University of Cape Town

THE ASSESSMENT OF EXCESSIVE PRICING: BEFORE, DURING AND AFTER COVID-19

by

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Supervised by Richard Bradstreet

COMPULSORY DECLARATION

This work has not been previously submitted in whole, or in part, for the award of any degree. It is my own work. Each significant contribution to and quotation in this dissertation from the work or works of other people has been attributed and has been cited and referenced.

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Abstract

The prohibition of excessive pricing is the most controversial contravention in the Competition Act 89 of 1998. The publication of *Babelegi Workwear*[1] *and Industrial Supplies CC* and *DisChem Pharmacies Limited*,[2] by the Competition Tribunal of South Africa ("**Tribunal**") and subsequently the Competition Appeal Court ("**CAC**") in 2020 has brought the assessment of excessive pricing under the limelight. This is because competition authorities, in their assessment of dominance and market power, departed from existing precedent and stood in contrast with international best practice and guidance provided by the European Commission and the Organisation for Economic Co-operation and Development ("OECD"). The implications of such departures can prove detrimental to future cases of excessive pricing and the assessment thereof. For instance, by departing from traditional approaches to assessing excessive pricing and leaning more toward price gouging, the Tribunal and CAC have created uncertainty and made it difficult for firms to internally assess their conduct against relevant benchmarks. In this regard, the fundamental question that arises when considering the post- COVID-19 era is whether cases prosecuted during the COVID-19 era can be used as precedent for post-COVID-19 prosecutions.[3] It will be interesting to see what impact, if any, the COVID regulations have on post-COVID jurisprudence, as well as whether there is a general increase in prosecutions during normal market conditions.[4] It will be particularly interesting to see if competition authorities continue to embrace the concept of price gouging despite claims that it does not exist in our law.

[1] *Competition Commission v Babelegi Workwear and Industrial Supplies CC* CR003Apr20.
[2] Competition Commission of South Africa v Dis-Chem Pharmacies Limited CR008Apr20.

[3] Hlatshwayo & Leokaoke op cite note 370 at 1.
[4] Ibid.

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1. INTRODUCTION

Section 8(1)(a) of the Competition Amendment Act ("**Amendment Act**"),[1] prohibits dominant firms from charging excessive prices to the detriment of consumers and customers. Section 1 of the Competition Act ("**Competition Act**") defined an excessive price as "a price for a good or service which bears no reasonable relation to the economic value of that good or service [and] one that is higher than its value".[2] In other words, an excessive price is a price so high that it exceeds what ought to be reasonable and competitive in the context of the cost incurred to produce the relevant good.[3] The Amendment Act,[4] however, has changed this definition and outlined that an "excessive price" prohibition happens when a dominant firm exercises its market power by unilaterally[5] raising prices to levels that may be anti-competitive.[6] According to the Amendment Act,[7] for a firm to be found guilty of excessive pricing, it must meet the initial requirement of dominance (a high degree of market power), proof of market power, and abuse thereof.[8] The concept of market power refers to "the ability of a firm (or group of firms acting jointly) to profitably maintain prices above [a]

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[1] Competition Amendment Act 18 of 2018.
[2] Section 1(vi) of the Competition Act of 89 1998.
[3] A general understanding of section 1(1) and section 8(1) of the Competition Act 89 of 1998 and the Competition Amendment Act 18 of 2018.
[4] Competition Amendment Act 18 of 2018 (Amendment Act). The Amendment Act was passed into law on 14 February 2019. The excessive pricing provisions were effective from 12 July 2019.
[5] Unilaterally means acting alone.
[6] Section 8 of the Competition Amendment Act 18 of 2018.
[7] Competition Amendment Act 18 of 2018.
[8] Section 8 of the Competition Act 18 of 2018. See William M. Landes & Richard A. Posner "Market Power in Antitrust cases" (1981) 94 *Harvard Law Review* at 937.

competitive level for a significant period of time".[9] This means that, when determining whether a price is excessive, competition authorities must consider factors such as the alleged dominant firm's price cost margin, internal rate of return, return of capital invested, and profit history, among others.[10] This means a complainant would need to establish that the firm alleged to be charging the prices complained about holds a dominant market position and that the prices charged are "excessive" for purposes of the Competition Act. Essentially, the complainant would need to prove that a dominant firm is abusing its dominant position within a particular market by charging excessively high prices for their financial benefit for an extended period of time.

Proving abuse of dominance requires extensive evidence using legal and economic analysis. The first step in proving an allegation of abuse of a dominant position is that there must be proof that the respondent is dominant. The second step is that there must be evidence that the respondent is abusing or abuses its dominant position. This paper appreciates how difficult it is to measure an unfair or excessive price and how intervention requires skills and monitoring processes that competition authorities are ill-equipped with. This consequently results in a great variation on how courts analyse unilateral practices such as excessive pricing. It is the opinion of this paper that these variations result, in part,

[9] Robert Anderson, Timothy Daniel, Alberto Heimler & Thinam Jakob "Abuse of Dominance" in Rughvir Shyam Khemani & Catherine R. Ruglisi (eds) *A framework for the design and implementation of Competition Law and Policy* (1998) at 69 – 70.

[10] Section 8 of the Competition Amendment Act 18 of 2018.

from the reality that the welfare effects of unilateral practices are inherently difficult to assess.[11] On one the hand, economics and experience provide a strong presumption that certain coordinated practices are harmful.[12] On the other hand, the same economics and experience argue that there are circumstances where there is no reason to assume that aggressive unilateral pricing is bad – rather the opposite. Even so, a firm could use low prices to secure dominance. Therefore, it comes as no surprise that the courts have reached different conclusions when it comes to the assessment and determination of abuse of dominance cases in relation to excessive pricing.

The prohibition of excessive pricing is the most contentious and controversial area of competition enforcement in many jurisdictions.[13] The main reason for this is that there are diverse views on how competition authorities and courts ought to intervene to bridle prices that are "too high".[14] These diverse views have resulted in varying approaches by different jurisdictions. For instance, the United States ("**US**"), on the one hand, is of the view that intervention is unnecessary as markets can "self-correct" by attracting new entry, thus resulting in competition, which will in

[11] Massiom Motta & Alexandre de Streel "Excessive pricing and price squeeze under EU law" in Claus-Dieter Ehlermann and Isabela Atanasiu (eds) European Competition Law Annual 2003: What is an Abuse of a Dominant Position? (2006) at 2.
[12] Ibid.
[13] Reen das Nair & Pamela Mondliwa "Excessive pricing under the spotlight: What is a competitive price?" in Jonathan Klaaren, Simon Roberst & Imraan Valodia (eds) *Competition Law and Economic Regulation* (2017) at 97.
[14] Claudio Calcagno, Antoine Chapsal & Joshua While "Economics of Excessive Pricing: An Application to the Pharmaceutical Industry" (2019) 10 *Journal of European Competition Law & Practice* at 166. See das Nair & Mondliwa op cit note 13 at 97.

turn drive prices down.[15] On the other hand, the European Commission ("**EC**") is of the opinion that although there is a legitimate reluctance to intervene as prices are already set by regulators, there are instances where the EC should and will intervene.[16] In essence, for those against intervention, competition authorities are seen as interfering with "the unilateral actions [and practices] of profit-maximising firms engaging in business in the free market".[17] While those for intervention view interference by competition authorities as being centred on attempts to regulate the behaviour, conduct, and practice of dominant firms and making sure that dominant firms do not abuse their dominant position.[18] In South Africa, the Competition Act 89 of 1998 ("**Competition Act**"),[19] seems to have adopted an interventionist approach, similar to the one taken by the EC but with "consumer detriment" added to it. In terms of this approach, the charging of excessive prices is prohibited only when there is a detrimental effect on consumers,[20] and for a price to have a detrimental effect on consumers, it must be significant in both duration and extent and not trivial.[21]

Given the complexities involved, it is no surprise that only a handful of excessive pricing cases have been referred to competition authorities. The

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[15] Claudio Calcagno & Mike Walker "Excessive Pricing: Towards Clarity and economic coherence" 6 *Journal of Competition Law and Economics* at 896.
[16] das Nair & Mondliwa op cit note 13 at 100.
[17] Isabel Goodman, Patrick Smith, Paula Youens Luke Kelly, David Unterhalter "Abuse of dominance" in Isabel Goodman, Patrick Smith, Paula Youens Luke Kelly, David Unterhalter (eds) *Principles of Competition Law in South Africa* (2017) at 131.
[18] Ibid at 131 - 132.
[19] The Competition Act 89 of 1998.
[20] Ryan David McKerrow "Excessive pricing in South African competition law: elucidating the nature and implications of the consumer-determent requirement" (2017 29 *South African Mercantile Law Journal* at 189.
[21]Ibid.

two most significant cases are *Mittal Steel South Africa Limited & others v Harmony Gold Mining Company Limited & another*[22] and *Sasol Chemical Industries Limited v The Competition Commission*.[23] In these judgments, the Competition Appeal Court (CAC) brought clarity to the excessive pricing prohibition and established a detailed framework for its application. Thus, creating precedent used to inform the current Amendment Act of 2018. In this regard, the paper seeks to evaluate how competition authorities, especially courts, in South Africa have over the years grappled with issues associated with the determination and assessment of excessive pricing.

In 2020, the Competition Tribunal of South Africa ("**Tribunal**") and Competition Appeal Court of South Africa ("**CAC**"), in *Babelegi Workwear and Industrial Supplies CC*[24] and *Dis-Chem Pharmacies Limited,*[25] departed from long-standing precedent in their assessment of excessive pricing. Prior to *Babelegi* and *Dis-Chem*, long-standing precedents of Competition law advocated for the use of the following methods in assessing and determining excessive pricing: the two-stage "structure and conduct" test; the economic value test; and the competitive benchmark.[26] All of which the Tribunal failed to apply in its assessment of excessive pricing, in *Babelegi*

[22] *Mittal Steel South Africa Limited & others v Harmony Gold Mining Company Limited & another* ((unreported case no 70/CAC/Apr07) [2009] ZACAC 1 (29 May 2009)).
[23] *Sasol Chemical Industries Limited v The Competition Commission* ((unreported case no 131/CAC/Jun14 [2015] ZACAC 4 (17 June 2015)). The decisions of the Tribunal version of these cases will also be discussed.
[24] *Babelegi Workwear and Industrial Supplies CC v Competition Commission of South Africa* (186/CAC/JUN20) [2020] ZACAC 7.
[25] *Competition Commission of South Africa v Dis-Chem Pharmacies Limited* CR008Apr20.
[26] Patrick Smith "Observation of the economics of excessive pricing during a crisis" (2020) 16 *Competition Law International* at 61-70.

Workwear and Industrial Supplies CC[27] and *Dis-Chem Pharmacies Limited.*[28] Instead, the Tribunal departed from using these methods and informally relied on the COVID-19 Regulations ("**Regulations**"),[29] published by the Minister of Trade, Industry and Competition, in reaching its respective decisions. Despite the emphasis by the South African Competition Commission ("**Commission**") that the Regulations do not have a retrospective effect. Effectively, the implication of such departures from precedent – as a result of abnormal market conditions – can prove to be detrimental to the assessment of excessive prices – more especially under normal market conditions (post-COVID pandemic). Therefore, this paper seeks to analyse the detrimental effects the decisions of both the Tribunal and CAC, in *Babelegi* and *Dis-Chem*, on future excessive pricing cases.

Chapter two of this paper will discuss the legal framework of section 8 of the Competition Act and thus, the evolution of excessive pricing. The first part of the paper will focus on how the prohibition of excessive pricing came to South African. The second part of the chapter will outline the evolution of legal frameworks and how they have been applied and interpreted. This chapter acknowledges the tremendous value placed on judgments, as the interpretation of competition legal frameworks largely develops through jurisprudence. Chapter three will critically analyse the elements of a contravention of excessive pricing under section 8 of the Competition

[27] *Babelegi* supra note 24.
[28] *Dis-Chem* supra note 25.
[29] Government Gazette 43116, 19 March 2020. The full term of the COVID-19 Regulations or Regulations, as referred to throughout the paper, is Consumer and Customer Protection and National Disaster Management Regulations.

(Amendment) Act. Chapter four will critically analyse the two price gouging cases of *Babelegi* and *Dis-Chem* in attempts to show how the courts departed from existing precedent by re-defining what constitutes abuse of dominance in relation to excessive pricing. Chapter five will briefly look at the economics of price gouging. The chapter will be divided into two parts: the first part will discuss the model of supply and demand, and the second part will look at the economics of price gouging. Chapter six will constitute a commentary and a critique on the effects *Babelegi* and *Dis-Chem* have on future cases of excessive pricing. Further, the chapter will look at whether it was important for competition authorities to acknowledge that some measure of latitude must be given to firms regarding dominance, considering the lack of importance both the Tribunal and CAC associated with determining the market in which the two complainants were accused of being dominant.

