THE LEGAL POSITION OF EXCESSIVE PRICING IN SOUTH AFRICA PRE, DURING AND POST THE COVID-19 PANDEMIC

By

Ian Pillay 2289226

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

February 2023

DECLARATION

I, Ian Pillay s2289226, declare that this research report is my own, unaided work. It is being submitted in partial fulfilment 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 other degree or examination at this or any other university.

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

Word Count: 10380

Signature:

Date: 23 August 2023

ABSTRACT

The Competition Amendment Act 18 of 2018 (the Amendment Act) and the COVID-19 pandemic each had a significant impact on the legal position of excessive pricing in South Africa. Prior to the Amendment Act excessive pricing was prohibited in terms of the Competition Act 89 of 1998. However, the Amendment Act introduced a reverse onus requiring a dominant firm to refute the prima facie case against it by showing that prices charged are reasonable. It also introduced a broader and more discretionary benchmark in determining whether prices are excessive. The disruption of the competition conditions caused by the COVID-19 pandemic resulted in a different assessment in establishing market power in excessive pricing cases. Coincidentally, the first excessive pricing cases to be adjudicated under the Amendment Act occurred during the COVID-19 pandemic. The overlapping of these two events resulted in an important distinction between excessive pricing cases under conditions of normal and effective competition, versus excessive pricing cases under conditions of the COVID-19 pandemic. Therefore, it became clear that context is relevant when interpreting the excessive pricing provisions of the Amendment Act.

The aim of this research report is two-fold. First it aims to identify the legal position of excessive pricing in South Africa pre, during and post the COVID-19 pandemic. By doing so the report explains how the legal position of excessive pricing has changed. The report also highlights the difference between excessive pricing under normal and effective competition conditions, verses excessive pricing under conditions of the COVID-19 pandemic. Secondly it aims to determine whether the Amendment Act, particularly sections 8(2) and (3), adequately address the shortfalls in excessive pricing. Section 8(2) requires a prima facie case to be proved and introduces a reverse onus, and section 8(3) introduces a broader benchmark in determining whether prices are excessive.

TABLE OF CONTENTS PAGE NO

I. INTRODUCTION 5

II. THE LEGAL POSITION OF EXCESSIVE PRICING IN SOUTH AFRICA PRE COVID-19 PANDEMIC 7

(a) *Excessive pricing under the Competition Act. 89 of 1998* 7

(b) *The commencement of the Competition Amendment Act. 18 of 2018* 10

III. THE LEGAL POSITION OF EXCESSIVE PRICING IN SOUTH AFRICA DURING THE COVID-19 PANDEMIC.. 13

(a) *The Consumer and Customer Protection and National Disaster Management Regulations and Directions* 13

(b) *Excessive pricing cases during the COVID-19 pandemic* 15

(c) *Market power during the COVID-19 pandemic* 17

IV. THE INTERPRETATION OF SECTIONS 8(2) AND 8(3) OF THE COMPETITION AMENDMENT ACT 18

(a) *Shifting of the evidentiary burden: the reverse onus* 18

(b) *A broader and more discretionary interpretation benchmark* 23

V. THE LEGAL POSITION OF EXCESSIVE PRICING IN SOUTH AFRICA POST THE COVID-19 PANDEMIC 26

(a) *The end of the national state of disaster* 26

VI. CONCLUSION.. 28

VII. REFERENCES 29

I. INTRODUCTION

Globally, excessive pricing is a contentious issue in competition law. In addition to being regarded as one of the most difficult contraventions to establish mainly due to the standards of excessive pricing assessment as well as the difficulty in the analysis of data,[1] there is a debate as to whether competition law is fit for the regulation of excessive pricing. Two schools of thought have emerged from this debate, namely the non-interventionist and the interventionist.

The non-interventionist view is that excessive prices should not be subject to competition law intervention. One of the important arguments to support this view is that excessive prices charged by dominant firms is self-correcting, and cannot last long term as new entrants will be attracted to enter the market and therefore is not self-sustainable.[2] Another argument is that intervention to lower excessive prices can result in unexpected side effects in the long run including potential competitors having less incentive to enter the market.[3] Also, intervention results in competition authorities and courts becoming de facto price regulators, which function they are unsuitable to perform.[4]

On the other hand, the interventionist view is that excessive prices should fall within the jurisdiction of competition law. Some of the main arguments to support this approach are that excessive prices are not always self-correcting,[5] excessive prices harm consumer welfare and therefore laws should be implemented to prohibit such conduct,[6] and not all cases of excessive pricing are difficult to assess especially if such prices are extremely high.[7] Another

[1] Evans, DS & Padilla, AJ '*Excessive prices: Using economics to define administrable legal rules*' (2005) *1* Journal of Competition Law and Economics 97.
[2] Fletcher, A & Jardine, A '*Towards an Appropriate Policy for Excessive Pricing*' in CD Ehlermann & M Marquis (eds) European Competition Law Annual 2007: *A Reformed Approach to Article 82 EC* (Hart Publishing 2008) 533.
[3] Motta, M & De Streel, A '*Exploitative and Exclusionary Excessive Prices in EU Law*' in CD Ehlermann & I Atanasiu (eds) European Competition Law Annual 2003: *What Is an Abuse of a Dominant Position?* (Hart Publishing 2006) 91.
[4] Motta, M & De Streel, a '*Excessive Pricing in Competition Law: Never Say Never?*' in Swedish Competition Authority (ed) The Pros and Cons of High Prices *(2007*) 14; Paulis, E '*Article 82 and Exploitative Conduct*' in CD Ehlermann & I Atanasiu (eds) European Competition Law Annual 2003: *What Is an Abuse of a Dominant Position?* (Hart Publishing 2006) 515.
[5] A Ezrachi and D Gilo, '*Are Excessive Prices Really Self-Correcting?*' (2009) 5 Journal of Competition Law and Economics 2, 249-268.
[6] Fletcher, A & Jardine, A '*Towards an Appropriate Policy for Excessive Pricing*' in CD Ehlermann & M Marquis (eds) European Competition Law Annual 2007: *A Reformed Approach to Article 82 EC* (Hart Publishing 2008) 533.
[7] Ibid.

argument is that one the objectives of the European Union competition law, a jurisdiction which South Africa derives many of its laws, is the prohibition of excessive prices.[8]

Needless to say, South Africa has followed the interventionist approach given the excessive pricing provisions in South African competition law, and it is submitted that such approach is necessary due to the harm caused on consumers, which was clearly observed during the Covid-19 pandemic as later discussed.

In South Africa, excessive pricing is prohibited in terms of section 8 of the Competition Act. 89 of 1998 as amended (the Competition Act) which provides that a dominant firm is prohibited from charging an excessive price to the detriment of consumers or customers.[9] The definition of excessive price contained in section 1(vii) of the Competition Act. 89 of 1998 (the 1998 Act) was repealed by the Competition Amendment. 18 of 2018 (the Amendment Act). In terms of the Competition Act,[10] an excessive price is interpreted to be a price that is higher than a competitive price, which such difference is unreasonable.

South Africa has a smaller economy and is faced with overwhelmingly dominant firms and barriers to entry into those markets. Therefore, excessive pricing is likely to result in negative consequences on consumers.[11]

The emergence of COVID-19 in December 2019 in particular, highlighted the importance of regulating excessive pricing. Widespread shortages of goods resulted in increased instances of excessive pricing, and what is known as 'price gouging' where companies take advantage of periods of crises and disaster by charging excessive prices for products that are used by citizens to cope with that situation.[12]

Coincidentally, the COVID-19 pandemic occurred at the time when the Amendment Act was being introduced. As such, the first excessive pricing cases to be adjudicated under the Amendment Act occurred during the COVID-19 pandemic.

