and this was sufficient to prove the durability requirement in terms of section 8(3). The Tribunal produced no evidence of the behaviour of other firms and the pricing practices it adopted as this matter was dealt with under protracted timelines.[178] The CAC however had no difficulty with this approach as section 8(2), read with section 8(3) in any event places an evidential burden on the firm in question to rebut a prima facie finding of excessive pricing once dominance is established.[179] Babelegi did not proffer any evidence but it merely anticipated a price increase from its suppliers once its stock had been sold. [180] The CAC accordingly found that Babelegi charged consumers maximum prices for FFP1 facemasks during the complaint period.[181]

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[171] Ibid para 46.

[172]Ibid.

[173] Ibid.

[174] Ibid para 47.

[175] Ibid para 49.

[176] Ibid para 50.

[177] Ibid para 51.

[178] Ibid para 56.

[179] Ibid para 56.

[180] Ibid para 59.

[181] Ibid.

Considering that Babelegi increased its prices at a time of a global crises, for which the wearing of facemasks was critical to reducing the spread of COVID-19, the high prices were undoubtedly ‘to the detriment of consumers’.[182] The appeal was therefore dismissed.[183] The Regulations were not applicable as the case was brought prior to the coming into effect of the Regulations.

It is submitted that as with the *Dis-Chem case*, the *Babelegi* case introduced a different aspect of dominance that was not seen in the *Mittal* and *SCI* cases. Before the pandemic, a firm’s market power ordinarily arose from the state or ‘natural efficiencies, from unparalleled investment efforts or superior management ability’.[184] This was not the case in the Babelegi case, as even smaller firms may have the dominance required during a pandemic. The CAC assessed the issue of excessive pricing in the context of the COVID-19 pandemic and the disastrous impact that it had from a health, social and economic perspective.[185] It is observed that even smaller firms increase their prices exponentially, without a corresponding increase in costs, their conduct may be found to be in contravention to section 8(a). The dominance created in a pandemic accordingly differs from the dominance competition authorities were faced with pre COVID-19.

VI. CHALLENGES BROUGHT ABOUT BY SECTION 8(a) OF THE 1998 ACT

It is observed from the above discussion that the Commission was unsuccessful before the CAC in the *Mittal case* (as well as in the *SCI* case).[186] It is submitted that a possible factor for the Commission’s difficulty to successfully prosecute cases of excessive pricing is the previous wording of section 8*(a)* of the 1998 Act. [187]

It is submitted that the different applications by the Tribunal and CAC in the *Mittal* and *SCI* cases illustrate that the excessive pricing contravention is difficult to prove. The excessive pricing enquiry under section 8 of the 1998 Act required a determination of dominance, when

[182] Ibid para 67.

[183] Ibid para 82.

[184] Ibid para 48.

[185] Ibid para 42.

[186] Note 32 above para 84 and note 135 above para 186.

[187] R D McKerrow ‘Excessive pricing in South African Competition Law: Elucidating the nature and implications of the Consumer-Detriment Requirement’ (2017) 29 *SA Merc LJ* 173 175-6.

read with section 7. Competition authorities were also required to determine whether a price charged for a particular good or service is excessive, an enquiry which requires a determination of an 'excessive price', therefore a determination on whether a price paid for a good or service 'bears no reasonable relation to the economic value of that good or service; and whether the excessive price is higher than this value'[188]. Before such an enquiry could be determined, the competition authority had to determine what 'economic value' was. Regrettably, the 1998 Act provided no guidance on the meaning of economic value. Therefore, a notable element in the 1998 Act is the lack of a definition of 'economic value', or criteria for the assessment thereof. In instances where the legislation is not clear reliance is placed on the judiciary to interpret the relevant legislation. It is submitted that the competition authorities have interpreted the excessive pricing provision in the 1998 Act inconsistently under the 1998 Act. Although the four-stage test as articulated by the CAC in the Mittal case provides some direction, the Tribunal in the SCI case deviated from the application thereof.

VII. THE EFFECT OF THE NEW EXCESSIVE PRICING PROVISIONS

Considering that the term 'economic value' is not defined in the 1998 Act, it would be reasonable to expect the Amendment Act to include a definition for 'economic value'. The Amendment Act does not do so. Instead, it contains criteria to be used when assessing excessive pricing cases. It is submitted that the legislature chose to include criteria set out in section 8(3), as opposed to defining economic value, as economic value is a difficult concept to define.