Ultimately, this paper argues that under normal economic conditions, the assessment of excessive pricing is usually triggered by the unreasonable unilateral behaviour of a dominant firm over an extended time period. Meanwhile, the assessment of excessive pricing under abnormal economic conditions, such as COVID-19, has proven to be entirely different. Essentially, the experience and economic consequences brought about by the COVID-19 pandemic in South Africa was novel. This was also evident in how the Competition Act and Amendment Act were not prepared to deal with circumstances relating to price gouging, as the country has never dealt

with circumstances relating to natural disasters. The paper also acknowledges the importance of qualifying precedent for different factual circumstances. However, the paper does not agree with entirely changing the application of a doctrine to suit temporary market conditions. Ultimately, it is the opinion of this paper that departure from existing precedent, as a result of brief abnormal market conditions, may have detrimental effects on the future assessment of excessive prices under normal market conditions.

1.1 BACKGROUND CONTEXT

On the 30th of January 2020, under the International Health Regulations, the Director-General of the World Health Organisation (WHO), Dr. Tedros Adhanom Ghebreyesus, declared the COVID-19 outbreak to be a global health emergency of international concern. On the 11th of March 2020, Dr. Ghebreyesus announced that the COVID-19 outbreak had become so widespread that it constituted a pandemic. Local and international restrictions were implemented, and WHO recommended preventative measures – which included the wearing of face-masks (and gloves), hand sanitising and physical distancing, in attempts to curb the spread of SARS-CoV-2, the CORONA. The recommendations resulted in an increase in demand and prices of face-makes, toilet paper, and other essential items determined to be essential.

There is a simultaneous shift in demand (increase) and supply (decrease) during a natural disaster, which forces the prices of certain goods and services upwards. Increased demand for various goods and services, and distribution of supply – often accompanied by sharp increases in prices – are often brought about by extreme exogenous[30] and endogenous[31] shocks to the economic system.[32] During this time, competition authorities tend to implement regulations against price gouging in relation to basic food, medicinal, and other consumer items as part of a policy response.[33] So, it came as no surprise, after South African President Cyril Ramaphosa declared a state of national disaster due to the COVID-19 pandemic, that the Minister of Trade, Industry and Competition published Regulations pertaining to the pricing and supply of certain consumer and medical products and services during the disaster period.[34] At the time, one of the many consequences of the COVID-19 pandemic included disruptions in the supply chain of products described as essential. These disruptions in the supply of essential products consequently brought about an increase in demand for said products and evidently led to shortages. Further, the shortages influenced the behaviour of companies, as some took advantage of the difficulties associated with the production and distribution of some essential products by exponentially increasing their prices. Although price

[30] A short that arises from within the economic system. An example of this is the Great Recession of 2008 – an exogenous shock sparked by the financial crisis. However, a genuine exogenous shock would be something like an earthquake or tsunami.
[31] An endogenous shock is a shock co-created by the economic relations of humanity and the biosphere. An example of this is COVID-19.
[32] Willem H. Boshoff "South African Competition Policy on Excessive Pricing and its relation to Price Gouging during the COVID-19 disaster period" (2021) 89 *South African Journal of Economics* at 113.
[33] Ibid.
[34] Ibid at 113 – 114.

increases, in some instances, can reflect an increase in the costs of market participants and provide essential market signals to increase production to stimulate new entry, they can also reflect exploitative business practices without objective justification.[35]

Essentially, the pandemic necessitated the introduction of several unprecedented measures aimed at mitigating its impact, such as the COVID-19 Regulations[36] and block exemptions published by the Minister of Trade, Industry and Competition (pursuant to the National State of Disaster declared by the government under Government Gazette number 313 of 15 March 2020). The Regulations represented a break from past practice, as the implications of the COVID-19 Regulations, for assessing excessive pricing are considerably different from the implications resulting from the Competition Act and its amendments. In terms of the Regulations, an increase in the cost of production or service in the three-month period prior to 1 March 2020 will be a "relevant and critical factor" in determining whether the price is "excessive" in terms of the Competition Act and whether it is *prima facie* evidence that the price is "excessive or unfair" in terms of the Regulations. This created a break between how cases of excessive pricing were evaluated before and during the pandemic. For instance, prior to the COVID-19 pandemic and under normal economic conditions, the increase of prices of goods and services by a company is referred to as excessive pricing. During abnormal economic conditions,

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[35] OECD "Exploitative pricing in the time of COVID-19" (2020) at 1, available at *https://www.oecd.org/competition/Exploitative-pricing-in-the-time-of-COVID-19.pdf*, accessed on 15 January 2022.
[36] Government Gazette 43116, 19 March 2020.

brought about by a natural disaster such as COVID-19, the sudden increase in prices for goods and services defined under a legal framework as essential is usually referred to as price gouging or profiteering. Both excessive pricing and price gouging are competition violations, as they bring about unwanted and prejudicial changes in the market.

Prior to the COVID-19 pandemic era, firms alleged to have engaged in excessive pricing were prosecuted in terms of section 8 of the Competition Act.[37] However, during the COVID-19 pandemic, South African competition authorities, in their attempts to maintain the affordability of goods deemed essential during the first couple of weeks of the global pandemic, erred in their efforts to mitigate existing laws. This is because competition authorities could not use the Regulations – as they did not have retrospective application – to mitigate the law when it came to Babelegi and Dis-Chem. Instead, competition authorises have resorted to indirectly applying the COVID-19 Regulations in their assessment of both *Babelegi* and *Dis-Chem* under the guise of applying the open-ended factors under section 8(3) of the Competition Act.

The paper acknowledges that the erupted economic conditions brought about by the pandemic were novel to South Africa, and as a result, it comes as no surprise that competition authorities did not have the necessary tools to deal with the abnormal economic conditions brought about by the

[37] Competition Act 89 of 1998 and later the Competition Amendment Act 18 of 2018.

pandemic. As a result, in their assessment of excessive pricing, they departed from existing South African precedent and stood in contrast with international best practice and guidance provided by the European Commission [38] and the Organisation for Economic Co-operation and Development ("**OECD**"). [39] By departing from traditional approaches to assessing excessive pricing cases in order to address price gouging concerns, firms risk undermining certainty and thus making it difficult for firms to internally assess their conduct against relevant benchmarks. Like all laws, the enforcement and application of competition law should constantly work to increase legal certainty. The Tribunal and CAC could have gone a long way toward providing such certainty if they had made it clear that price gouging cases like those prosecuted to date were only applicable during states of Natural Disaster. However, this was not the case, as both the Tribunal and CAC, in their assessments of *Babelegi* and *Dis-Chem* took a different approach to the assessment and enforcement of section 8 of the Amendment Act. With that said, the purpose of this paper is to demonstrate that the behaviour of both *Babelegi* and *Dis-Chem* was not abuse of dominance in the traditional sense, as the Tribunal and CAC ruled, but behaviour that is in alignment with the principles of supply and demand during a disaster, which perpetuates and is also accepted as price gouging. It is for this reason that the next chapter will focus on the legal framework of the excessive pricing contravention. The chapter will outline the adaptation

[38] See Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abuse exclusionary conduct by dominant undertakings OJ (2009) C 45/07, [10].

[39] See Guidance on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreement (14 January 2011) [39]; and Directorate for Financial and Enterprise Affairs Competition Committee: Market Concentration (20 April 2018) [11] and [15].

and evolution of section 8 throughout the years and how the traditional approach to excessive pricing was formed and maintained until the pandemic.

2. THE LEGAL FRAMEWORK OF SECTION 8 OF THE COMPETITION ACT: THE ADAPTATION AND EVOLUTION OF EXCESSIVE PRICING:

The formulation of excessive pricing in the South African Competition Act ("Competition Act")[40] broadly followed that of European case law[41] with the definition of an excessive price having been taken directly from the *United Brands Co. v Commission of the European Communities* decision.[42] According to the judgment of the Court of Justice of the European Union ("CJ") in *United Brands*, a price is abusive if "it has no reasonable relation to the economic value of the product", and an abuse can be determined by a twofold test that considers whether (1) the price-cost margin is excessive and (2) the price imposed "is either unfair in itself or when compared to competing products".[43]

This definition, which also constituted a test, of excessive pricing under section 8 of the Competition Act has been developed by courts, though case law, and the legislature, though amends. As much as the formulation of the definition and test are important, tremendous value is placed on court decisions, as they inform how competition law is regulated.

[40] Competition Act 89 of 1998.

[41] Although there is no clear reference to excessive pricing in European legislation, the word is a result of case law. Article 102 of the Treaty of the Functioning of the European Union ("TFEU") regulates unilateral market power in EU competition law, and subparagraph (a) explicitly stipulates that abuse of a dominant position may consist of "imposing unfair purchase or selling prices".[41] Article 82 of the EC Treaty prohibits a dominant firm from engaging in "unfair" pricing practices, which has been interpreted as including excessive and predatory prices, See Treaty on the Functioning of the European Union Article 102, 13 December 2007, 2010 O.J. (C 83).

[42] *United Brands Co v Commission of the European Communities*, Case 27/76*, 1978 E.C,R.*.

[43] Ibid para 250-252.

In Europe, the abuse of dominance was originally dealt with in Article 86 of the Treaty Establishing the European Economic Community ("TEEC") and subsequently in Article 82 of the Treaty establishing the European Community ("TEC"). Currently, the relevant text lies in Article 102 of the Treaty of the Functioning of the European Union ("TFEU").[44] Article 102 TFEU prohibits any abusive undertakings by a firm in a dominant position, and subsection specifies that such abuse may consist of "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions".[45] This prohibition has been applied, for example, to excessively high prices. The European Court of Justice in *General Motors Continental NV v Comm'n* (1975)[46] held that the pricing of a dominant is unfair if it is "excessive in relation to the economic value of the service provided".[47] The Court of Justice expanded the concept of unfairness even further in *United Brands Co. BV v Comm'n* (1978),[48] holding that it is important to investigate whether the dominant undertaking has used the opportunities arising from its dominant position to gain trading benefits that it would not have enjoyed if regular and suitably effective competition existed. Furthermore, the Court of Justice stated in this instance that this excess may be objectively determined if it is possible to compute it by comparing the selling price of the commodity in question with its cost of manufacture.[49] As a result, a price-cost comparison is mentioned in the United Brands decision as the

[44] McKerrow op cit note 20 at 185.
[45] Article 102(a) of the Treaty on the Functioning of the European Union of 13 December 2007 — consolidated version (OJ C 202, 7.6.2016, pp. 47-360).
[46] *General Motors Continental NV v Commission of the European Communities*, Case 26/75, [1975] ECR 1367
[47] Ibid at para 12.
[48] *United Brands Co* supra note 42.
[49]Ibid para 251.

main competitive benchmark. According to this logic, a price is unreasonable if it is excessive in comparison to the cost. The economic justification for employing a price-cost comparison as a competitive benchmark is that the competitive process, which competition laws strive to achieve, and drive prices toward the cost of production. In this regard, costs should include not only variable costs of supplying the product, but also any costs, investments, or risks required by the dominant firm to supply the product.