---

[8] Akman, P '*Searching for the Long-Lost Soul of Article 82EC*' (2009) 29 Oxford Journal of Legal Studies *267* Journal of Competition Law and Economics 249.
[9] Section 8(1)(a) of the Competition Act No. 89 of 1998 as amended.
[10] Section 8(3) of the Competition Act.
[11] Reena Das Nair and Pamela Mondliwa, *Excessive Pricing under the spotlight: What is a competitive price? (Or, how many economists does it take to define economic value?)* (2017), in Klaaren J, Roberts S, and Valodia I, *Competition Law and Economic Regulation*, 1st edn. Johannesburg: Wits University Press pp 97-119.
[12] Par 71, *Competition Commission vs Babelegi Workwear and Industrial Supplies CC* (CR003Apr20).

Prior to the introduction of the Amendment Act, only two excessive pricing cases had been adjudicated to finality in South Africa namely *Mittal Steel vs Harmony Gold*[13] (*Mittal Steel*) and *Sasol Chemical Industries vs Competition Commission*[14] *(Sasol)*. In both cases, the Competition Appeal Court (CAC) overturned the Competition Tribunal's decisions which respectively found Mittal and Sasol guilty of excessive pricing. The unsuccessful prosecution of excessive pricing cases in South Africa gave rise to the criticism that 'excessive pricing cases can never succeed before South African Courts'.[15]

As a means to alleviate the evidentiary burden previously placed on the Competition Commission to successfully prove cases relating to excessive pricing, a reverse onus was introduced in the Amendment Act.[16] The introduction of the reverse onus requires the dominant firm to refute the prima facie case against it by showing that the prices charged are reasonable.[17] The introduction of the reverse onus is controversial because it is very different from the way in which the South African legal system operates, which has generally followed the principle of 'innocent until proven guilty'. The Amendment Act also introduced a broader and more discretionary economic test in determining whether prices are excessive.[18]

Both the COVID-19 pandemic and the Amendment Act changed the legal position of excessive pricing in South Africa. The aim of this research report is two-fold. First, it aims to identify the legal position of excessive pricing in South Africa pre, during, and post-the COVID-19 pandemic. Secondly, it seeks to determine whether the Competition Amendment Act, particularly the recently introduced sections 8(2) and (3), adequately address the shortfalls in excessive pricing. Section 8(2) requires a prima facie case to be proved and introduces a reverse onus, and section 8(3) introduces a broader benchmark in determining whether prices are excessive.

II. THE LEGAL POSITION OF EXCESSIVE PRICING IN SOUTH AFRICA PRE COVID-19 PANDEMIC

(a) Excessive pricing under the Competition Act 89 of 1998

---

[13] *Mittal Steel vs Harmony Gold Mining* (2009) ZACAC 1 (70/CAC/Apr07).
[14] *Sasol Chemical Industries vs Competition Commission* 2015 (5) 471 (CAC).
[15] Par 183 *Sasol Chemical Industries vs Competition Commission* 2015 (5) 471 (CAC).
[16] Section 8(2) of the Amendment Act.
[17] Section 8(2) of the Amendment Act.
[18] Section 8(3) of the Amendment Act.

Excessive pricing under the 1998 Act has been extensively debated and analysed by academics. The 1998 Act has also been judicially scrutinized by the Competition Tribunal and CAC in the pivotal cases of *Mittal* and *Sasol.*

Prior to the introduction of the Amendment Act, the prohibition on excessive pricing was found in section 8(a) of the 1998 Act which read:

> *'It is prohibited for a dominant firm to-*
> *(a) charge an excessive price to the detriment of consumers.'*

This section remains unchanged in the Amendment Act save for the exception that the Amendment Act now refers to consumers or customers. The inclusion of 'customers' means that purchasers such as retailers and resellers, who are not end-users and, therefore, not consumers, can be victim of excessive pricing.[19]

Once a firm has satisfied the financial threshold in terms of section 6 of the 1998 Act,[20] the next step in the process is to establish whether a firm is dominant in terms of section 7. Section 7 of the 1998 Act determines the threshold for dominance and states the following:

> *'A firm is dominant in the 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.'*

Section 7(a) contains an irrebuttable presumption of dominance whereas the presumptions of dominance in sections 7(b) and (c) are rebuttable. Sections 7(b) and (c) require a determination of whether a firm has 'market power'. Market power is defined in section 1(1)(xiii) of the1998 Act 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'*.

Sections 6 and 7 as well as the definition of market power in the 1998 Act remain unchanged in the Amendment Act. However, the assessment of market power is different in the context of the COVID-19 pandemic as it shall be discussed later.

---

[19] Par 55 *Mittal Steel vs Harmony Gold Mining* (2009) ZACAC 1 (70/CAC/Apr07) wherein the court noted the difference between consumers and customers.
[20] Section 6 of the 1998 Act requires a firm's annual turnover or assets to exceed R5 million.

The next step is to determine if the firm charged an 'excessive price', which was defined in section 1(1)(ix) of the 1998 Act as:

'*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)'.

The concept of 'economic value' finds its origin in European Competition law particularly in *United Brands Company and United Brands Continental BV vs The Commission of the European Communities*.[21] The 1998 Act did not define the concept of economic value nor establish tests for its calculation, and as the CAC in *Mittal* stated, the term needed to be interpreted and given meaning by our courts, a meaning capable of practical application.[22] The determination of 'economic value' in relation to excessive pricing has been a point of contestation by academics and courts.[23] The fact that one of the central concepts in the assessment of excessive pricing was not defined in the 1998 Act made it difficult to prove excessive pricing.[24] Hence, the prosecution of excessive pricing in South Africa was limited to certain select cases partly due to the complexity of economic assessment that was required. The definition of 'excessive price' was removed by the Amendment Act, as well as the concept of economic value.

The last leg in proving a contravention of section 8(1)(a) was that the excessive price had to be 'to the *detriment* of consumers'. In *Mittal*, the CAC confirmed that the assessment of detriment requires a value judgement[25]. The CAC further confirmed that regarding the establishment of detriment, if the prices complained of were excessive, detriment to consumers will have resulted.[26] Therefore, if prices are found to be excessive, naturally it would have been at the expense of consumers. However, it is submitted that the way the provision is drafted, implies that there can be a situation where a price can be ruled to be excessive but not to the detriment of consumers. To date such a situation has never occurred however it would be

[21] *United Brands Company and United Brands Continental BV vs The Commission of the European Communities* (1978) 1 CMLR 429.
[22] Par 34 *Mittal Steel vs Harmony Gold Mining* (2009) ZACAC 1 (70/CAC/Apr07).
[23] Reena Das Nair and Pamela Mondliwa, *Excessive Pricing under the spotlight: What is a competitive price? (Or, how many economists does it take to define economic value?)* (2017), in Klaaren J, Roberts S, and Valodia I, *Competition Law and Economic Regulation*, 1st edn. Johannesburg: Wits University Press pp 97-119; *Mittal Steel vs Harmony Gold Mining* (2009) ZACAC 1 (70/CAC/Apr07).
[24] Reena Das Nair and Pamela Mondliwa, *Excessive Pricing under the spotlight: What is a competitive price? (Or, how many economists does it take to define economic value?)* (2017), in Klaaren J, Roberts S, and Valodia I, *Competition Law and Economic Regulation*, 1st edn. Johannesburg: Wits University Press pp 97-119.
[25] Par 55 *Mittal Steel* case.
[26] Par 55 *Mittal Steel* case.

interesting to see a court's reasoning in ruling a price to be excessive but which is not to the detriment of consumers. Naturally such a possibility would depend on the nature and facts of the case. Nevertheless, it is submitted that the detriment element and assessment thereof have not changed after the Amendment Act.