In the *Mittal* and *SCI* cases (pre-COVID-19 and prior to the amendment), the market power of an alleged dominant firm, which in turn required a determination of its relevant market and market share was critical in the assessment of an alleged contravention of an excessive price. In the *Babelegi* and *Dis-Chem* cases, the Tribunal held that a determination of the relevant market and market share were not the only analytical determinations available to a competition regulator. Price increases were used as determining tools to assess market power, thereby moving away from the assessment of dominance seen in the cases before the pandemic. Furthermore, the Tribunal found that temporary market power in a pandemic was

[188] Note 3 Section 1(1)(vii).

sufficient in the assessment of excessive pricing as it provided alleged contravening firms with market power that it ordinarily would not have. There has however been criticism that the Commission's approach may be strict on small and medium-sized enterprises, who would have historically fallen short of the prescribed requirements for dominance couched in section 7.[189] It is submitted however, that this is illustrative of the commitment of the competition authorities to protect consumers against abuse of dominance by firms, which is to their detriment.

Section 8(2) is a shift of onus and places a lighter onus on the Commission, while burdening the alleged dominant firm with the onus of proving that a prima facie excessive price is reasonable. Section 8(3) of the Amendment Act is a codification of case law.[190] The relevant comparator brought about in section 8(3), is a competitive price, rather than economic value. Das Nair and Mondliwa note that the 'accepted measures of assessing economic value include price cost tests, comparators and profitability analyses.'[191] These measures are listed in ss(3)(a), ss(3)(b)(i) and ss(3)(b)(ii) of the Amendment Act. The shift of onus provided for in section 8(2), together with the new section 8(3) criteria and the absence of the term 'economic value' are a new dispensation in South African competition law.

Even when factors for assessing excessive pricing exist in terms of section 8(3), there exists a possibility that the competition law authorities may not apply them uniformly. It is imperative that the factors set out in the Amendment Act be applied to the facts of each case. In the *Babelegi* case, the Tribunal noted that the factors that are relevant in each case and the resultant weight to be attached to each factor, ought to be assessed on a case-by-case basis. Consequently, as competition authorities are faced with more cases, the factors will become more crystallised.

The preamble of the Amendment Act also provides that the Amendment Act seeks to introduce provisions to promote the administrative efficiency of the Commission and Tribunal. In the *Mittal* Tribunal matter, the Tribunal found against the dominant firm. In the *Mittal* CAC matter, the CAC found against the Commission and remitted the matter to the

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[189] M Keleme & N Moeketsi "Excessive pricing in the time of COVID-19: Insights from a regulator's perspective" available at *http://www.compcom.co.za/wp-content/uploads/2020/11/Excessive-pricing-in-the-time-of-COVID-19-insights-from-a-regulators-perspective-29.10.20-Final.pdf* on 2 February 2022 p 10.

[190] A codification of the decisions of the CAC in the *Mittal* and *SCI* cases.

[191] Note 1 above 115.

Tribunal so that the Tribunal can apply the four-stage enquiry set by the CAC. In the *SCI* Tribunal matter, the case was referred by the Commission and the Tribunal found against SCI, the dominant firm. On appeal, the CAC found against the Commission, in favour of the dominant firm. The Commission applied for leave to appeal the decision before the Constitutional Court and the application was dismissed on the basis that it bore no reasonable prospect of success. This analysis of the Commission's success (pre-COVID-19 and prior to the amendment) in these seminal cases shows that the Commission has not been successful in prosecuting excessive pricing complaints and how the Amendment Act appears to render the prosecution of abuse cases easier for the Commission. It is also observed that it aids competition authorities to determine excessive pricing cases more clearly, particularly due to the new sections 8(2) and 8(3) in the Amendment Act. An additional factor in the analysis of the Commission's success with excessive pricing cases is that excessive pricing cases are ordinarily lengthy and complex in nature,[192] and are often against well-resourced opponents. It was only during the COVID-19 pandemic that the Tribunal decided to hear excessive pricing cases on an expedited basis.[193] It is submitted that this is illustrative of the commitment of competition authorities to protect consumers, particularly vulnerable consumers against excessive pricing during a global pandemic, where such consumers could suffer harm.