Over the years, it has been observed that each enforcement decision raises a different concern about the judicial and regulatory interpretation of the concept of excessive pricing. In South Africa, since the prohibition of excessive pricing is clearly derived from European case law, it is useful to look at the European approach to assessing excessive pricing. In *General Motors Continental NV v Commission of the European Communities*,[50] the European Communities Court of Justice, for the purpose of Article 86 of TEEC, took the position that an unfair price could be inferred from a comparison of the actual price charged and the "real economic cost" of producing the goods and services in question.[51] This approach was further developed by the same court in the leading case of *United Brands v Commission*.[52] In this case, the court held that "charging a price which is excessive because it has no reasonable relation to the economic value of

[50]*General Motors* supra note 46.
[51] Ibid para 22.
[52] *United Brands Co* supra note 42.

the product supplied [constituted an abuse contemplated in Article 86]".[53] The European Court of Justice went on to assert that the excess of price over economic value could be objectively determined by means of a cost-profit analysis.[54] Subsequently, if the price of the product in question were found to exceed its cost of production, the reasonableness and consequential fairness of such a price could be determined with reference to the profit margin alone or to the price in comparison to that of competing products.[55]

United Brands is the first case in which the European Court of Justice examined the element of excessive pricing within the framework of competition law. In this case, the European Court of Justice reviewed the decision of the European Commission with respect to the pricing behaviours of the United Brands Company ("UBC") and declared that the charging of an excessive price that did not have a reasonable relationship to the economic value of the product would be considered an abuse of dominance. The European Court of Justice states that the European Commission failed to consider the cost structure of UBC, as it did not compare the cost of the product with its selling price, which could have provided an "objective" method of calculating and determining the excessive price.[56] Further, the court indicated that prices would be considered excessive where the profit margin demanded by the dominant

[53] *United Brands Co* supra note 42 para 250.
[54] Ibid para 251.
[55] Ibid para 252.
[56] *United Brands Co* supra note 42 para 252. See McKerrow op cit note 20 at 175.

firm was excessive in comparison with the cost of providing goods and services.[57]

The position of *United Brands* was further confirmed in *Attheraces*,[58] where the United Kingdom (UK) Court of Appeal asserted that evidence showing that a firm was pricing above cost does not provide sufficient evidence to conclude that prices were excessive.[59] According to the court, this was an intermediate step in the analysis.[60] The same position was taken by the European Commission earlier in *Scandlines*,[61] where it stated that the comparison of prices and cost which reveal the profit margin, of a particular company may serve as the first step of the analysis.[62] Therefore, similar to what was later held in the appeal case of *Attheraces*,[63] "above-cost" pricing was held to be "a necessary but not sufficient condition for excessive pricing.[64] Once the profit margin has been ascertained, a determination must be made as to whether the price charged is unfair – either in it or in comparison to the prices charged by the firm to other consumers or by other firms for similar products.[65] In *Scandline*, the European Commission stated that in assessing whether prices can be considered excessive, it is important to note that the test set out by the European Court of Justice in *United Brands* focuses on the price charged and its relation to the economic

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[57] *United Brands Co* supra note 42 para 250 - 252.
[58] *Attheraces Ltd v British Horseracing Board Ltd.* [2005] EWHC 3015 (Ch.), [2005] UKCLR 757 (Ch.D).
[59] Ibid at para 269 - 270.
[60] Ibid at para 129, 132-133 & 280.
[61] *European Commission, Scandlines Sverige AB v Port of Helsingborg,* Case No COMP/A.36.568/D3 (2004)
[62] Ibid para 102.
[63] *Attheraces Ltd v British Horseracing Board Ltd.* [2007] EWCA (Civ) 38, [2007] UKCLR (CA).
[64] Ibid para 104 – 105 and 309.
[65] *Scandlines Sverige* supra note 61 para 103.

value of the product. In addition, the European Commission in *Sandline* confirmed that the "mere fact that [revenue] may exceed costs incurred is not sufficient to conclude that the difference is excessive".[66] What this means is that one must not only focus on profit margins but also on whether those profit margins are excessive based on the *United Brands* test,[67] which was conveniently adopted under section 8 of the Competition Act 89 of 1998.

2.1 COMPETITION ACT 89 OF 1998

The Competition Act came into effect on 1 September 1999 and prohibited several practices (vertical and horizontal) and abuses of a dominant position. The purpose of the South African Competition Act[68] is to promote the efficiency, adaptability, and development of the economy and to provide consumers with competitive prices and product choices. The prohibition of excessive prices, under section 8, makes the Competition Act a basis for price control.[69]

A large part of section 8 of the Competition Act is focused on exclusionary acts, while a small portion of it is made to address a single exploitative practice – excessive pricing. Section 8(a) of the Competition Act, as originally drafted, prohibited a dominant firm from charging "an *excessive*

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[66] *Scandlines Sverige* supra note 61 para 142.
[67] *United Brands Co* supra note 42 para 250 - 251.
[68] Competition Act 89 of 1998.
[69] Simon Roberts "Effects-based tests from abuse of dominance practice: The case of South Africa" (2012) 4 *Centre for Competition Economics* at 5.

price to the detriment of consumers"[70] and defined an excessive price as "a price for a good or service that bears no reasonable relation to the economic value of that good or service".[71] This definition was incorporated into our legislation as a direct import from the judgment of the European Communities Court of Justice in *United Brands Company and United Brands Continental B.V. v Commission of the European Communities*.[72] A key component of the definition is its reference to "economic value" – a concept that was not defined in the judgment and in the Competition Act. Instead, it was given content by subsequent South African case law.[73]

The assessment of whether a firm charges excessive prices for the purpose of the Competition Act is complex. In terms of section 8(3) of the Competition Act, there are several factors to consider when assessing whether a firm is charging excessive prices. These factors include, but are not limited to, price margins, prices for other products, return of capital, structural characteristics of the market, and prices charged by competitors for similar products. In response to the implunged prices relating to basic, essential, and medical items during the COVID-19 natural disaster, this assessment has, to some extent, been simplified by the issuing of the COVID-19 Regulations. The Regulations do not eliminate the critical prerequisite for embarking on the assessment – the requirement that the impugned firm be dominant in its particular market. Instead, they simply

[70] Section 8(a) of the Competition Act 89 of 1998.
[71] Section 1(1)(ix) of the Competition Act 89 of 1998.
[72] *United Brands Co* supra note 43.
[73] Boshoff op cit note 32 at 118.

streamline the assessment as to whether the price levels are excessive. This means, no matter how exorbitant the extracted profits are, without the establishment of dominance, the excessive pricing prohibition does not apply.[74] This does not mean pricing under the Regulations is legally impermissible. On the contrary, this form of pricing under the Regulations may well automatically fall within the ambit of the unfair pricing prohibition contained in the Consumer Protection Act;[75] as this prohibition does not depend on dominance for its application.[76] Hence, it is important for competition authorities to not pursue excessive pricing cases in the absence of dominance.

The excessive pricing prohibition is a per se prohibition under section 8.[77] As a per se prohibition, successful prosecution is not reliant on proof of anti-competitive harm, nor can it be defended by establishing a pro-competitive gain.[78] In essence, interpreting and applying the prohibition in a factual context is by no means simple. A court hearing an excessive pricing complaint will be required to grapple with a host of vexing issues. In terms of the express wording of the Competition Act and subsequent case law, the court will need to determine the economic value of the goods or

[74] Read how the Competition Act defines Abuse of Dominance under section 7 and 8 of the Competition Act. The establishment of "dominance" is important for the assessment of "Excessive Pricing" See Roberts op cit note 69 at 7-8. See Heather Irvine "Minister of Trade Industry and Competition responds swiftly to COVID-19" (2020) 20 *Without Prejudice* at 10.

[75] Consumer Protection Act 68 of 2008.

[76] Section 8(1)(e) of the Consumer Protection Act 68 of 2008.

[77] McKerrow op cit note 20 at 175. See how section 8(a) and section 8(b) of the Competition Act of 1998 are structured. It is important to note that excessive pricing is one of the two per se prohibitions under section 8. The other being the prohibition on refusing to allow a competitor access to an essential facility when it is economically feasible to do so

[78] Ibid.

services.[79] Then, it will need to determine whether the relationship between the economic value and the actual price charged for the good or service is reasonable. [80] In addition, competition authorities are burned with a qualifying criterion for the application of the prohibition: that the firm in question must be dominant within its market. This calls for an initial analysis with its own challenges.[81]

To re-reiterate, according to section 8(a) of the Competition Act an excessive pricing enquiry involves the following steps:[82]

(1) The factual determination of:

a. The actual price of the good or service in question is said to be excessive in reality, and

b. the economic value of that good or service (expressed as a monetary amount); and

(2) The exercise of a value judgment as to whether:

a. there is an unreasonable difference between the actual the actual price and the economic value; and

b. if so, whether charging an excessive price is at the detriment of consumers.

[79] Section 8 of the Competition Act.
[80] McKerrow op cit note 20 at 175.
[81] Section 7 of the Competition Act contains the framework for establishing market dominance.
[82] *Competition Commission v Sasol Chemical Industries Ltd* (48/CR/Aug10) [2011] ZACT9 (24 February 2011) para 32.

Therein, before the Competition Act was amended in 2019, an excessive price was to be determined by reference to "economic value" – a concept that was given content in subsequent case law. However, the amended Act removes this concept and sets out factors that should be considered in determining a benchmark competitive price and whether a price is deemed excessive relative to such a competitive price.[83] These factors, although they do not explicitly mention "economic value" are derived from the assessment of the concept in case law over the years. This means the factors under section 8(3) of the Amendment Act encompass what courts have come to define as "economic value".

Still, it is important to understand how the concept of "economic value" was determined prior to its removal under the Amendment Act. The determination of economic value was a point of contention in excessive pricing literature and case law. As legislation did not define the term or establish tests for its calculation, case law has, over time, developed both.[84] Therefore, the interpretation of economic value has developed through jurisprudence. At first glance, economic value may be observed as the value consumers are willing to pay for a product or service. This, however, is not the case, as the most obvious determination of excessive pricing and economic value, according to Simon Roberts, is "the charging of (non-discriminatory) monopoly prices with a loss of consumer surplus and a

[83] Although the concept "economic value" has been removed in the amended Act, from an economic perspective, however, it is useful to note that the factors under section 8(3) are similar to the factors considered by case law to give content to the concept of "economic value". See Boshoff op cit note 32 at 117-8.

[84] das Nair & Mondliwa op cit note 13 at 100.

deadweight loss".[85] This means an efficiency loss to the economy and harm to consumers, both of which are at the core of competition law and policy objectives.[86] Therefore, according to Roberts, economic value is the marginal cost, with excessive pricing being about the mark-up over this.

Moreover, in South Africa, abuse of dominance is predominantly considered under the classic “rule of reason” principles.[87] Under the rule of reason, the plaintiff is required to plead and prove that the defendant with market power is engaged in anti-competitive conduct.[88] To conclude that a practice is “reasonable” means that it survives scrutiny under competition law. This principle contrasts with the “per se” rule, in which power generally need not be proven and anti-competitive effects are largely inferred from the conduct itself.[89] Disparate from the per se rule, the rule of reason requires detailed analysis of market power and its effects, as well as consideration of possible efficiency gains.[90] Therefore, it was this rule, over the years, that has helped competition authorities define what excessive pricing means in South Africa.

Historically, excessive pricing has proven difficult to prosecute, with the CAC overturning findings of excessive pricing by the Tribunal. In addition to

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[85] Simon Roberts “Assessing Excessive Pricing: The case of Flat Steel in South Africa” (2008) 4 *Journal of Competition Law and Economics* at 2.
[86] Ibid.
[87] OECD “Economic analysis and evidence in abuse cases in South Africa: Context maters – Lessons from the *Babelegi* Excessive Pricing Case” (2021) at 2, available at *https://one.oecd.org/document/DAF/COMP/GF/WD(2021)7/en/pdf,* accessed on 22 November 2022.
[88] Herbert Hovenkamp, “The rule of reason” (2018) 70 *Florida Law Review* at 84.
[89] Ibid.
[90] Ibid at 85.

this, jurisprudence before COVID-19 showed little appetite for successful prosecution in this area. Nonetheless, this does not take away from the fact that the definition of excessive pricing has developed through case law, and the first two cases of the Competition Act played a vital role in the definition of what constitutes excessive pricing today.

2.1.1 *Harmony Gold Mining Company Ltd;*[91] *Mittal Steel South Africa Limited and Others*[92]

Mittal Steel was founded by ISCOR. Before its privatisation and being listed in the JSE, ISCOR was established and ran by the state. By the time of both cases,[93] Mittal Steel was effectively established as a dominant firm that had adopted an import parity price as the basis for pricing in the local market. Import parity pricing is a practice where local firms charge prices equal to those charged for imported products, even though there is a trade surplus and imports are not required.[94] This means the price includes the notional cost of transport. Harmony Gold, the complainant, submitted that Mittal Steel import parity prices were excessive under section 8(a).[95]

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[91] *Harmony Gold Mining Company Ltd & another v Mittal Steel South Africa Ltd & another* ((reported case no 13/CR/Feb04) [2007] ZACT 21 (27 March 2007)).
[92] *Mittal* supra note 22.
[93] In reference to "both cases" this means, the case by the Tribunal and the case by the Competition Appeal Court. However, the Tribunal decision is not relevant as the Appeal Court overruled it.
[94] *Mittal* supra note 22 para 22 & 44.
[95] *Mittal* supra note 22 para 6.

The Tribunal, after a brief examination of numerous ways to test excessive pricing, held that the most appropriate manner to determine the definition of excessive pricing is to engage in a two-stage enquiry. [96] The first stage of the test deals with the interpretation of economic value. The second stage of the test deals with the proper assessment of the reasonableness of the relationship between price and economic value. The Tribunal, when it came to the first stage, held that, in interpreting the economic value of a good or service, an objective test is necessary as "the cost savings to the firm resulting from the subsidised loan or the lower than market rental – or indeed any other special advantage, current or historical, that serves to reduce the particular firm's cost below the notional competition norm out to be disregarded". [97] Therefore, the Tribunal held that if the relevant price is not higher than the economic value, there will be no breach of section 8(a)".[98]

Should it happen that the price is higher than the economic value, it is necessary to apply the second stage of the enquiry which determines whether the difference in price is reasonable. The Tribunal noted that it is important to understand that the difference

[96] *Harmony Gold* supra note 91 para 140-155; see *Mittal* supra note 22 para 32.

[97] See the analysis of the Tribunal's decision in *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another* 70.CAC/Apr07 [2009] ZACAC1 at para 43.