(b) The commencement of the Competition Amendment Act. 18 of 2018

The Amendment Act came into effect on 12 July 2019, several months before the COVID-19 pandemic, and it amended the excessive pricing provisions in several aspects. The new excessive provisions in section 8 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 and 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 costs 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 the 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 s 78 regarding the calculation and determination of an excessive price.'

In the first instance, the Amendment Act removed the concept of 'economic value' and instead sets out a list of factors[27] that should be considered in determining a 'competitive price' and whether a price is deemed excessive relative to such competitive price. It has been said that the competitive price is often considered the appropriate benchmark for assessing excessive prices.[28] Similar to economic value in section 8 of the 1998 Act, the concept of competitive price is not defined in the Competition Act nor is there a generally accepted definition for what a competitive price is. It is said that a competitive price could be interpreted as any price that obtains under equilibrium conditions including the monopoly price.[29] Therefore, any equilibrium price below monopoly can be considered a competitive price. However ascertaining an equilibrium price is still an extremely complex task when the competition and market conditions are not perfect as usually is the case. It is correctly said that removing the reference to 'economic value' does not solve the problem of obtaining a competitive price.[30]

In *Mittal Steel,* a complaint was filed with the Competition Commission against Mittal for contravening sections 8(a) and 8(d)(i) of the 1998 in terms of s 49B. The CAC in *Mittal Steel* determined the stages of an excessive pricing case. First, it said that a determination needed to be made of the actual price in question that is alleged to be excessive. Secondly, what needed to be determined is the economic value in monetary terms. Thirdly, what needed to be determined was if the actual price was higher than the economic value of the goods and whether the difference was unreasonable.[31] This is similar to the current position because if the Commission needs to determine if the price charged by the dominant firm is higher than the

[27] Section 8(3) of the Competition Act.
[28] OECD Excessive Pricing Policy Roundtables (2011).
[29] OECD Excessive Pricing Policy Roundtables (2011).
[30] Page 118 of Willem H Boshoff, *South African Competition Policy on Excessive Pricing And Its Relation to Price Gouging During The Covid-19 Disaster Period* (2021) South African Journal of Economics Vol. 89:1.
[31] Par 32 *Mittal Steel* case.

competitive price, logically it needs to determine first what price the dominant firm charged. Also, if the Commission needs to determine if the price charged by the dominant firm is higher than the competitive price, logically it needs to determine what price the competitive price is in monetary terms. And the competitive price must be higher than the price charged. However, the difference is where reasonableness comes in. In the previous position the Commission had the onus to prove that the price charged was unreasonably higher than the economic value, however the current position is that the onus lies on the dominant firm to show that the price was reasonable. But nevertheless, the factors assessment of reasonableness is the same. The approach in *Mittal Steel* was confirmed by the CAC in *Sasol*[32] and is settled law, and it can be said that the amendments are an attempt to codify the current precedent set by *Mittal Steel* and *Sasol.*

The new test for excessive pricing contained in section 8(3) of the Amendment Act contains a few key components to it.[33] The Amendment Act now mandates the Competition authorities to consider whether the price is higher than the 'competitive price', and to determine whether the price is 'unreasonable', taking into consideration the factors set out in section 8(3).[34] Therefore after the recent amendments, once the dominance requirements of sections 6[35] and 7[36] are proved by the Commission, the appropriate economic test to assess excessive pricing is determined in terms of section 8(3), and the onus is on the Commission to prove a prima facie case of an excessive price by showing that the price charged by the dominant firm is higher than the competitive price.[37]

---

[32] *Sasol* case.
[33] Oxenham et al '*COVID-19 Price Gouging Cases in South Africa: Short-term Market Dynamics with Long-term Implications for Excessive Pricing Cases*' (2020) Journal of European Competition Law & Practice 2.
[34] Section 8(3)(a)–(f) sets out the following factors that must be considered:
"(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."
[35] Section 6 of the Competition Act.
[36] Section 7 of the Competition Act.
[37] Par 45, *Competition Commission vs Babelegi Workwear and Industrial Supplies CC* (CR003Apr20).

Once the Commission has discharged the onus of showing a prima facie case of excessive pricing, in terms of section 8(2) the onus then shifts to the dominant firm to show that its price was reasonable. If the dominant firm fails to discharge the onus of proving that its price was reasonable, then a determination is made whether the excessive price was to the detriment of consumers or customers. Therefore, an excessive pricing hearing in terms of the Amendment Act is conducted similarly to the 1998 Competition Act in that first the dominance requirements need to be met, then the price must be determined to be excessive, and the price must be to the detriment of consumers. The difference is the approach by which prices are determined to be excessive.

III. THE LEGAL POSITION OF EXCESSIVE PRICING IN SOUTH AFRICA DURING THE COVID-19 PANDEMIC

(a) The Consumer and Customer Protection and National Disaster Management Regulations and Directions

The emergence of SARS-CoV-2 and the magnitude and severity of the COVID-19 outbreak in South Africa resulted in a state of national disaster being announced on the 15th of March 2020,[38] and the Disaster Management Regulations being published on the 18th of March 2020.[39] Regarding excessive pricing, economic effects in markets including supply and demand disruptions, as well as the exploitation of consumers by businesses charging excessive prices, resulted in the Consumer and Customer Protection and National Disaster Management Regulations and Directions (Consumer Protection Regulations) being published on the 19th of March 2020.[40]

The Consumer Protection Regulations separates the competition cases from the consumer protection cases. Regulation 4[41] deals with excessive pricing committed by dominant firms, whereas regulation 5[42] deals with 'unconscionable, unfair, unreasonable, and unjust prices' committed by non-dominant firms. As this report focuses on excessive pricing in terms of competition law, we shall only concern ourselves only with Regulation 4.[43]

[38] 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 if 15 March 2020).
[39] 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.
[40] Published under Government Notice No. R 350 in Government Gazette No. 43116 of 19 March 2020.
[41] Regulation 4 of the Consumer Protection Regulations.
[42] Regulation 5 of the Consumer Protection Regulations.
[43] Regulation 4 of the Consumer Protection Regulations.

Regulation 4 states the following:

'4 Excessive Pricing.

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

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

4.2.1 does not correspond to or is not equivalent to the increase in the cost of providing 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.'

The Consumer Protection Regulations have also been referred to by the CAC in *Babelegi Workwear vs Competition Commission* (*Babelegi* CAC) as price gouging regulations.[44] Price gouging laws prevent firms in general from profiteering from situation necessity.[45] Although no definition exists in the Competition Act, in *Babelegi* and *Dis-chem* price gouging was described as firms taking advantage of a crisis situation by charging excessive prices for goods used by citizens to cope with the situation.[46] This explanation clearly fits into the wording of Regulation 4.2.

Both Regulations 4(1) and 4(2) refer to and empower the excessive pricing provisions of the Competition Act. Regulation 4 was tested before the Tribunal in *Babelegi* and *Dis-chem,* however because the price increases implemented by both firms preceded the date of publication of the Consumer Protection Regulations, the Tribunal correctly did not enforce the Consumer Protection Regulations in the respective cases.[47] The Tribunal in the *Dis-chem* case correctly applied the legal principal that legislation cannot be applied retrospectively without good reason.[48] Therefore these decisions imply that if a firm increased its prices for goods and

[44] Par 10 *Babelegi Workwear vs Competition Commission* (186/CAC/JUN).
[45] Par 76 *Babelegi* CAC case.
[46] Par 71 *Babelegi* case and par 108 *Dischem* case.
[47] Par 37 *Babelegi* case.
[48] Par 49 *Dis-Chem* case.

services listed in Annexure A[49] after the publication of the Consumer Protection Regulations, then it would fall in the ambit of regulation 4. This was the situation in the third and only other excessive pricing case to be adjudicated in South Africa under the Amendment Act *Competition Commission vs Tsutsumani Business Enterprises CC*[50] (*Tsutsumani*). In *Tsutsumani* the firm increased its prices for face masks after the publication of the Consumer Protection Regulations and was therefore found to have contravened both section 8(1)(a) of the Competition Act as well as regulation 4 of the Consumer Protection Regulations.