South African history is fraught with economic imbalances[194] which are characterised by concentrated industries because of previous exclusionary policies.[195] It is submitted that this is reflected in South African competition law. It is therefore important that the amendments to its competition law legislation make provision for this. During times of national disaster, consumers and customers are at a greater disadvantage against corporations. Competition authorities took this context into consideration in the *Dis-chem* and *Babelegi* cases.

Considering the successful prosecution of excessive pricing by the Commission post the amendment, the Amendment Act may be a saving grace, potentially leading to more success with cases. Although the *Dis-Chem* and *Babelegi* cases relate to the COVID-19 pandemic, which is an exceptional factor in the consideration of excessive pricing cases, it will be

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[192] Note 189 above 8.

[193] Ibid 7.

[194] Note 187 above 174.

[195] Note 1 above at 114.

enlightening to see what the Tribunal's approach will be when adjudicating cases of excessive pricing outside the realms of a pandemic. With the clarity and guidance provided in the Amendment Act, through the shift of onus in section 8(2), as well as the criteria provided in section 8(3), players in the economic market may be encouraged to refer excessive pricing cases to competition authorities.

VIII. CONCLUSION

It is submitted that the Amendment Act alters the competition law landscape in South Africa. The difficulty with proving excessive pricing under the 1998 Act is that it provides little assistance with assessing excessive pricing complaints or defining 'economic value'. A notable consequence of these provisions as contained in the 1998 Act is that the Commission has not been very successful in prosecuting these excessive pricing cases.

Legislative intervention is a controversial matter and competition authorities must be careful not to become price regulators, which would contravene the nature of a free market economy. However, in a country with a history such as that of South Africa - where its economy 'is characterised by concentrated industries and an economy skewed to resource-based and capital-intensive production due to previous exclusionary policies',[196] legislative intervention is welcomed, particularly in markets where there are high barriers to entry, little innovation, where a firm's dominant status was achieved by historical advantages.[197]

The intervention of the competition authorities described in this study, particularly the *Dis-Chem* and *Babelegi* cases during the pandemic, were borne out of section 2 of the Amendment Act, which provides that the purpose of the Act is to promote and maintain competition, inter alia to 'provide consumers with competitive prices and product choices'. Furthermore, the preamble of the Amendment Act noted the importance of addressing market dysfunction. Arguably, consumers may have been worse off, without the commission's intervention during the pandemic. It is therefore submitted that the Tribunal's intervention assisted customers and consumers of face masks, who may have suffered harm but for this intervention. In doing so, the Tribunal's intervention may have curbed abuse of dominance in the competition law landscape, particularly during the pandemic.

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[196] Note 1 above at 114.

[197] Ibid at 115.

The COVID-19 pandemic called for a more expeditious approach when dealing with excessive pricing cases, while also calling for a different analysis for determining dominance. Consumers also became pro-active with reporting the conduct of companies who they felt were abusing the effects brought about by the pandemic, indicating an increased awareness of excessive pricing contravention on the part of consumers. Notwithstanding the fact that the Regulations were not applicable in the Dis-Chem and Babelegi cases, they provided clarity in the codification of the excessive pricing prohibitions during the COVID-19 state of disaster period. Although the national state of disaster has been lifted, it is likely that competition authorities will continue their robust approach of protecting consumers and customers against excessive prices. This is especially so because the Amendment Act authorises them to do so. The amendments brought about by the Amendment Act, as well as the interpretation by the Competition Authorities in the *Dis-Chem* and *Babelegi* cases, spark a new dispensation in the competition law of South Africa as it provides the South African competition authorities with legislative guidance that it previously did not have when determining excessive prices. It is therefore observed that the Amendment Act has, thus far, aided competition authorities to determine excessive pricing cases more clearly. It is submitted that a proper application and enforcement will assist in meeting, inter alia, the competition law and economic objectives sought to be achieved in South Africa. As more and more excessive pricing complaints are brought before the Tribunal and appealed before the CAC, the excessive pricing jurisprudence will be enhanced.

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