[98] *Harmony Gold* supra note 91 para 186. See the analysis of the Tribunal's decision by the CAC in *Mittal* supra note 22 para 43.

between the economic value and the "pure profit" is implicit in the test.[99] The "pure profit" enquiry requires a subjective test as it examines the circumstance peculiar to the particular dominant firm, which would rationally come into reckoning. For this to be achieve, it is necessary to take into account "benefits flowing to the firm from the subsidised loan, long-term low rental, or other special advantage which may serve to reduce its own long-term average cost below the notional norm".[100]

In 2009, the Competition Appeal Court, in *Mittal Steel South Africa Limited*,[101] handed down the first definitive judgment on the test to be applied in determining whether a firm has contravened section 8(a) of the Competition Act. The CAC replaced the two-stage "structure and conduct" test by the Tribunal with the following four enquiries:

(1) What is the actual price of the allegedly excessive good or service?[102]

(2) What is the monetary and economic value of the good or service?[103]

[99] See the analysis of the Tribunal's decision in *Mittal* supra note 22 para 43.
[100] *Mittal* supra note 22 para 43.
[101] *Mittal* supra note 22.
[102] *Mittal* supra note 22 para 32.
[103] *Mittal* supra note 22 para 32.

(3) Is the actual price greater than the economic value? If yes, is there a reasonable relationship between the actual price of the good or service and its economic value?[104]

(4) If there is no reasonable relationship, a value judgment must be made to determine whether charging the excessive price is detrimental to consumers.[105]

While these steps merely outlined the logically required framework suggested by the express words of the Competition Act, the fundamental contribution of the *Mittal* case was the creation of a conceptual understanding of "economic value". Most importantly, the CAC concluded that the South African legislature must have intended that the term "economic value"[106] refers to the notional price of the particular "good" or "service" under the presumptions of "long-run competitive equilibrium".[107] Furthermore, the CAC believed that economic value is a notional, objective, and competitive market norm, as opposed to one formed from factors unique to the dominant firm in particular, such as a distinctive history of governmental assistance, subsidised finance, or a corporate-specific cost advantage.[108] These conceptual principles are critical for defining "economic value" in any given circumstance, and especially for calculating the price benchmark in a long-run

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[104] Ibid.
[105] Ibid.
[106] *Mittal* supra note 22 para 40
[107] John Oxenham "South Africa Excessive Pricing – An Evaluation of the *Sasol Chemical Industries* Decision – A New Dawn, or a Continuation of the status quo" (2015) *American Bar Association Fall Forum* at 5.
[108] Oxenham op cit note 107 at 5.

competitive equilibrium, in which notional competing companies act in accordance with market-specific conditions that may or may not match those of the dominant firm.[109]

Furthermore, the CAC held that a literal construction of the definition of "excessive pricing" required the determination of an actual amount by reference to empirical evidence. The court went on to identify various methods of estimating economic value, defining the concept of economic value as the price that would have prevailed over time under competitive market conditions. [110] Eventually, the CAC determined that the economic value benchmark referred to the notional price of the good or service under “long-run competition equilibrium” conditions.[111] Long-run competition equilibrium is, in turn, "a notional, objective, competitive-market standard in which competing firms could enter the industry in the event of a higher-than-normal rate of return or exit the industry to avoid a lower-than-normal rate of return".[112] Under the long-run competition equilibrium, rival firms could recover their costs.

[109] Ibid.
[110] *Mittal* supra note 22 para 40 - 43. See Andrew Sylvester "A critical evaluation of the proposed treatment of special cost advantage in excessive prices law" (2014) 7 *Journal of Economic and Financial Science* at 608.
[111] *Mittal* supra note 22 para 38 – 40.
[112] Smith op cit note 26 at 62. See *Mittal* supra note 22 para 40.

2.1.2 ***Sasol Chemical Industries Limited ("SCI")***

The second excessive pricing case to successfully make it to the Tribunal and later to the CAC related to the pricing of propylene and polypropylene by Sasol Chemical Industries (SCI) and largely focused on the assessment of SCI's particular cost advantages, although the overall logic of the test was largely undisturbed. In 2011, the Tribunal in *Competition Commission v Sasol*,[113] ruled that an analysis under section 8(a) can be carried out by establishing that the price under consideration can be determined and compared to the actual costs of the dominant firm,[114] but it did not offer a precise definition or test for figuring out economic value.[115] Instead, the Tribunal used guidance from the CAC and the Constitutional Court to determine the economic value of the product in question, concluding that history is important when evaluating excessive pricing. Thus, the history of how SCI acquired its dominant position and cost advantage was central to the debate over SCI's cost advantage. Effectively, the Tribunal held that the position SCI had was not due to risk-taking or innovation but rather to past exclusive or special rights and historical state support for a considerable period of time.[116] For instance, SCI's low-cost feedstock propylene arises from the natural resources of South Africa, and SCI

[113] *Competition Commission v Sasol* supra note 82.
[114] Ibid para 62-63.
[115] Ibid para 64-74.
[116] Ibid at para 95-97.

significantly benefited from state support, and its position in purified propylene and polypropylene is a result of that.[117] Therefore, due to the governmental support of this magnitude, the Tribunal was correct to consider the benefit of lower feedstock costs when evaluating whether prices are excessive.[118]

The Tribunal's decision was an appeal, but the CAC upheld the appeal and dismissed the case against SCI. In a lengthy judgment, the CAC observed that the translation of clear ideals about what constitutes a case of excessive pricing in law is "immensely complex".[119] Nonetheless, the CAC made important observations and remarks that have implications for future enforcement of excessive pricing complaints. The general strategy and guiding principles outlined in *Mittal* were confirmed as offering a framework for evaluating cases of excessive pricing. However, despite the widely acknowledged precedent of *Mittal*, the CAC in *Sasol* indicated that it was unnecessary to engage in complicated matters relating to the "pricing" of the feedstock when considering the impact of the "cost" of the feedstock to be used in determining the economic value of the SCI products.[120] Instead, and this is crucial, the CAC came to the conclusion that the economic value of the SCI

[117] *Competition Commission v Sasol* supra note 82 para 96.
[118] Ultimately, the decision establishes important precedents for a variety of reasons, one of which is the emphasis on considering not only the provisions of the Competition Act, but also the preamble and the purpose of the Competition Act (as stated in section 2 of the Competition Act).
[119] *Competition Commission v Sasol* supra note 82 para 2.
[120] *Sasol* supra note 23 para 108-9.

products should be determined using the actual cost of feedstock.[121] Furthermore, the CAC found that the actual price that SCI paid for feedstock was a result of an arm's length contract concluded some years prior between SCI and Synfuels, and that deference should be shown as this price had been the subject of independent scrutiny.[122]

In summation, the *Sasol* ruling supported the standards created in the *Mittal* case for deciding whether the prices of a dominant firm are excessive. In so doing, *Sasol* set a precedent for the interpretation and application of section 8(a) of the Competition Act. The court, in applying this provision, accepted specific rules set forth in the judgment, such as the "rule of thumb", by which firms use a twenty percent (20%) margin on economic costs to determine if their prices are excessive.[123]

[121] *Sasol* supra note 23 para 141 and 149.
[122] *Sasol* supra note 23 para 109. It is deplorable that the CAC could not be more explicit about how they were departing from the general premise that "economic value" should be calculated with respect to the notional costs and not always the actual costs.
[123] *Sasol* supra note 23 para 175.

2.2 COMPETITION AMENDMENT ACT

The Competition Amendment Act of 2018 ("**Amendment Act**")[124] was enacted in 2018 and included a new test for excessive pricing in section 8(1)(a). The Amendment Act removed the previous definition of the Competition Act, which defined an excessive price as a price that has "no reasonable relation to the economic value of the product"[125] and replaced it with the following requirements: (1) examination of whether the price is greater than the "competitive price"; and (2) determination of whether the price is "unreasonable" having regard to the factors set out in section 8(3).[126] In addition to these requirements, the Amendment Act added a reversal onus, which shifts the burden of proof to the respondent (to show that the price was "reasonable") once the complaint establishes *prima facie* evidence of excessive pricing.[127] In summation, although the Amendment Act removed the definition of excessive pricing as it stood under section 8(a), it largely incorporated the existing jurisprudence, from *Mittal Steel* and *Sasol*, into the description of the prohibition. The Amendment Act replaced the definition, which also constituted a test of excessive pricing, with a few key components from existing precedent. The first component includes the importance of excessive pricing and requirements the examination of whether the price is greater than the "competitive price".[128] The second

[124] Competition Amendment Act 18 of 2018 (Amendment Act). The Amendment Act was passed into law on 14 February 2019. The excessive pricing provisions were effective from 12 July 2019.
[125] Section 8(a) of the Competition Act 89 of 1998.
[126] Section 8(3) of the Competition Amendment Act 18 of 2018.
[127] Section 8(2) of the Competition Amendment Act 18 of 2018 .
[128] Section 8(3) of the Competition Amendment Act 18 of 2018.

component is to determine whether the price is "unreasonable", having regard to the factors set out in section 8(3).[129] The third component is a reserve onus, which states that after a prima facie case of excessive pricing is established, the onus transfers to the respondent to show that the price is justified.[130]

Ultimately, the promulgation of the Amendment Act has resulted in a lot of critical changes. All of whom are summarised by Patrick Smith, in *Observation on the Economics of Excessive Pricing during a Crisis*.[131] According to Smith, the Amendment Act made three main changes, including the following:

(1) The prohibition of excessive pricing was tweaked to clarify that it refers to conduct that is to the detriment of consumers or customers.[132]

(2) A new section dedicated to reverse onus was inserted to raise the potential that if a prima facie case of excessive pricing is made out, the onus of having to prove that its pricing is reasonable might lie with the dominant firm.[133]

(3) A new section sets out an open-ended list of factors that may be considered by anyone making a determination of excessive pricing,

[129] Section 8(3) of the Competition Amendment Act 18 of 2018 sets out factors that must be considered.
[130] Section 8(2) of the Competition Amendment Act 18 of 2018.
[131] Smith op cit note 26 at 61-76.
[132] Section 8(1)(a) of the Competition Amendment Act 18 of 2018.
[133] Section 8(2) of the Competition Amendment Act 18 of 2018.

although this section states that such a determination must take into account “all relevant factors”.[134]

Furthermore, the Amendment Act introduced new difficulties in evaluating claims of excessive pricing, such as new restrictions on dominant firms imposing unfair purchase prices or other trading terms on small, medium, and micro enterprises (SMMEs).[135] These also included firms controlled or owned by historically disadvantaged persons, within certain sections that may be designed by the relevant government ministers, [136] as well as other novel provisions addressing allegations of abuse of dominance more generally.[137] In addition, the complex and uncertain context of the COVID-19 pandemic saw an addition to the factors proposed under section 8(3) of the Competition Amendment Act. As the Minister of Trade, Industry and Competition, within two weeks of the first confirmed case of COVID-19, published regulations and directions targeted at regulating the supply and pricing of certain essential medical and consumer product services during the disaster period.[138] The Regulations set out the definition of “a material price increase” and directed that such a material price increase is a relevant and critical factor for determining whether a price is excessive or unfair, and stated that this would provide a prima facie indication that a price is excessive or unfair.[139] The introduction of these Regulations was for the

[134] Section 8(3) of the Competition Amendment Act 18 of 2018.
[135] Section 8(3) of the Competition Amendment Act 18 of 2018.
[136] Section 8(4) of Competition Amendment Act 18 of 2018.
[137] See the price discrimination provisions under section 9 of the Competition Amendment Act 18 of 2018.
[138] Boshoff op cit note 32 at 112-3
[139] section 4 of the Government Notice no.350 of Government Gazette no.43116 (19 March 2020).

benefit of encompassing Competition violations that occurred because of the pandemic. So far, the Competition Commission of South Africa ("**Competition Commission**") has vigorously applied these Regulations and directions in the prosecution of a large number of cases in a short period of time,[140] although the first two excessive pricing cases took almost a decade to finalise.

Ultimately, when determining whether a price is excessive, according to the Amendment Act, competition authorities must take into account factors such as the price cost margin, internal rate of return, return on invested capital, and profit history of the dominant firm, among others.[141] This means that in order to file a complaint, a complainant must show that the firm charging the prices in question holds a dominant position in the market and that the prices are excessive for the purpose of the Amendment Act. However, during a natural disaster, an increase in the net margin of a particular good or service that is more than the usual margin or mark-up for a given period would constitute a *prima facie* case of "excessive pricing".[142]

[140] In the first five months under these new regulations, the Commission had referred and settled thirty-four COVID-19 related cases, resulting in total penalties of over ZAR 15 million. See the Competition Commission Media Statement, "Competition Tribunal confirms an order against media product distributor and manufacturer for excessive pricing of respiratory masks during COVID-19 disaster" (20 August 2020).
[141] Section 8 of the Competition Amendment Act 18 of 2028.
[142] 19 MARCH 2020. R. 350. Competition Act (89/1998): Consumer and Customer Protection and National Disaster Management Regulations and Directions. Government Gazette 43116.