However, by the Tribunal in *Babelegi*[51] submitting *'we shall have no regard to the Consumer Protection Regulations for the assessment of the merits of this case'*, it is submitted that it incorrectly dismissed the relevance of the Consumer Protection Regulations. The Tribunal in *Dis-chem* correctly submitted that the economic tests contained in regulation 4(2) are still relevant to an excessive pricing enquiry.[52] It is submitted that section 8(3) of the Competition Act contains a non-exhaustive list of factors in determining whether prices are excessive. Therefore, even if regulation 4(2) is not applicable or had never been promulgated, the economic tests contained therein fall within the scope of section 8(3) of the Competition Act.

(b) Excessive pricing cases during the COVID-19 pandemic

Globally, the outbreak of the coronavirus, and the responding government measures, had devastating impact on businesses. As observed, South Africa, like many other countries around the world, was forced to adopt unprecedented measures to curb the spread of infections and the effects thereof, including the announcement of the national shutdown and the publication of the *Consumer and Customer Protection Regulations and National Disaster Management Regulations and Directions*.[53] Following the declaration of the State of National Disaster, the Competition Commission (the 'Commission') received a total of 559 complaints, with most cases relating to hand sanitizers and face masks, toilet paper, flu medication, and other products.[54]

[49] Annexure A of the Consumer Protection Regulations refers to goods and services in four groups: (i) basic food and consumer items; (ii) emergency products and services; (iii) medical and hygiene supplies; and (iv) emergency clean-up products and services.
[50] *Competition Commission vs Tsutsumani Business Enterprises CC* (COVCR113Sep20).
[51] *Competition Commission vs Babelegi Workwear and Industrial Supplies CC* (CR003Apr20).
[52] Par 53 *Competition Commission vs Dis-Chem Pharmacies Limited* (CR008Apr20).
[53] Ratshisusu & Mncube 'Addressing excessive pricing concerns in time of the COVID-19 pandemic—a view from South Africa' (2020) *Journal of Antitrust Enforcement* 1.
[54] Ibid.

However, only a year later did the Commission refer its first case since the Amendment Act to the Tribunal. The case alleged excessive pricing for the supply of facial masks against Babelegi Workwear Overall Manufacturers & Industrial Supplies CC.[55] In *Babelegi,* the Tribunal was required to determine whether the firm's price increases for face dust masks sold to customers over a three consecutive month period constituted excessive pricing. The firm was found by the Tribunal to have contravened section 8(1)(a) of the Competition Act by charging excessive prices. The firm was issued with a fine of R76 040 (seventy-six thousand and forty rand). The decision was upheld on appeal to the CAC in *Babelegi* CAC. However due to the small size of the firm and the small volume of face masks sold, the CAC held it to be a de minimis breach of section 8(1)(a).[56] And further considering the exorbitant litigation costs borne by the firm, the CAC decided not to impose a penalty for the contravention.

Similarly, in *Dis-chem* the Tribunal was required to establish whether the firm's price increases for surgical face masks sold to members of the public over a one-month period constituted excessive pricing. The firm was found to have contravened section 8(1)(a) of the Competition Act by charging excessive prices, and was issued with a fine of R1 200 000 (one million two hundred thousand rand). And lastly in *Tsutsumani* the Tribunal was required to determine whether the firm's sale of face masks to the South African Police Service over a one-month period constituted excessive pricing. The firm was found to have contravened both section 8(1)(a) of the Competition Act read with regulation 4 of the Consumer Protection Regulations by charging the South African Police Service excessive prices for face masks and was issued with a fine of R3 441 689.10 (three million four hundred and forty-one thousand six hundred and eighty-nine rand and ten cents). This was the first case to be determined under the Consumer Protection Regulations read with section 8(1)(a) of the Competition Act, as the Consumer Protection Regulations were not yet in force at the time of the firms' conduct in *Babelegi* and *Dis-chem*.

In all three cases above the following was held: the firms were dominant as they exerted market power; prima facie cases of excessive pricing were proved by the commission; the firms failed to show that the price increases were reasonable; the excessive prices were to the detriment of consumers. However, what needs to be understood is that although these three cases were adjudicated under the amended section 8, it was in the context of the COVID-19 pandemic and not under conditions of normal and effective competition. This distinction is

[55] Ibid.

[56] Par 77-80 *Babelegi* CAC case.

emphasised in the discussions hereunder along with an analysis of the essential elements in an excessive pricing case.

(c) Market power during the COVID-19 pandemic

As mentioned, the first requirement for a contravention of section 8(1)(a) of the Competition Act and Regulation 4 of the Consumer Protection Rules is that the firm must be dominant in the market, which is established in terms of the thresholds in sections 6 and 7 of the Competition Act. Under normal competition conditions, market definition would be undertaken to determine a firm's market share and whether that share exceeds the thresholds.[57] However, in all the contested excessive pricing cases during the COVID-19 pandemic,[58] no market definition was conducted to establish the firms' market shares and the extent of the firms' market power. Instead, market power was inferred from the behaviour of the firms. The firms had far less than 35% of the relevant market but were declared dominant because they had exerted market power. In *Babelegi* the firm allegedly had less than 5% market share but was still declared dominant. In supporting its decision in declaring the firm to be dominant, the Tribunal in *Babelegi* referred to Massimo Motta[59] who stated:

> *'Firms that may be accused of price gouging might not necessarily be dominant in ordinary times. However, they may well be in our exceptional times…In cases of excess demand, even a small firm may have considerable market power*.'

The Tribunal correctly concluded that the COVID-19 pandemic provided conditions for market power to be conferred on firms that may not otherwise have market power under normal competition conditions.[60] This view was upheld by the CAC on appeal. Supply and demand disruptions, lockdown restrictions, and panic buying were major contributors to creating temporary market power. Therefore, had it not been for the COVID-19 pandemic, *Babelegi* would not have been able to behave to an appreciable extent independently from its competitors, customers, or suppliers,[61] and therefore would not have had market power. In *Dischem,* it was held that market power definition is not the only tool in assessing a firm's extent of market power, and it can be inferred from a firm's economic behaviour.[62] It was

---

[57] In terms of section 7 of the Competition Act.
[58] *Babelegi*, *Dis-chem* and *Tsutsumani* cases.
[59] Par 79 *Babelegi* case referring to Massimo Motta '*Price regulation in times of crises can be tricky*' Daily Maverick (22 April 2020).
[60] Par 89 *Babelegi* case
[61] Definition of market power in section of 1 of the Competition Act.
[62] Par 102 and 106 *Dis-Chem* case.

further held that this temporary market power exerted by firms taking advantage of a crises situations and exploiting market conditions, is not foreign to competition jurisprudence.[63]

Therefore, it is submitted that the notion of market power and assessment thereof has not changed regarding market conditions of normal and effective competition. However, under non-ordinary market conditions such as in the context of the COVID-19 pandemic, the assessment of market power has changed, and market power can be inferred or exerted by firms. It is clear that the notion of temporary market power has been accepted by the Tribunal and CAC.

IV. THE INTERPRETATION OF SECTIONS 8(2) AND 8(3) OF THE COMPETITION AMENDMENT ACT

(a) Shifting the evidentiary burden: the reverse onus

In terms of section 8(2) of the Competition Act, the onus now is on dominant firms to prove that the price was 'reasonable' in the event it is established that there is a 'prima facie' case for excessive pricing. In *Babelegi* and *Dis-chem,* the Tribunal interpreted section 8(2) to be a reverse onus.[64] In *Dis-Chem,* the Tribunal correctly indicated that the questions that needs to be asked are: what must be led by the Commission to establish a *prima facie* case of excessive pricing?[65] The court further asked what must be led by the dominant firm to establish that the excessive price was reasonable?[66] The relevance of these questions cannot be overstated as parties should have certainty on how to discharge their respective onuses, which ultimately determines the result of a dispute.

Section 8(3) of the Competition Act provides that the price must be 'higher than a competitive price' and the 'difference unreasonable'. However, section 8 does not specify what the Commission needs to show to establish a 'prima facie' case. In *Dis-Chem,* the Tribunal sought guidance from the CAC in *Mittal Steel*[67] on what constitutes a 'prima facie' case,[68] which held *'where the actual price is shown…to exceed the normal price…on the face of it, utterly exorbitant…in this way a prima facie case would have been made out…'*. Therefore following *Mittal Steel,* the Tribunal in *Dis-Chem* confirmed that in order to establish a prima

[63] Par 108-109 *Dis-Chem* case which referred to European case law.
[64] Par 44 *Babelegi* case, and Par 64 *Dis-Chem* case.
[65] Par 66 *Dis-Chem* case.
[66] Par 67 *Dis-Chem* case.
[67] Par 49 *Mittal Steel* case.
[68] Par 71, *Dis-Chem* case.

facie case, all that the Commission has to show is that, there was a material price increase which on the face of it was utterly exorbitant, then the onus would shift to Dis-Chem to show that the increase is reasonable.[69] Therefore, it is clear that section 8(3) needs to be read together with section 8(2).

As already indicated, in both *Babelegi* and *Dis-chem*, the Tribunal interpreted section 8(2) to be a reverse onus.[70] A reverse onus provision is one that shifts the burden of proof onto a party (dominant firm), other than the party who is normally required to prove the case (Commission), to disprove an allegation. The Background Note on the Competition Amendment Bill, 2017[71] and an Explanatory Memorandum[72] explains what the legislator intended with the shifting of the evidentiary burden in terms of section 8(2)

> *'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 dominant firm is addressed…'*

Clearly from the above discussion, the purpose of the shift of the evidentiary burden is to render the prosecution of excessive pricing cases easier for the Commission. This is an acceptable reason given the purpose of the Competition Act which is to promote and maintain competition. One of the ways to equalise the scales of justice is the fair allocation of the burden of proof between the parties.[73] If the evidentiary burden is allocated that it falls on the party that can most likely discharge it because it has the means and resources to do so easily, then such allocation can hardly be said to be fair. However, if the burden is placed on the weaker party who does not have the means to discharge the burden, then such allocation could be argued to be unfair. Whether the Commission is considered the weaker party and the dominant firm considered the former party in this scenario is debatable. The unsuccessful prosecution of excessive pricing cases pre-amendments could suggest that the Commission lacked the means and resources over several years to discharge the burden, and that dominant firms which are usually large corporations, have the financial means and resources and can prepare comprehensive defences to discharge their burdens.

---

[69] Par 72, *Dis-Chem* case.
[70] Par 44 *Babelegi* case, and Par 64 *Dis-Chem* case.
[71] Published on 1 December 2017, Government Notice No. 1345 of Government Gazette No. 41294.
[72] Pg 16 of the Explanatory Memorandum.
[73] Pg 80, CRM Dlamini, '*The Burden of Proof: Its Role and Meaning*', Stellenbosch Law Review Vol. 14 No. 1, pgs 68-88, 2003.

The only two South African excessive pricing cases prior to the Amendment Act which were contested and adjudicated by the Tribunal and CAC were the *Mittal Steel* and *Sasol* cases, and both cases were unsuccessfully prosecuted. Being the first South African excessive pricing cases to be adjudicated, the cases concerned the meaning and scope of section 8(a) of the 1998 Act as well as the definition of excessive price contained in section 1(1)(ix) of the 1998 Act. In *Mittal Steel* Harmony Gold Mining Company Limited and Durban Roodepoort Deep Limited lodged filed a complaint against Mittal Steel South Africa Limited and Macsteel International Holdings BV that they were dominant in the domestic market for flat steel products and that they abused their dominance by charging excessive prices for flat steel products. In *Sasol* the Commission filed a complaint against Sasol Chemicals Industries Limited on the basis that it was dominant in the market for the supply of propylene and polypropylene over a complaint period of several years and that they abused their dominance by charging excessive prices propylene and polypropylene.

However, subsequent to the excessive pricing amendments, all the excessive pricing cases that have been adjudicated have been successfully prosecuted, one such decision even being upheld on appeal to the CAC, which is a significant improvement from the past. This suggests that the shifting of the evidentiary burden and broader benchmark were a breakthrough in excessive pricing enforcement.

It is well known that in criminal proceedings that most reverse onus provisions are unconstitutional due the infringements to the right to be presumed innocent until proven guilty and the right to remain silent.[74] However, the reverse onus provisions in criminal proceedings may be constitutionally acceptable provided that it does not cause undue hardship or unfairness.[75] Examples of such reverse onuses in the criminal proceedings of the Competition Act are contained in section 77.[76] However in non-criminal proceedings, where the standard of proof is on balance probabilities such as abuse of dominance cases, the constitutional guarantees afforded to an accused[77] are not applicable and therefore reverse onus provisions such as section 8(2) cannot be challenged on a constitutional basis. But this does not mean that they are always appropriate. The administrative penalties imposed by the Tribunal[78] on dominant firms who have engaged in prohibited practices such as excessive pricing, are often

[74] Section 35(3)(h) of the Constitution of the Republic of South Africa, 1996 (the Constitution).
[75] Par 38 S vs Zuma 1995 (2) SA 642 (CC).
[76] Section 77(1)(a) and (b), and 77(2) of the Competition Act.
[77] Section 35(3)(h) of the Constitution.
[78] Sections 58(1)(iii) and 59(1)(a) of the Competition Act.

significantly greater than the maximum criminal fines that may be imposed upon conviction of criminal offences in the Competition Act and other criminal laws for that matter. Considering that excessive pricing cases are already assessed on a lower standard on proof,[79] imposing a reverse onus on the dominant firm to refute the prima facie case against it by showing that prices charged are reasonable, could be argued to be over burdensome. It can imbalance the scales of justice given the enormous administrative penalties that can be levied against it as well as the complex economic assessment in excessive pricing. The administrative penalties imposed can result in far-reaching consequences for dominant firms including financial distress. However, it is submitted that the reverse onus is not over burdensome given the exploitative nature of excessive pricing.

Another reason why a reverse onus in terms of section 8(2) may be over burdensome is that excessive pricing is one of only two ‘per se’ prohibitions in section 8, the other being denial of access to an essential facility.[80] As such, the mere proof of excessive pricing shall result in a contravention. There is no provision for an efficiency or pro-competitive defence by the dominant firm in an excessive pricing case. The direct harm to consumers and customers as a result from excessive pricing warrants it as a ‘per se’ prohibition. However, considering that a dominant firm cannot use an efficiency or pro-competitive defence to justify charging excessive prices, shifting the evidentiary burden onto the dominant firm to prove that the price is reasonable, can in a certain light be argued to be inappropriate.

Given the limited budget and resources the Commission has at its disposal, there are a limited number of abuse of dominance cases that can be taken each year.[81] As seen with the *Mittal Steel* and *Sasol* cases, a considerable amount of limited resources were consumed within the Commission, the Tribunal and the Competition Appeal Court, as well as the valuable management time of both Mittal and Sasol and the respective legal costs. It is clear that a better allocation of the evidentiary burden was necessary to ensure that dominant firms charging excessive prices are easily prosecuted in the interests of justice and that the Commission is not overburdened by legal formalities and evidentiary challenges. However, on the other hand imposing evidentiary burdens on dominant firms lead to false convictions will not be in the interest of justice.