2.3 **COVID-19 REGULATIONS**

On 15 March 2020, as a result of the COVID-19 pandemic, the South African President, President Cyril Ramaphosa declared a state of natural disaster. Following this declaration, the Minister of Trade, Industries and Competition[143] relied on section 8(3)(f) of the Competition Amendment Act and published the Consumer Protection Regulations also referred to as "anti-price gouging regulations" ("Regulations").[144] The Regulations were responsible for determining excessive prices in selected industries and applied to a prescribed list of "essential goods" during the period of a natural disaster. Regulation 4 defines excessive price increases as a substantial increase in the price of a good or service contemplated in Annexure A that (1) does not correspond to increases in costs of provision; or (2) increases the net margin or markup on that good or service over what it would normally be throughout the three months leading up to 1 March 2020.[145] Four major categories of goods and services are considered in Annexure A: (1) fundamental food and consumer goods; (2) emergency goods and services; (3) medical and hygiene supplies; and (4) emergency clean-up goods and services.[146] Therefore, under the Regulations, firms supplying these groups of goods and services “were prohibited from implementing a price increase that is not directly proportional to an

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[143] Section 8(3)(f) of the Competition Amendment Act 18 of 2018.

[144] Competition Act: National Management Regulations and Directions: Consumer and Customer Protection during Coronavirus COVID-19 lockdown, available at *https://www.gov.za/documents/competition-act-regulations-consumer-and-customer-protection-and-national-disaster*, accessed on 27 October 2022.

[145] Regulation 4 of the National Management Regulations and Directions: Consumer and Customer Protection during Coronavirus COVID-19 lockdown.

[146] Annexure A of the National Management Regulations and Directions: Consumer and Customer Protection during Coronavirus COVID-19 lockdown.

underlying cost increase".[147] An increase that cannot be justified in terms of the Regulations, is considered *prima facie* "excessive" for purposes of section 8(1)(a) of the Amendment Act. Therefore, the courts held that they would not regard the Regulations for the assessment of the merits of the cases.[148] This is because it is a fundamental principle of rule of law that legislation may not be applied retrospectively.[149] Instead, it held that the substantive issue of both firms charging excessive prices for their marks during the Complaint Period is in contravention of section 8(1)(a) of the Competition Act.[150]

As a consequence, this paper will not regard the Regulations as the courts did not regard them in their assessment of the merits of the two cases, *Babelegi* and *Dis-Chem*. In both cases, the Regulations were found not to have application as the Complaint Period (31 January to 5 March 2020) proceeded the date on which the Regulations came into force (being 19 March 2020).[151] This meant the Regulations were not applied, as the law in South Africa has a strong presumption that legislation is not intended to be retroactive or retrospective.[152] However, this did not detract from the courts' ability to determine the merits of the matters i.e. the substantive issue of

[147] John Oxenham, Michael-James Currie & Charl van der Merwe "COVID-19 Price Gouging cases in South Africa: Short-term market dynamics with long-term implications for Excessive Pricing cases" (2020) 11 *Journal of European Competition Law & Practice* at 525.
[148] *Babelegi* supra note 28 para 37. *Dis-Chem* supra note 25 para 49.
[149] See *Dis-Chem* supra note 25 para 49. This precedent was set in *S v Mhlungu and others* 1995 (3) SA 867 (CC) at 65-67.
[150] *Babelegi* supra note 28 para 36.
[151] *Babelegi* supra note 28 para 37.
[152] *Babelegi* supra note 28 para 34.

whether the firms charged excessive prices for their masks during the Complaint Period in contravention of section 8(1)(a) of the Competition Act.

Consequently, on 28 April 2022, the Tribunal determined the first case under the Regulations, read with section 8(1)(a) of the Amendment Act.[153] Tsutsumani was accused by the Commission of charging the South African Police Service (SAPS) excessive prices for the urgent supply of five hundred thousand three-ply surgical face-masks during April 2020. In its order, the Tribunal found that Tsutsumani contravened section 8(1)(a) of the Amendment Act read with Regulation 4,[154] during the period 5 April 2020 and 29 April 2020. The Tribunal, in terms of the fines prescribed by legislation, fined Tsutsumani the maximum administrative penalty of 10% of its relevant turnover, amounting to a total of R3 441 689.10.[155]

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[153] *Competition Commission v Tsutsumani Business Enterprise CC* COVCR11Sep20. The case against Tsutsumani also marked the first time the Commission successfully prosecuted a company for price gouging during a public procurement process.

[154] Regulation 4 of the National Management Regulations and Directions: Consumer and Customer Protection during Coronavirus COVID-19 lockdown.

[155] *Tsutsumani* supra note 154 para 164.

3. ELEMENTS OF A CONTRAVENTION OF SECTION 8 OF THE COMPETITION ACT

Although the Amendment Act does not prohibit firms from holding a dominant position, section 8 prohibits a number of anti-competitive practices perpetuated by dominant firms. Section 8(1)(a) of the Amendment Act prohibits a dominant firm from charging excessive prices to the detriment of consumers or customers. This section among other things, addresses the misuse of power by a dominant form and ensures that consumer welfare standards. Nonetheless, for a dominant firm to be found in contravention of section 8 of the Amendment Act, the three following elements must be satisfied: (i) dominance; (ii) an excessive price; and (iii) detriment on consumers or customers.

3.1 FIRST ELEMENT: DOMINANCE

The first prerequisite for a violation of Section 8 of the Competition Amendment Act is that the offending firm must have market dominance. For the firm to be found to be dominant in that market, requirements under sections 6 and 7 must be met. According to section 6 of the Competition Act, the annual turnover or assets in the Republic of a firm in question must meet a certain threshold.[156]

[156] Section 6 of the Competition Act 89 of 1998.

The term dominance in relation to excessive pricing is defined differently in different jurisdictions. For many jurisdictions, the assessment of dominance in relation to excessive pricing focuses on behavioural aspects. For instance, competition authorities will look at the degree to which an allegedly dominant firm restricts competition. Or its ability to act in such a manner that a firm subject to competition restrictions would not be able to do so. In these jurisdictions, some focus primarily or exclusively on structural elements that typically define control by a set market share threshold. Other jurisdictions use market share analysis as a first step, taking into account situation-specific differences. Different approaches to the legal definition of dominance matter. A behavioural focus on defining advantages in aspects of dominance has the advantage of encouraging a multifaceted analysis, as many factors can determine whether a firm's market power has achieved the required level of sustainability and durability. Conversely, a definition of dominance that is focused on market share may not be flexible enough to take into account relevant market characteristics, such as easy entry or intense competition based on industry development. This indicates that a firm may not be able to maintain its market power despite having a high market share.

In South Africa, dominance is defined under section 7 of the Competition Act. According to this definition, there is no time frame or limitation on dominance. Which means the determination of dominance, in terms of time

frame and limitation, is at the discretion of competition authorities (such as the Tribunal and CAC). Over the years, as will be outlined below, this discretion has resulted in a competition policy or an assumption on the longevity or durability of market power. Therein, it is now difficult to come to the conclusion that the assessment of market power no longer depends on longevity but on whether or not it is present. In terms of the decisions by the Tribunal and the CAC, the core concept behind dominance from both an economic perspective and in terms of the Competition Act (as amended) is whether a firm holds market power, which section 1 of the Competition Act (as amended) defines in economic terms 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".[157] In this regard, it is important to understand that dominance is measured by the ability of an organisation to act without significant constraint, or to influence prices to exclude competition, or to profitability maintain prices above the cost of supply in the long run. Therefore, in relation to excessive pricing, abuse of a dominant position occurs when a firm, holding a position of economic strength that allows it to operate in a market without being significantly affected by competition,[158] engages in conduct that is likely to impede the development or maintenance of effective competition.[159]

[157] Section 1 of the Competition Act. See *Babelegi* supra note 28 para 54.
[158] Kunal Choudhary "Abuse of Dominance in Competition Law" (2021) 2 *Jus Corpus Law* at 499.
[159] David S Evans & Jorge A Padilla "Designing antitrust rules from assessing unilateral practices. A neo-Chicago approach" (2005) 72 *University of Chicago Law Review* at 73.

Conversely, a firm engaged in vigorous competition resulting in the taking of business from less efficient competitors is not in breach of the dominance provisions as this is part of the competitive process. It is important to understand that firms engage in a variety of practices to increase sales and make profit, often at the expense of competitors and customers. Some of these practices are unilateral and anti-competitive in nature and come under the radar of Competition law only when the firm using them holds what is termed a "dominant position".[160] A firm holding a dominant position is defined as a single firm in an industry[161] with no close substitutes and can act without taking account of the implications of its actions on its customers or competitors.[162] The holding of a "dominant" position by a firm is not unlawful, but its unilateral conduct becomes subject to scrutiny once it has reached dominance.[163] This is because a dominant firm has a special responsibility not to allow its conduct to impair competition. For this reason, dominant firms tend to be under critical observation and examination when it comes to balancing the law and the economy. The term "dominance" is a legal concept in theory, but its evaluation is ultimately influenced by economic considerations. As a result, defining "market power" entails identifying corresponding legal and economic concepts.

3.1.1 **THEORETICAL DEFINITION OF DOMINANCE**

[160] Evans & Padilla op cit note 159 at 73. Like in South Africa, it is termed a “dominant position” in the European Union (EU) and “monopoly power” under United States (US) law.
[161] For the purpose of this paper an industry is a group of firms that produce the same good.
[162] Evans & Padilla op cit note 159 at 73.
[163] Motta & de Streel op cit note 11 at 2.

In economic terms, a dominant firm is one with significant market power, which means the firm is not effectively restricted by its rivals and customers.[164] This enables the firm to act autonomously, raise prices, and scale back its innovative initiatives in order to increase profit.[165] Fundamentally, a firm holds a dominant position whenever the following two steps are involved: (1) the market definition and (2) market power analysis. An accurate definition of a market is important for identifying, in a systematic way, the immediate competitive constrains faced by a firm.[166] Identifying the products and geographic markets involved will help determine whether the firm in question holds a dominant position and whether its conduct is likely to be abusive within the meaning of Section 8 of the Amendment Act.[167] This is important because it provides a frame of reference for the analysis.[168] After identifying the relevant market, the next step is to analyse the degree of market power enjoyed by that firm in consideration of its market share. This analysis includes an assessment of the nature of the market and its competitive processes – entry, exit, expansion,[169] and competitive barriers faced by potential competitors, and whether customers are able to exercise countervailing buyer power.[170] In this context, abuse of a

[164] Calcagno & Walker op cit note 15 at 499-500.
[165] Anderson, Daniel, Heimler & Jakob op cit note 9 at 69.
[166] Mikhail Anufriev & Dàvid Kopànyi "Oligopoly Game: Price Makers Meet Price Takers" (2018) 91 *Journal of Economic Dynamics and Control* 84 at 85.
[167] Jan Louis van Tonder "Predatory Pricing: Single-firm dominance, exclusionary abuse and predatory prices (Part 1)" (2020) 42 *OBITER* at 838.
[168] van Tonder op cit note 167 at 838.
[169] Ibid.
[170] McKerrow op cit note 20 at 188.

dominant position in the market occurs when a dominant firm (or group of firms) adopts behaviour intended to discipline or eliminate competitors or to prevent the future entry of new competitors, which then leads to the suppression or reduction of competition.[171]

Competition is commonly understood as the process of rivalry between firms in the market in the absence of market power. Under competition, competitive firms have no ability to change the prices of goods, as each competitive firm, relative to the market, is small and has no influence on price. Any attempts by competitive firms to exert influence over the market, particularly in terms of the setting of the product price, will fail. In contrast, non-competitive firms with market power are called "price makers" as they are dominant in their relevant market.[172] "Price makers know the market composition and produce optimally given this composition".[173] With that said, the theoretical definition of dominance essentially concerns the ability of a firm to influence the prices of goods or services in the market. In this regard, the holding of a dominant position is defined as the capacity of a firm to behave or act in a way that is independent of market factors.[174] This means a dominant position is a position of strength enjoyed by a firm in a relevant market that allows it to operate independently of the

[171] Anderson, Daniel, Heimler & Jakob op cit note 9 at 72.
[172] Anufriev & Kopànyi op cit note 166 at 84 at 85.
[173] Ibid 84 at 85.
[174] Boshoff op cit note 32 at 120.

competitive forces prevailing in the relevant market.[175] Further, a firm holding a dominant position has the power to affect its competitors, consumers, or the relevant market in its favour.[176]

3.1.2 LEGAL DEFINITION OF DOMINANCE

The legal definition of dominance under the Competition Act is concerned with market share and market power.[177] According to the legal definition, any corporation that possesses genuine market power, regardless of market share, is considered dominant.[178] According to the Competition Act, market power incorporates ideas from the definition of dominance by the European Union, which include "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".[179] To put it another way, market power is the ability to charge more than the marginal cost in the short run and more than the average total cost in the long run.[180] As a result, competition law established legal and economic frameworks for assessing market power and abuse of dominance in order to avoid excessive pricing. However, what is contentious

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[175] Kunal Choudhary "Abuse of Dominance in Competition Law" (2021) 2 *Jus Corpus Law* at 499.
[176] Kunal Choudhary "Abuse of Dominance in Competition Law" (2021) 2 *Jus Corpus Law* at 499.
[177] Section 7 of the Competition Act 89 of 1998.
[178] OECD "Competition Law and Policy in South Africa" (2003) at 24, available at *https://www.oecd.org/daf/competition/prosecutionandlawenforcement/2958714.pdf*, accessed on 9 July 2022.
[179] Ibid at 85. See Section 1(1)(xiv) of the Competition Act 89 of 1998.
[180] Ibid.

about the legal framework, especially the expressed wording in the Competition Act, is the fact that it does not contain any time frame or limitation on the assessment of dominance or market power. This was accentuated by the Tribunal in both *Babelegi* and *Dis-Chem*.[181] Additionally, the legislature leaves the determination of "economic value" and "reasonable" to the competition authorities, as both concepts are undefined in the Competition Act.