---

[79] Section 68 of the Competition Act indicates that the burden of proof in in all proceedings of the Act other than criminal law proceedings, is a balance of probabilities.
[80] Section 8(1)(b) of the Competition Act.
[81] See p188 of David Lewis, *Thieves at the Dinner Table: Enforcing Competition Rules in South Africa* (2012) Jacana Media.

Another reason the reverse onus can be regarded as arguably problematic is because in discharging its onus in section 8(2), *Dis-chem* could show that a prima facie case of excessive pricing, was in fact reasonable. The reason being is that charging an excessive price is itself an abuse of dominance and prohibited. Therefore, it is submitted that an abuse of dominance should not be argued to be reasonable, as the reason why excessive pricing is termed 'abuse' of dominance is because it is prohibited and cannot be reasonable. It is further submitted that in the way section 8(2) is drafted, if the Commission establishes a prima facie case of abuse of dominance by charging an excessive price, logically the dominant firm cannot discharge its evidentiary burden by showing that the excessive price is reasonable, because the price is already deemed to be excessive. Therefore, the provision needs to be interpreted purposively rather than literally. This shows that the provision is badly formulated.

Regulation 4 of the Consumer Protection Regulations does identify what a prima facie case entails. It is submitted that this inclusion in the Consumer Protection Regulations could be as a result of the Competition Act not specifying what prima facie is. However, as discussed, the Consumer Protection Regulations are only enforced for contraventions committed after the publication of the Consumer Protection Regulations, such as in the case of *Tsutsumani.* Also, the Consumer Protection Regulations were only enforceable whilst the COVID-19 outbreak was declared a national disaster.[82] As such, it would not be useful for cases of normal and effective competition.

The wording used in section 8(3) is ambiguous. It can be interpreted that the factors listed in section 8(3)(a)-(f) may be taken into account when determining a competitive price, or either determining whether the difference between the actual price and the competitive price is reasonable, or the factors would be taken into account at both of these stages. It would appear from the Tribunal decisions in *Babelegi* and *Dis-chem* that both the determination of whether the price is excessive, and the question of reasonableness are to be determined by the factors listed in section 8(3). This was confirmed by the CAC in the appeal decision of *Babelegi.*[83] However, in *Mittal Steel*,[84] the CAC expressly stated that special cost advantages such as past state support (which is captured under factor 8(3) (e) in the Amendment Act can only be used when determining if the price is reasonable. This means that when considering the factors in section 8(3), one needs to read them taking into account the approach taken in applicable case

[82] Regulation 2.3 of the Consumer Protection Regulations.
[83] Par 59 *Babelegi Workwear and Industrial Supplies CC vs Competition Commission* (2020) ZACAC (186/CAC/Jun20).
[84] *Mittal Steel* case.

law such as *Mittal Steel* as some factors may not be applicable to either the determination of whether the price is excessive or the question of reasonableness. The poor drafting of the provision was also pointed out by CAC in *Babelegi* which held that the section was hardly drafted with the precision that should be demanded of national legislation.[85]

Clearly from the above analysis, both sections 8(2) and section 8(3) are not drafted to an acceptable degree expected of legislative authority. Legislation requiring the adjudicating authorities to interpret more than what is necessary may likely cause interpretations which do constitute the true intention of legislative authorities. It also increases the discretion of the adjudicative authorities as the legislation is left in their hands to interpret in a manner it deems right, and such discretion may not always be appropriate.

(b) A broader and more discretionary interpretation benchmark

The complexity of analysis in excessive pricing cases is to a considerable extent determined by the relevant benchmark used in judging whether prices are excessive.[86] The CAC in *Sasol* highlighted the complexities by citing O'Donoghue and Padilla,[87] who stated, among other things:

(a) that there's no generally accepted criterion to determine whether prices are excessive, and even if a benchmark was agreed upon it would still be a complex exercise to determine whether prices are excessive;
(b) that excessive pricing policies are likely to yield incorrect predictions; and
(c) that there is insufficient guidance from case law.

Reliable methodologies in assessing whether prices are excessive include profitability analysis, margin analysis, and historic or geographic comparisons.[88] The different methodologies that can be used depend on how the benchmark is constructed, what type of information is required for the calculation, and what is actually being measured.[89] The different benchmarks that can be used to determine if a price is excessive can be geographic if the comparison is based on similar products or services located in other similar geographic

---

[85] Par 59 *Babelegi Workwear and Industrial Supplies CC vs Competition Commission* (2020) ZACAC (186/CAC/Jun20).
[86] Page 136 of Willem H Boshoff, *South African Competition Policy on Excessive Pricing And Its Relation to Price Gouging During The Covid-19 Disaster Period* (2021) South African Journal of Economics Vol. 89:1.
[87] Par 2 *Sasol* case citing Pg 737, O'Donoghue and Padilla '*The Law and Economics of Article 102 TFEU*' (2nd Ed).
[88] OECD Excessive Pricing Policy Roundtables (2011).
[89] Ibid.

markets, or historic if the comparison is based on a comparison between current and past variables of the same company, or the benchmark can relate to other companies providing identical or similar products or services.[90] Also, a combination of these can be a suitable benchmark. It has been said that given the difficulties in identifying a generally accepted test to assess excessive prices in all scenarios, competition authorities may prefer to analyse the available data and combine as many of the methods and tests to assess excessive pricing.[91] As no single test can be sufficiently reliable, combining results from different benchmark tests could prove to be more reliable. This approach was applied in a European case *NAPP Pharmaceutical Holdings Ltd and Others vs General Office of Fair Trading*.[92]

It is submitted that the broad and discretionary approach to section 8(3) accommodates the above methodologies and benchmarks in the list of factors and allows the Tribunal to choose the appropriate economic test to assess whether prices are excessive and whether the excessive price is unreasonable. For instance, the historical benchmark is incorporated in section 8(3)(b)(iv) of the Competition Act, and in *Dis-chem* the Tribunal used the firm's historical prices before the complaint period as a benchmark to determine whether the prices charged during the complaint period were excessive. Arguably, this broad approach to use different methodologies and benchmarks to assess excessive pricing was already the position before the amendments as the CAC *Mittal Steel* also accepted that different methods may be used to ascertain the economic value. However, section 8 of the 1998 Act did not contain any factors that could be considered when assessing a price leaving the difficult task up to the Tribunal and CAC.

It is submitted that the broad and discretionary nature of section 8(3) allows the Tribunal to choose the most appropriate and sensible benchmark in determining whether prices are excessive. Section 8(3) provides a list of factors to be taken into account when determining a competitive price and whether the price was reasonable. The Tribunal in *Babelegi* and *Dis-chem* interpreted the following wording of section 8(3) '*all relevant factors*', to mean that the Tribunal has discretion on which factors to use and the relevant weight attached thereto, and it is logical that the relevant factors to be considered depend on the nature and facts of each case as well as the proper context. However, the wording cannot only be interpreted to mean that the Tribunal has discretion, it can also be interpreted to be peremptory that all relevant factors

[90] Ibid.
[91] OECD Excessive Pricing Policy Roundtables (2011).
[92] Par 203 *NAPP Pharmaceutical Holdings Limited and Others vs General Office of Fair Trading* (2002) CA98/2/2001.

be taken into account. Furthermore, how would the discretion be applied and be justified if all the factors are relevant? The Tribunal did not perform an exercise of elimination to determine how many factors were indeed relevant nor provide justified explanations as to why other relevant factors were not considered. This arguably gives too much discretion to the tribunal. The wording '*which may include*' implies that the list of factors are open and non-exhaustive. This was confirmed in *Babelegi*[93] and *Dis-chem.*[94] Also, section 8(3)(b)(f) of the Competition Act further broadens the scope as it provides that the Minister can set regulations regarding the calculation and determination of excessive prices.[95]

In *Babelegi* and *Dis-chem,* the Tribunal was tasked to choose the appropriate economic test to assess excessive pricing during disrupted competitive conditions namely the corona-virus crises. In *Babelegi,* the Tribunal assessed whether the prices charged were higher than a competitive price, which the Tribunal in *Babelegi* defined as '*whether the price exceeds what the firm would have obtained in the counterfactual world of normal and sufficiently effective competition*'. This benchmark was also in line with the CAC's decision in *Sasol* where it stated *'where the dominant firm raises the normal price for its product substantially without any corresponding rise in costs, this may indicate prima facie that the new price is higher than the economic value…'*. The Tribunal made it clear that although the actual price is compared to the 'competitive price' and no longer the 'economic value', the principle as laid out in *Sasol* remains the same.