Section 7 of the Competition Act,[182] defines the circumstances in which a firm may be found to possess dominance. These circumstances are referred to as legal presumptions of dominance, and a firm that falls within the ambit of these presumptions will be subject to prohibitions under sections 8 and 9 of the Competition Act. Therein, dominance, although not unlawful, is a necessary precondition or jurisdictional fact for the application of Section 8 and 9. Said differently, a firm engaged in conduct described as unlawful or prohibited has to hold a dominant position in order for it to be found in contravention of section 8 and/or 9.[183]

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[181] See *Babelegi* supra note 28 para 52. *Dis-Chem* supra note 25 para 111-115.

[182] Chapter 2, Part B sections 7 to 9 of the Competition Act 89 of 1998, amended by section 45(a) and (c) of Act 18 of 2018, In terms of section 3(1), the Competition Act applies to all economic activities in or having an effect within South Africa.

[183] Goodman, Smith, Youens, Kelly & Unterhalter op cit note 17 at 132.

For the abuse of dominance provision to apply, four elements must be satisfied: (i) a firm; [184] (ii) meeting the financial threshold provisions;[185] holding a dominant position; (iv) and must engage in an exclusionary act prohibited by section 8 or 9 of the Competition Act. First, competition authorities need to establish that the entity in question is a firm. A firm is a commercial enterprise that buys and sells products and/or services. [186] Second, the competition authorities need to be sure that the firm meets the financial threshold. Section 6 of the Competition Act stipulates that firms of a certain size are excluded from the dominance provisions.[187] The section provides that where a firm has an annual turnover into or from South Africa of less than R 5 million or its assets in South Africa are less than R 5 million, it cannot be subjected to the prohibitions contained in sections 8 and 9 of the Competition Act.[188] Section 6 is thus a “safe harbour”[189] for firms that are too small to be able to meaningfully alter the structure of the markets in which they operate. Those that do not meet the R 5 million threshold will be deemed not to violate, while dominant firms with annual turnover or assets more than R 5 million are prohibited from abusing their dominance and market power. Third, competition authorities must determine whether the firm holds a dominant position (also referred

[184] Section 1 of 89 of 1998.
[185] Section 6 of 89 of 1998.
[186] Motta & de Streel op cit note 11 at 2.
[187] Part B, Chapter 2, section 7 to 9 of the Competition Act deals with abuse of dominance.
[188] Sections 6(1) to 6(3) of the Competition Act 89 of 1998.
[189] A safe harbour is a legal term that defines a situation where legal and regulatory liability in certain situations is reduced or eliminated as long as certain conditions are met.

to as "dominance"). A dominant firm is defined as a single firm in an industry[190] with no close substitutes.[191] Several factors will be considered by competition authorities to determine whether a firm is dominant. Market share is the first indicator of how much competitors are restricting the behaviour of the firm. The larger the market share, the more likely it is the firm has a high degree of market power.[192] As a result, determining dominance begins with defining the relevant market within which the firm's market share is calculated. When a firm's market share exceeds 50%, there is a presumption of dominance under EU law, but there is no presumption of dominance when the market share is less than 40%. In South Africa, section 7 of the Amendment Act defines three circumstances in which a firm may be found to possess dominance. The first circumstance defines a firm with a market share of at least 45% of a specific market as irrefutably dominant.[193] The second circumstance defines a firm with a market share of between 35% and 45% of a specific market as being refutably dominant, unless it can show it does not have “market power”.[194] The third and last circumstance defines a firm with a market share of less than 35% of a particular market as only being dominant if it has “market

[190] For the purpose of this paper an *industry* is defined as a group of firms that produce the same good.
[191] Anufriev & Kopànyi op cit note 166 at 85. *Substitutes* are defined as alternative firms available to buyers of the product or service offered by the firm under investigation and/or the one described as dominant in that market/industry.
[192] Ibid.
[193] Section 7(a) of the Competition Act 89 of 1998.
[194] Section 7(b) of the Competition Act 89 of 1998.

power".[195] This codified analysis of dominance involves determining which of the three structurally defined situations a firm fits into. Further, this codification of dominance not only provides a low threshold for dominance, but it also provides a sense of comfort for small firms, as they, in an accurately defined market,[196] will unlikely have market power. The objective of having a low threshold is to remove or reduce the distorting effects of excessive economic concentration and corporate conglomeration, collusive practices, and the abuse of economic power by firms in a dominant position. In addition, the codification of the threshold also ensures that the participation of small- and medium-sized efficient enterprises in the economy is not jeopardised by anti-competitive structures and conduct. Fourth, the dominant firm must be engaged in abusive conduct, prohibited under section 8 of the Competition Act. Section 8 prohibits dominant firms from engaging in various types of conduct, which include: excessive pricing;[197] denying competitors access to "essential facilities" when it is economically feasible to do so;[198] engaging in a broad category of exclusionary acts that impede or prevent a firm from entering into, participating in, or

[195] Section 7(c) of the Competition Act 89 of 1998.

[196] A *defined market*, simultaneously referred to as a *relevant market*, provides an indication of the boundaries within which competition between undertakings takes place, making it possible, for instance, to calculate market share, which can be used when assessing market dominance. A relevant market comprises of both a product and geographic scope. A relevant product market comprises all products and/or services that are regarded by consumers as interchangeable or substitutable due to their characteristics, prices and intended uses. The scope of the geographic market is defined by how far away or close by alternative sources of supply need to be, to be acceptable to customers seeking to switch from one producer or service provider to another, and can be worldwide, regional, national or even local.

[197] Section 8(1)(a) of the Competition Amendment Act 18 of 2018.

[198] Section 8(1)(b) of the Competition Amendment Act 18 of 2018.

expanding within a market;[199] price discrimination;[200] and abusing buyer power.[201] Overall, a dominant firm in terms of sections 6 and 7 participating in any of these prohibited conduct or practices is, in terms of sections 8 and 9 of the Competition Act, abusing its dominance.

Moreover, section 7 of the Competition Act addresses abuse of dominance in terms of market share and market power. [202] According to this section, a firm with market power is dominant regardless of its market share.[203] The reason more relevance is attached to market power is because competition policy is more concerned with regulating the conduct of firms that enjoy market power than market share.[204] The term "market power" is defined as the ability to sustain a price above the marginal cost[205] or the ability to control prices and behave in a manner that does not consider the reactions of its competitors, customers, or supplies.[206] In terms of the Competition Act, when a dominant firm has market power, it is said to be anti-competitive and abuses its dominant position.[207] The concept of market power under the Competition Act includes concepts of dominance as defined by the European Union. The

[199] Section 8(1)(c) of the Competition Amendment Act 18 of 2018.
[200] Section 9 of the Competition Act Amendment Act 18 of 2018.
[201] Section 8(4) of the Competition Amendment Act 18 of 2018.
[202] See section 7 of the Competition Act 98 of 1998.
[203] OECD "Competition Law and Policy in South Africa" (2003) at 24, available at *https://www.oecd.org/daf/competition/prosecutionandlawenforcement/2958714.pdf*, accessed on 9 July 2022.
[204] Boshoff op cit note 32 at 114.
[205] Ibid.
[206] Anderson, Daniel, Heimler & Jakob op cit note 9 at 69 - 70.
[207] Ibid at 70. See Timothy J Muris "The new rule of reason" (1988) 57 *Antitrust Law Journal* at 861.

European Union defines dominance 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".[208] In other words, market power is the ability to raise prices above marginal cost in the short run and above average total cost in the long run. Therein, it was for this reason – attempt to avoid excessive pricing – that competition law established legal and economic frameworks for assessing market power and abuse of dominance. Additionally, these legal and economic frameworks were created for the purpose of assessing the appropriate time, justifiable enough, to warrant legal intervention.

In all three circumstances where dominance is assumed, section 7 uses market share as an indicator of dominance. However, the Competition Act does not specify how market share is calculated. This omission is within good reason, especially in relation to section 7(a) – which outlines that a firm is dominant in a market if it has at least 45% of that market[209] – as the assessment of market share is not the sole or main basis for the assessment of dominance. Essentially, while market share is important in determining market power, it is traditionally used as the first indicator of market power because it cannot be used alone as a guide to effectively conclude

[208] Section 1(1)(xiv) of the Competition Act 89 of 1998.
[209] Section 7(a) of the Competition Act 89 of 1998.

that a firm has market power.[210] This is primarily due to the fact that the existence of a dominant position is derived from a number of additional factors that are not necessarily determinative when considered separately.[211] Failure to consider relevant market conditions, market characteristics, and competitive constraints faced by the firm in conjunction with market share can be highly misleading and a poor indicator of market performance.[212] When a company only focuses on market share, its pricing power, capacity to fend off competitors, or ability to act independently are all ignored.[213] Therefore, using market share makes findings of dominance purely mechanical. With that said, although Section 7(a) of the Competition Act establishes an irrebuttable presumption in favour of the competition authority, this strategy for dominance is incompatible with an economic strategy.[214] This is because the section assumes market power (based on market share), and does not go through the necessary economic tests to evaluate its existence.

[210] David Bailey & Laura Elizabeth John "Bellamy & Child: Materials on European Union Law of Competition" 8ed (2018) at 871-872.
[211] *Hoffmann-La Roche & Co. AG v Commission of the European Commiunities* [1979] ECR 461 at para 39.
[212] Bailey & John op cit note 210 at 872.
[213] Ibid.
[214] van Tonder op cit note 167 at 841.

3.2 SECOND ELEMENT: AN EXCESSIVE PRICE

The second prerequisite for a violation of section 8 of the Competition Amendment Act is that the firm in question must be charging an excessive price for its goods or services. Excessive pricing is one obvious symptom of abuse of a dominant position resulting in surprisingly high prices and profits. The definition of what constitutes excessive pricing is the usual starting point for the assessment of excessive pricing. The legal definition of excessive pricing is referred to as the practices of a dominant firm that are alleged to have a negative impact on the competitive process.[215] Although the definition appears hard to follow, it is formulated to indicate how abuse is likely to influence market structure, reduce the level of market competition that already exists, and result in dominant firms being forced to resort to methods different from those governing regular competition.[216]

In assessing whether a price is excessive, the Amendment Act requires (1) consideration of whether the price is higher than the "competitive price";[217] and (2) determination of whether the price is "unreasonable" having regard to the factors set out in section 8(3).[218] In addition, the Amendment Act introduced a reverse onus, where once a prima facie case of excessive pricing has been established, the onus shifts to the respondent to

[215] Bailey & John op cit note 210 at 894.
[216] Bailey & John op cit note 210 at 895.
[217] A competitive price is a strategic process, mostly used by firms selling similar products, to set prices according to how their competitor's price.
[218] Section 8(3) of the Competition Amendment Act 18 of 2018.

demonstrate that the price was "reasonable".[219] Therein, the 2018/9 amendments to the Competition Act are the most significant amendments (since the Act came into force in 1999) as they were informed, to a large extent, by "public interest" considerations. The South African legislature paid particular attention to restrictive practices, especially those engaged by dominant firms. Therefore, in line with public interest considerations, some of the abuse of dominance provisions consider the effect of abusive conduct on small and medium businesses owned by historically disadvantaged persons.

Moreover, when the Competition Act was amended, the concept of "economic value" was removed and replaced by a set of factors that should be considered when assessing the benchmark of a competitive price and whether a price is deemed excessive relative to such a competitive price. The factors identified under section 8(3) of the Amendment Act are: (1) price-cost margins and other profitability measures; (2) prices and profits of competitors; (3) prices charged by the respondent in other markets and over time; (4) duration of pricing at that level; (5) structural characteristics of the relevant market, such as market share, contestability barriers to entry, and advantages due to the respondent's own past and current commercial efficiency or investment; and (6) any regulations made by the Minister of Trade, Industries and Competition.[220]

[219] Section 8(2) of the Competition Amendment Act 18 of 2018.
[220] Section 8(3) of the Competition Amendment Act 18 of 2018.

The wording under section 8(3) is peremptory, as it suggests that it is a must for all relevant factors be taken into account in determining whether a price is excessive. Despite this, the Tribunal in both *Babelegi* and *Dis-Chem* failed to adopt this as it followed a unique approach to the factors in determining whether the price differences between the charged price and the competitive price were unreasonable.[221] Logically, not all the factors will be relevant or find application in all cases; however, the Tribunal, in determining whether the factors were indeed relevant to the facts, did not engage with most of the factors. Instead, the Tribunal concentrated on factors that are relevant in price gouging testing. The Tribunal deviated from the peremptory wording of the Amendment Act by limiting itself to (indirectly) applying the simple price gouging test and focusing on comparative prices to the exclusion of other potentially relevant factors.[222] Furthermore, the Tribunal did not give any justification as to why various factors that the respondent sought to rely on were insignificant in substance and ultimately resulted in the application of the Regulations in contravention of the rule of law.[223]

3.3 THIRD ELEMENT: DETRIMENT ON CONSUMERS OR CUSTOMERS

The third and last prerequisite for a violation of section 8 of the Competition Act is that the firm in question must be charging excessive prices that are to

[221] van Tonder op cit note 167 at 842.
[222] Palesa Mpe & Jeremy De Beer "What's with the price gouging?" (2020) 20 *Without Prejudice* at 1.
[223] Ibid.

the detriment of consumers or customers.[224] The focus on the consumer can be tracked to section 2 of the Competition Act, which identifies the key purpose of the Competition Act as "provid[ing] consumers with competitive prices and product choices [and] advance[ing] the social and economic welfare of South Africans".[225] Therefore, reference to consumer (and "customer" after the amendment) detriment effectively means that charging an excessive price will be prohibited only if it has a detrimental effect on consumers of the product or service in question. This means that the detrimental effect on consumers or customers must be significant in both duration and extent and not trivial.[226] Although competition policy goals are regularly framed in the academic literature as a choice between the consumer welfare standard and the aggregate economic welfare standard, competition regulations in practice tend to be consumer orientated.[227] This is perfectly illustrated in section 8(1)(a), which prohibits excessive pricing based on consumer harm without any reference to welfare implications for other economic participants.[228] The express reliance on consumer welfare standard distinguishes the South African excessive pricing prohibition from its European counterpart, which seeks to safeguard competition from possible distortions associated with single firm market power.[229] In consideration of the historical and contextual backgrounds of both

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[224] Section 8(1)(a) of the Competition Amendment Act 18 of 2018.
[225] Section 2(b) and (c) of the Competition Act 89 of 1998.
[226] McKerrow op cit note 20 at 189.
[227] Jonathan B. Baker & Steven C. Salop "Antitrust, competition policy, and inequality" (2015) 104 *Georgetown Law Journal* at 15.
[228] McKerrow op cit note 20 at at 189.
[229] European policy recognizes the need for legal intervention as a means of protecting the competitive process and affording all firms the opportunity to compete on merit. See McKerrow op cit note 20 at 188-9. Mark Furse "Excessive Prices, Unfair Prices and Economic Value: The Law of Excessive Pricing Under Article 82 EC and the Chapter II Prohibition" (2015) 4 *European Competition Journal* 59 at 76-7.

countries, the distinction in how the respective prohibitions work between the two countries is entirely necessary. In South Africa, the need to address economic inequality is recognised by the Competition (Amendment) Act. This is why the consumer welfare standard assists in addressing these inequalities by disallowing conduct that would benefit shareholders at the expense of consumers.[230] Basically, reference to consumer welfare is a necessary means of addressing economic inequality and protecting the disenfranchised.

The incorporation of the consumer-detriment requirement in the Competition Act indicates that the legislature must have envisaged the possibility that, in certain circumstances, an excessive price may not be detrimental to consumer interest.[231] This was not the case in *Mittal*,[232] as the Tribunal took a different view on the issue, as it held that:

> "An overly fastidious defence counsel may wish to make something of the subordinate phrase "*to the detriment of consumer"* though none have attempted to do so here. What, after all, could more clearly inure to the detriment of consumers than an "excessive price"? We will, without further consideration, as, implicitly, have the defence counsel, treat

[230] This can be seen from the preamble of the preamble to the Competition Act as it emphasizes the importance of "provid[ing] all South Africans equal opportunities to participate fairly in the national economy". Also, section 2(e) of the Competition Act identifies the purpose of the Act as the need to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy.
[231] McKerrow op cit note 20 at 191.
[232] *Harmony Gold* supra note 91.

> this phrase as simply a superfluous description of an excessive price rather than a qualifier of its likely effects".[233]

This approach is problematic, as it fails to show sufficient deference to the wording of the prohibition or the legislative underpinning it.[234] The CAC, when the matter was taken on appeal, criticized the Tribunal for "taking … liberties with the language of the Act so as to make section 8(a) serve [its] preference to deal with market structure rather than price levels".[235] Taking a different stance from the Tribunal, the CAC recognised consumer detriment as an essential element of the prohibition. Thus, incorporating it into its four-step process of evaluating an excessive pricing complaint is "the final step involving a value judgment as to whether a detrimental effect on consumer interest can be established".[236] This was done by involving a value judgment as to whether a detrimental effect on consumer interest would be established.[237] The Tribunal in *Sasol*,[238] acknowledged the incorporation of a consumer-detriment enquiry for evaluating excessive pricing complaints.[239] The wide scope of the Tribunal's analysis was underpinned by the CAC, in *Mittal*,[240] finding that consumer detriment is to be evaluated both at the direct and downstream consumer levels.[241] The Tribunal then proceeded to analyse the effects of Sasol Chemical Industries' (SCI) pricing practice on Safripol (its only external customer for

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[233] *Harmony Gold* supra note 91 para 71.
[234] McKerrow op cit note 20 at 192.
[235] *Mittal* supra note 22 para 28.
[236] *Mittal* supra note 22 para 32. See McKerrow op cit note 20 at 191.
[237] Ibid.
[238] *Competition Commission v Sasol* supra note 82.
[239] *Competition Commission v Sasol* supra note 82 para 420.
[240] *Mittal* supra note 22.
[241] Ibid para 32.

purified propylene) as well as the downstream consumers in the polypropylene and plastic goods markets. The scope of this analysis was underpinned by the findings of the CAC in *Mittal*,[242] that consumer detriment is to be evaluated both at the direct and downstream consumer levels.[243] Therefore, the willingness of the Tribunal in *Sasol* to receive evidence and hear arguments on the question of consumer detriment represented a significant shift from its position in *Mittal* – that excessive prices are invariably detrimental to consumers.

Having dealt with the role of consumer detriment, it is important to understand its meaning. The CAC in *Mittal* elucidated the scope of the term "consumer" and delivered two pertinent findings in this regard. First, the court held that although the plural "consumers" is used in section 8(a), the prohibition may also apply to a price charged to a single consumer.[244] Second, the court found that it would be appropriate to adopt a wide interpretation of the term. Thus, it included both downstream consumers of the product in question, or its derivative, as well as direct consumers of the dominant firm.[245]

[242] *Mittal* supra note 22.
[243] *Mittal* supra note 22 para 52.
[244] *Mittal* supra note 22 para 55.
[245] Ibid.

3.3.1 **EVALUATING CONSUMER DETRIMENT**

After identifying excessive pricing as an exploitative abuse (one that focuses on the effect of the abuse on consumers), the Tribunal in *Sasol* acknowledged the complexities inherent in ascertaining such an effect.[246] The Tribunal espoused that the difficulty with the customer/consumer detriment value judgement is the comparison of the actual position of the consumers against the position they would have been in had they been charged a reasonable instead of an excessive price. This has proven to pose a significant challenge, one that is made all the more difficult by the fact that the Competition Act does not appear to place a temporal restriction on the consumer-detriment requirement.[247]

The reference to “consumers” and “customers” under section 8 is without qualification and is a term that must be taken to denote current as well as future consumers/customers of the product in question.[248] This approach will ensure that the textual interpretation of the consumer-detriment requirement and its pragmatic stance are both satisfied by making sure that both present and future consumers/customers are implicated in the pricing practices of the

[246] *Competition Commission v Sasol* supra note 82 para 433.
[247] McKerrow op cit note 20 at 194.
[248] Ibid.

dominant firm.[249] However, there is considerable judicial support for the contention that the interests of poor and vulnerable consumers should be prioritised.[250] This approach is undoubtedly an attractive solution in so far as addressing economic inequality, as harm to a wealthier consumer is potentially justifiable.[251] However, it is still not clear how current prices will affect the structure of the market and, in turn, the welfare of future consumers and/or customers. Regardless, the competition authorities have adopted a largely static approach to the consumer-detriment requirement and have until now advocated interventionist outcomes. In contrast, the US uses a "self-correction" model reliant on market dynamics, as described above, to justify its non-interventionist stance on excessive pricing. This approach regards the interests of current and future consumers as being divergent and prioritises those in the latter category.[252]

Ultimately, the correct method for addressing excessive pricing in the context of section 8(1) (a) depends on whether such interests are in fact divergent and, if so, to what extent.[253] If the interests of the consumers are aligned, then the non-interventionist (on the basis of deficient reasoning) stance will be correct. However, if the

[249] Ibid.
[250] Philip Sutherland & Katharine Kemp "Competition Law of South Africa (LexisNexis Service Issue 18 2014) 1-60 (see the judgments referred to in n 345).
[251] Jonathan B. Baker & Steven C. Salop "Antitrust, Competition Policy and Inequality" (2015) 104 *Georgetown Law Journal* at 24-25.
[252] McKerrow op cit note 20 at 194.
[253] McKerrow op cit note 20 at 196.

interests of the consumers are divergent, an interventionist approach may be an inappropriate response to excessive pricing. Therefore, to adequately account for the interplay between legal, market, and social forces, a more dynamic enquiry is required[254].

[254] Ibid.

4. THE INTERPRETATION AND APPLICATION OF SECTION 8 IN *BABELEGI* AND *DIS-CHEM*

Before the outbreak of the COVID-19 pandemic, there was no legal framework in South Africa to regulate price gouging. It was only in this complex and uncertain context that the government introduced new regulations and directions targeted at regulating the pricing of essential items during the pandemic. The reason is that, in times of normalcy, anti-price gouging legislation is seldom thought of and almost never used. However, in the wake of natural disasters, where instances of price gouging arise, so does the discussion about what should be done to stop it. The purpose of anti-price gouging laws is not only to directly protect consumers against artificially high predatory pricing, but they are also an important defence against opportunistic firms (usually distributors) and individual actors in times of crisis and emergency.[255] According to followers of classical law and economics theories, "price gouging" is simply a negatively framed colloquialism for "market equilibrium".[256] To others, especially consumers, price gouging is "a predatory business practice by which unscrupulous companies abuse their power to extract excess money from consumers in times of duress, emergency, and disaster".[257] Regardless of

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[255] Spencer Warkentin "Price Gouging in the time of COVID-19: How U.S. Anti-Price Gouging Laws fail consumers" (2021) 36 *Maryland Journal of International Law* at 78.

[256] Ibid at 79. See Geoffrey C. Rapp "Gouging: Terrorist Attacks, Hurricanes and the Legal and Economics Aspects of Post-Disaster Price Regulations" 94 *Kentucky Law Journal* at 535 -536.

[257] Ibid. See Geoffrey C. Rapp "Gouging: Terrorist Attacks, Hurricanes and the Legal and Economics Aspects of Post-Disaster Price Regulations" 94 *Kentucky Law Journal* at 536 -537.

the school of thought, it is evident that price gouging occurs, and the need to make expedient legislative decisions to curb it is necessary.

At the time of the pandemic, competition authorities were not prepared to deal with circumstances relating to price gouging, as the country had never dealt with circumstances relating to natural disasters. However, this did not mean they should disqualify existing and traditional competition law precedents (by changing the enforcement and application of competition law) to suit temporary market conditions. Departure from existing precedent as a result of brief abnormal market conditions may have detrimental effects on the future assessment of excessive prices under normal market conditions.

The purpose of this chapter is to critically evaluate the judgments of the Tribunal in *Babelegi Workwear and Industrial Supplies CC*[258] and the CAC in *Dis-Chem Pharmacies Limited*[259] in attempts to prove that the actions of the two firms were in line with the principle of supply and demand during a natural disaster – and not excessive pricing in the ordinary sense. However, this principle was not seen through fruition as competition authority immediately intervened, thus standing in the way of market regulations. Therefore, it is within this reason and the geographic restrictions brought

[258] *Babelegi* supra note 28.
[259] *Dis-Chem* supra note 25.

about by COVID-19 Regulations that the increase in demand was not met with an increase in supply.