However, in *Dis-chem* it has been acknowledged that the Tribunal was concerned whether the prices charged were higher than a 'comparative price' which was the price the firm charged before the complaint period.[96] However, the comparative price in the context of *Babelegi* was synonymous with a 'competitive price'. Therefore, in determining the competitive price, the Tribunal used the prices the firms charged and mark up before the complaint period as the appropriate benchmark because the demand and supply conditions at that time were normal. This was consistent with section 8(3)(b)(iv) of the Competition Act that states that the firm's prices for the goods historically is a relevant factor to consider.

[93] Par 46 *Babelegi* case.
[94] Par 62 *Dis-Chem* case.
[95] Regulation 4 of the Consumer Protection Regulations is an example of such regulations set by the Minister in determining whether prices are excessive during the national state of disaster.
[96] Jeremy De Beer and Palesa Mpe, '*What's With The Price Gouging?*' Without Prejudice Vol. 20, No. 7, pg 6-7, 02 August 2020.

V. THE LEGAL POSITION OF EXCESSIVE PRICING IN SOUTH AFRICA POST THE COVID-19 PANDEMIC

(a) The end of the national state of disaster

Subsequent to the successful prosecutions of *Babelegi, Dis-chem* and *Tsutsumani*, other firms charged for contraventions of section 8(1)(a) read with regulation 4 of the Consumer Protection Regulations ended up concluding consent agreements, mostly notably *Competition Commission vs Pathcare,*[97] *Competition Commission vs Ampath,*[98] *Competition Commission vs Lancet Laboratories,*[99] *Competition Commission vs Fruit Stop CC*.[100]

The 4th of April 2022 was declared the end of the national state of disaster. The end of the national state of disaster resulted in the Consumer Protection Regulations no longer being in force and effect.[101] This means that firms alleged to have charged excessive prices can only be prosecuted in terms of section 8 of the Competition Act. A critical question that arises is whether firms that contravened the Consumer Protection Regulations at the relevant time could still be prosecuted in terms of the Consumer Protection Regulations if no prosecution proceedings were initiated at the time.[102] It is submitted that the wording of regulation 2.3 of Consumer Protection Regulations '*shall be of no force and effect when the COVID-19 outbreak is no longer a disaster'* suggests not. However as earlier indicated in this report, the Tribunal in *Dis-chem* correctly held that the economic tests contained in regulation 4(2) of the Consumer Protection Regulations are still relevant to an excessive pricing enquiry.

As a result of the Competition Tribunal Rules for COVID-19 Excessive Pricing Complaint Referrals[103] (Tribunal COVID-19 Rules) being published, cases of *Babelegi*, *Dis-chem* and *Tsutsumani* were prosecuted expeditiously compared to the cases pre-amendments and pre-COVID-19 pandemic which took several years. But as the Tribunal COVID-19 Rules no longer apply due to the end of the national disaster,[104] we may expect that the prosecution

---

97 *Competition Commission vs Drs Dietrich, Voigt, Mia and Partners and Dr WJH Vermaark Incorporated (jointly referred to as "Pathcare")* (COVCO154Dec21).

98 *Competition Commission vs Drs Du Buisson, Kramer, Swart, Bouwer Incorporated t/a Ampath* (COVCO158Dec21).

99 *Competition Commission vs Drs Mauff AC and Partners t/a Lancet Laboratories* (COVCO155Dec21).

100 *Competition Commission vs Fruit Stop CC* (COVCO037Jul 21).

101 Regulation 2.3 of the Consumer Protection Regulations states '*These regulations and directions shall be of no force and effect when the COVID-19 outbreak is no longer a disaster.*'

102 Nkonzo Hlatshwayo, '*Competition Law Post the National State Of Disaster*' Without Prejudice Vol. 22, No. 2, pg 6-7, 01 June 2022.

103 Published under Government Gazette Notice R448 in Government Gazette 43205 on 3 April 2020.

104 Regulation 3.2 of the Tribunal COVID-19 Rules states'*Subject to sub-rule 3.4, these Rules shall be of no force and effect when the COVID-19 outbreak is declared to no longer be a national disaster.*'

of cases post-COVID-19 pandemic to span several years as it used to during the pre-amendment pre-COVID-19 era due to the complexity in establishing excessive pricing under conditions of normal and effective competition.

It is submitted that markets appear to have self-corrected, and there is no longer a surge in demand for goods and services as there was during the national state of disaster. Excessive pricing cases will still be adjudicated under the excessive pricing amendments however the interpretation of the new excessive pricing amendments will be in the context of normal and effective competition. However, it is submitted that to date such a case has yet to be adjudicated.

As earlier submitted section 8(2) of the Competition Act is poorly formulated because in the way section 8(2) is drafted if the Commission establishes a prima facie case of abuse of dominance by charging an excessive price, logically the dominant firm cannot discharge its evidentiary burden by showing that the excessive price is reasonable, because the price is already deemed to be excessive. It would make more linguistic and practical sense if hypothetically section 8(2) read the following instead:

> '8(2) If there is a prima facie case *that a dominant firm charged a price higher than a competitive price,* the dominant firm must show that the price was reasonable'

It is submitted that the manner in which section 8(2) is hypothetically constructed above is exactly how section 8(2) is applied in a hearing. Because a prima facie case is proved by showing that a dominant firm charged a higher price than a competitive price. The methods and tests used to determine a competitive price may vary depending on the facts of each case but nevertheless the price charged needs to be compared to the competitive price. This is also in line with section 8(3) of the Competition Act which states that in order for the Commission to establish if a price is excessive it '*must determine if that price is higher than a competitive price'*. However, it could also be argued that by phrasing the provision this way it removes the Tribunal's discretion on deciding what constitutes a prima facie case, because what constitutes a prima facie case may well vary depending on the facts and context of each case. But the manner in which the provision is currently phrased does not provide a degree of certainty on what constitutes a prima facie case.

As earlier submitted Section 8(3) is also ambiguous because it can be interpreted that the factors listed in section 8(3)(a)-(f) may be taken into account when determining a competitive price, or either determining whether the difference between the actual price and the competitive price is reasonable, or the factors would be taken into account at both of these stages. The decisions in *Babelegi* and *Dis-chem* confirm that both the determination of whether the price is excessive, and the question of reasonableness are to be determined by the factors listed in section 8(3). Therefore, it would make more sense if sections 8(2) and 8(3) hypothetically be amended to read the following:

> ‘8(2) If there is a prima facie case that a dominant firm charged an excessive price, the dominant firm must show that the price was reasonable *by taking into account all relevant factors referred to in subparagraphs (3)(a)-(f)’*
>
> ‘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, *both of which are* determined by taking into account all relevant factors, which may include-’

The manner in which the provisions are hypothetically constructed above are how they have been interpreted by the Tribunal and CAC.

VI. CONCLUSION

The legal position of excessive pricing in South Africa pre, during and post the COVID-19 pandemic is undoubtedly different. Pre-COVID-19, excessive pricing laws in South Africa were underdeveloped. The 1998 Act lacked sufficient substantive law to successfully confront excessive pricing, requiring the courts in *Sasol* and *Mittal* to provide further definition. During the COVID-19 pandemic, the Amendment Act introduced provisions to better confront excessive pricing, which have proven successful regarding excessive pricing cases in the context of the COVID-9 pandemic. The Amendment Act still required the Tribunal and CAC to interpret the new provisions. The COVID-19 pandemic resulted in the publishing of the Consumer Protection Regulations. Post the COVID-19 pandemic, the end of the national state of disaster resulted in the Consumer Protection Regulations being repealed with immediate effect. Markets have self-corrected meaning that going forward excessive pricing cases will also be adjudicated under the Amendment Act but in the context of normal and effective competition.

Further to the above, the successful enforcement and prosecution of excessive pricing in South Africa is reliant upon the evidentiary burdens placed on the parties of the dispute, as well as the economic tests and benchmarks used to assess whether prices are excessive. Imposing very onerous evidentiary burdens on parties, may result in false convictions or false acquittals, neither of which satisfies the philosophy of the Competition Act. Likewise, the same erroneous decisions can be made if the inappropriate economic test and benchmark are used to determine whether prices are excessive. Therefore, appropriate and effective evidentiary burdens and economic tests need to be adopted to ensure excessive pricing decisions are justified and reflect an accurate degree of justice.

Every excessive pricing case adjudicated under the Amendment Act to date has resulted in successful prosecution.[105] Therefore in terms of economic conditions in the context of the COVID-19 pandemic, it is submitted that the shifting of the evidentiary burden as well as the broader more discretionary benchmark create a framework to successfully prosecute excessive pricing in South Africa. However, context is important and it is submitted that the Amendment Act has not yet been tested during conditions of normal and effective competition. Although the new excessive pricing provisions appear to assist the competition commission, the establishment of dominance and the methodologies and benchmarks used to determine whether prices are excessive will still be a complex exercise for cases under normal and effective competition. The introduction of the reverse onus provision is a hurdle for the dominant firm to overcome and it is not clear whether it is warranted in these circumstances. It will be interesting to see what precedent (if any) the decisions in *Babelegi*, *Dis-chem,* and *Tsutsumani* will have on post COVID pandemic excessive pricing cases in conditions of normal and effective competition.

VII. REFERENCES

Case law:

Babelegi Workwear and Industrial Supplies CC vs Competition Commission (186/CAC/JUN).

Competition Commission vs Babelegi Workwear and Industrial Supplies CC (CR003Apr20).

Competition Commission vs Dis-Chem Pharmacies Limited (CR008Apr20).

Competition Commission vs Tsutsumani Business Enterprises CC (COVCR113Sep20).

Competition Commission vs Drs Dietrich, Voigt, Mia and Partners and Dr WJH Vermaark Incorporated (jointly referred to as "Pathcare") (COVCO154Dec21).

[105] *Dischem* case, *Babelegi* case and the *Tsutsumani* case.

Competition Commission vs Drs Du Buisson, Kramer, Swart, Bouwer Incorporated t/a Ampath (COVCO158Dec21).

Competition Commission vs Drs Mauff AC and Partners t/a Lancet Laboratories (COVCO155Dec21).

Competition Commission vs Fruit Stop CC (COVCO037Jul 21).

Mittal Steel vs Harmony Gold Mining (2009) ZACAC 1 (70/CAC/Apr07).

NAPP Pharmaceutical Holdings Limited and Others vs General Office of Fair Trading (2002) CA98/2/2001.

Sasol Chemical Industries vs Competition Commission 2015 (5) 471 (CAC).

S vs Zuma 1995 (2) SA 642 (CC).

United Brands Company and United Brands Continental BV vs The Commission of the European Communities (1978) 1 CMLR 429.

Books:

David Lewis, *Thieves at the Dinner Table: Enforcing Competition Rules in South Africa* (2012) Jacana Media.

Klaaren J, Roberts S, and Valodia I, *Competition Law and Economic Regulation*, 1st edn. Johannesburg: Wits University Press pp 97-119.

Codes of Practice:

OECD Excessive Pricing Policy Roundtables (2011).

Articles:

A Ezrachi and D Gilo, '*Are Excessive Prices Really Self-Correcting?*' (2009) 5 Journal of Competition Law and Economics 2, 249-268.

Akman P, '*Searching for the Long-Lost Soul of Article 82EC*' (2009) 29 Oxford Journal of Legal Studies *267* Journal of Competition Law and Economics 249.

CRM Dlamini, '*The Burden of Proof: Its Role and Meaning*', Stellenbosch Law Review Vol. 14 No. 1, pgs 68-88, 2003.

Evans, DS & Padilla, AJ '*Excessive prices: Using economics to define administrable legal rules*' (2005) *1* Journal of Competition Law and Economics 97.

Fletcher, A & Jardine, A '*Towards an Appropriate Policy for Excessive Pricing*' in CD Ehlermann & M Marquis (eds) European Competition Law Annual 2007: *A Reformed Approach to Article 82 EC* (Hart Publishing 2008) 533.

Jeremy De Beer and Palesa Mpe, '*What's With The Price Gouging?*' Without Prejudice Vol. 20, No. 7, pg 6-7, 02 August 2020.

Massimo Motta '*Price regulation in times of crises can be tricky*' Daily Maverick (22 April 2020).

Motta, M & De Streel, A '*Exploitative and Exclusionary Excessive Prices in EU Law*' in CD Ehlermann & I Atanasiu (eds) European Competition Law Annual 2003: *What Is an Abuse of a Dominant Position?* (Hart Publishing 2006) 91.

Motta, M & De Streel, a '*Excessive Pricing in Competition Law: Never Say Never?*' in Swedish Competition Authority (ed) The Pros and Cons of High Prices *(2007*) 14.

Nkonzo Hlatshwayo, '*Competition Law Post the National State Of Disaster*' Without Prejudice Vol. 22, No. 2, pg 6-7, 01 June 2022.

Oxenham et al '*COVID-19 Price Gouging Cases in South Africa: Short-term Market Dynamics with Long-term Implications for Excessive Pricing Cases*' (2020) Journal of European Competition Law & Practice 2.

O'Donoghue and Padilla '*The Law and Economics of Article 102 TFEU*' (2nd Ed).

Paulis, E '*Article 82 and Exploitative Conduct*' in CD Ehlermann & I Atanasiu (eds) European Competition Law Annual 2003: *What Is an Abuse of a Dominant Position?* (Hart Publishing 2006).

Reena Das Nair and Pamela Mondliwa, *Excessive Pricing under the spotlight: What is a competitive price? (Or, how many economists does it take to define economic value?).*

Willem H Boshoff, *South African Competition Policy on Excessive Pricing And Its Relation to Price Gouging During The Covid-19 Disaster Period* (2021) South African Journal of Economics Vol. 89:1.

Legislation:

Competition Act No. 89 of 1998 as amended.

Competition Amendment Act. 18 of 2018.

Constitution of the Republic of South Africa, 1996.

Disaster Management Act No. 57 of 2002.

Regulations:

Consumer and Customer Protection and National Disaster Management Regulations and Directions published under Government Notice No. R 350 in Government Gazette No. 43116 of 19 March 2020.

Competition Tribunal Rules for COVID-19 Excessive Pricing Complaint Referrals published under Government Gazette Notice R448 in Government Gazette 43205 on 3 April 2020.

Disaster Management Regulations published under Government Notice No. R 350 in Government Gazette No. 43116 of 19 March 2020.