During a natural disaster, there is usually a disruption in the normal balance of supply and demand as demand spikes and supply for the first few weeks declines as a result of panic buying. Once there is a spike in demand, new entrants will enter the market, thus creating equilibrium where both suppliers and consumers are happy with pricing. Therefore, the price increases in both cases were in conjunction with the increase in quantity, which was simultaneously in conjunction with what ought to be expected during a (natural) disaster, as both demand and supply increased.

4.1 ***BABELEGI***[260]

The contextual background of the case dates back to 9 April 2020, when the Commission referred a complaint to the Tribunal. The complaint was that Babelegi charged an exorbitant price for the supply of facial masks.[261] It was alleged that Babelegi significantly raised the price of FFP1 masks from R50.60 per box of 20 to R500 per box minus value-added tax (VAT), an increase of roughly 888%.[262] During this time, and as a result of the circumstances that prevailed during the COVID-19 pandemic, there was a

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[260] *Babelegi* supra note 24.

[261] OECD "Economic analysis and evidence in abuse cases in South Africa: Context maters – Lessons from the *Babelegi* Excessive Pricing Case" (2021) at 4, available *https://one.oecd.org/document/DAF/COMP/GF/WD(2021)7/en/pdf*, accessed on 22 November 2022.

[262] Ibid.

future increase in procurement cost prices that was anticipated. The Commission found that the complaint period for this case was from 31 January 2020 to 5 March 2020, and that it was during this time that Babelegi increased its prices for face masks.

In *Babelegi*,[263] the Tribunal placed a lot of emphasis on the determination of dominance and whether section 7 of the Amendment Act imposes any time restrictions for doing so.[264] As expected, the Tribunal determined that there is no such restriction. On the one hand, the Commission argued that Babelegi was able to "affect material price increases over the complaint period, suddenly, over a short period of time..." and consequently exercised market power and was "dominant" during the complaint period.[265] Despite having less than 5% market share under "normal market conditions," the Commission argued that Babelegi should be regarded as "dominant" on this basis. On the other hand, Babelegi argued that market power must be understood as "the ability to raise prices consistently and profitably over competitive levels".[266] This was the test set out by the CAC in *Sasol Chemical Industries Limited v Competition Commission* ("*Sasol*").[267] The Tribunal, however, held that Babelegi failed to account for the "particular circumstance", which included the abnormal conditions of supply and demand that existed during the COVID-19 pandemic.[268] Accordingly, the

[263] *Babelegi* supra note 28.
[264] Oxenham, Currie & van der Merwe op cit note 148 at 524.
[265] *Babelegi* supra note 28 para 55.
[266] *Babelegi* supra note 28 para 61.
[267] *Sasol* supra note 23 para 2.
[268] *Babelegi* supra note 28 para 87.

Tribunal limited its assessment of market power to the complaint period, which lasted just over one month.[269] The Tribunal further held, as in *Dis-Chem*,[270] that one can infer market power by considering only the behaviour of the firm in question and that a delineation of the relevant market is not necessary.[271] Basically, the Tribunal argued that the COVID-19 crisis removed what would otherwise be an effective competition constraint, thus resulting in even a small firm potentially having market power.

Consequently, neither the Commission nor the Tribunal sought to define a relevant market for the purpose of establishing dominance in *Babelegi*. Instead, the Tribunal reasoned that "market delineation becomes problematic and impractical in crisis situations [and] if the market in question has been disrupted or disported. [There] is no compelling reason to engage in market delineation if other means exist to determine market power".[272] This is particularly critical in this case, as the firm is a small player with a market share of 5%. What is most contentious about this case is the fact that the Tribunal accepted the circular argument made by the Commission based on inferential reasoning.[273] The argument made by the Commission was based on the reality that Babelegi charged additional prices – something it would not have been able to do but for the peculiar circumstances of COVID-19 – which meant it had temporary market power and was, therefore, dominant. Essentially, the Tribunal collapsed two

[269] *Babelegi* supra note 28 para 52.
[270] *Dis-Chem* supra note 25.
[271] *Babelegi* supra note 28 para 84-86.
[272] *Babelegi* supra note 28 para 86.
[273] See *Babelegi* supra note 28 para 84-86.

definitional elements of excessive pricing into one circular test when it found the existence of an excessive price and proof that Babelegi had dominance.

In determining the benchmark price, instead of using the economic test, the Tribunal endorsed the suggestion of using the "pre-crisis price as a benchmark because demand and supply conditions at the time were presumably normal".[274] The Tribunal also confirmed in *Dis-Chem*,[275] with reference to European case law, that this assessment would be permissible even outside the Regulations.[276] In determining whether a price is *prima facie* excessive, the Tribunal endorsed the CAC's decision in *Sasol* that a price is *prima facie* excessive where a dominant firm substantially raises its prices without a corresponding increase in cost.[277] The requirement is important and should be preferred rather than the approach adopted by the Tribunal in *Dis-Chem*,[278] which suggested that any price increase, regardless of size, above the competitive price is *prima facie* excessive.[279]

[274] *Babelegi* supra note 28 para 99; See Massimo Motta "Price regulations in times of crisis can be tricky" *Daily Maverick* 22 April 2020, available at *https://www.dailymaverick.co.za/opinionista/2020-04-22-price-regulation-in-times-of-crisis-can-be-tricky/,* accessed on 07 November 2021.
[275] *Dis-Chem* supra note 25.
[276] Ibid para 53; At para 24-25, the Tribunal referred to the European cases, *United Brands Co* supra note 43.
[277] *Babelegi* supra note 28 para 100.
[278] *Dis-Chem* supra note 25.
[279] Ibid para 24.

4.2 ***DIS-CHEM***[280]

On 23 April 2020, the Tribunal received a complaint against Dis-Chem referred to by the Commission. In the complaint, the Commission alleged that Dis-Chem had contravened section 8(1)(a) of the Amendment Act, read in conjunction with Regulation 4 of the Regulations.[281] According to the complaint, Dis-Chem engaged in excessive pricing of surgical masks in March 2020, which were critical products in the fight against the COVID-19 epidemic.[282] Dis-Chem denied the allegations made by the Commission. On 14 July 2020, the Tribunal published written reasons for its decision to penalize Dis-Chem Pharmacies Limited (Dis-Chem) for contravening section 8(1)(a) of the Amendment Act by charging an excessive price for three types of surgical masks (SFM 50, SFM 5, and Folio 50) to the detriment of consumers during the Complaint Period.[283] The Tribunal ruled that Dis-Chem must pay an administrative penalty of R1 200 000 (one million two hundred thousand rand) - approximately twice the revenue generated by face masks during the complaint period.[284]

The crux of the case largely focused on whether, during the complaint period (1-31 March 2020), Dis-Chem was in fact dominant. In its affidavits, the Commission argued that it was not necessary to define the relevant

[280] *Dis-Chem* supra note 25.
[281] Ibid 5.
[282] Ibid para 2.
[283] Oxenham, Currie & van der Merwe op cit note 148 at 526-7.
[284] Ibid at 527.

market. Instead, the Commission claimed that the ability of Dis-Chem to dramatically increase its pricing in the face of a global health crisis, irrespective of its competitors, suppliers, and consumers, demonstrated that Dis-Chem possessed "market power" and was thereby "dominant".[285] This was supported by the Tribunal in its interpretation of the definition of dominance under the Amendment Act. Dis-Chem, however, did not fully support the argument made by the Commission. In principle, it conceded that market power can be inferred from a firm's economic behaviour, but argued that this must still be assessed in the context of a relevant market as required by the Amendment Act.[286] Even so, the Tribunal confirmed that the assessment of "market power" may be conducted with reference to the prevailing market conditions only, without having to specifically define the market.[287] Contextually, the condition of the market at the time Dis-Chem was alleged to have charged excessive prices had been distorted by a spike in the demand of surgical face masks as the government encouraged the public to wear them. This, as a result, is the reason why the Tribunal rejected the argument raised by Dis-Chem that cloth face masks were a suitable substitute from a demand perspective and that barriers to entry were low as face masks were easy to produce from a supply-side perspective. It is for this reason that the Tribunal limited its assessment to the market for surgical face masks.

[285] *Dis-Chem* supra note 25 para 73.
[286] Ibid para 57.
[287] Ibid para 73.

Furthermore, when it came to the assessment of the geographical market, the Tribunal suggested that it must be narrow-based on customers' reluctance to travel far during the pandemic and their reluctance to find cheap alternative products. The Tribunal, without pronouncing what constitutes a specific geographic market, asked "whether a supplier, who had stock of face-masks, would be able to increase its prices by five percent (5%) or more during the complaint period without facing competitive constraints from other firms even if such firms were situated within the same narrow geographic market (i.e., a shopping centre)?".[288] After concluding that Dis-Chem was able to raise its prices by more than 5%, the Tribunal considered it unnecessary to delineate the geographic market. Said differently, the Tribunal was not concerned about the size of the firm but more about its ability to exercise market power.[289] Therein, according to the Tribunal, if a firm has market power, it has dominance, and if it has dominance, that dominance has to be regulated so as to prevent abuse. However, should a firm under investigation be accused of abuse, it will be given an opportunity to give evidence that its actions, as a dominant firm, were not abusive.

In *Dis-Chem*, when it came to the determination of whether a price is "reasonable", the Tribunal intimated that any price increase (presumably irrespective of the percentage increment) in relation to "essential goods" is unreasonable. This was held with little regard to the additional statutory

[288] *Dis-Chem* supra note 25 para 128.
[289] Ibid para 137-141.

factors listed under section 8(3) of the Amendment Act. Instead, the Tribunal in *Dis-Chem* noted that the list of factors under section 8(3), used to determine whether a price is "unreasonable" and thus excessive, is non-exhaustive.[290] Thus creating a leeway for the Tribunal to "import" the simple price gouging test from the Regulations and apply it as part of the relevant factors found under the Amendment Act, instead of applying it in terms of section 8(3)(f).[291] The Tribunal in *Dis-Chem* did not attempt to identify the relevant market and assess competitive factors in that market to determine market power and dominance; instead, it applied the same inferential reasoning as *Babelegi*.

In addition, the Tribunal clarified how the amendments to the Competition Act operate and indicated that it does not distinguish between the meaning of "competitive price" in the Amendment Act and the language contained in the Competition Act. The Tribunal, instead, held that section 8(3) of the Amendment Act only required that the "price is higher than a competitive price and whether such price difference is unreasonable".[292] Hence, the legal test in section 8(3) is that the price must be higher than the competitive price, without qualifying the size of that difference.[293] Essentially, instead of focusing on whether the prices charged were higher than competitive prices, as required by section 8, the Tribunal in *Dis-Chem*

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[290] *Dis-Chem* supra note 25 para 62.
[291] Section 8(3)(f) of the Competition Amendment Act 18 of 2018 provides that any regulations made by the Minister regarding the calculation and determination of an excessive price may be taken into account, and this does not apply retrospectively.
[292] *Dis-Chem* supra note 25 para 70.
[293] Ibid.

focused on whether the prices were higher than competitive prices, namely the prices that the firms charged pre-COVID. Therefore, this changed the inquiry and although it is evident that the prices increased, it is not clear to what extent competition failed, if at all. Further, the Tribunal took this approach despite the fact that under the previous "excessive pricing" regime, the CAC held that a price that was not more than twenty percent (20%) of the economic value of the product could not be considered "excessive".[294] Even though this was not a hard-and-fast rule, it provided quantifiable guidance as to when a price might be considered "excessive". Consequently, the Tribunal, in its discussion of dominance, economic value, and relevant market took an unprecedented approach and alluded to the likelihood that in crisis situations, more than one store in close proximity to a competitor could enjoy market power vis-à-vis consumers.

In summation, the Tribunal interpreted and applied legislation in a manner that was inconsistent with the nature and scope of the provision. The nature of the provision is to regulate dominant firms that abuse their power under normal market conditions in the long run. This was not the case, as the global pandemic (COVID-19) resulted in the distortion of the market over a short period of time. The scope of the provision is limited to dominant firms that abuse their dominant position, an important element in the determination of excessive pricing. When it came to this, the Tribunal failed to sufficiently satisfy all the requirements of dominance; instead, the

[294] *Sasol* supra note 23 para 175.

Tribunal insinuated that “material price increases of life-essential items such as surgical masks, even in the short run, in a health disaster such as the COVID-19 outbreak warranted [legal] intervention”.[295] In other words, the Tribunal is arguing that Dis-Chem is dominant solely on its ability to raise prices. It is in this regard that the Tribunal in *Dis-Chem* erred, as the assessment of dominance under section 8 is not limited to the rising of prices. Therefore, it goes without saying that this decision (along with the one made in *Babelegi*) did not satisfy all the necessary elements for a contravention of excessive pricing. The paper acknowledges that, from a moral and public interest point of view, the firms exploited vulnerable consumers when they elected to increase the prices of surgical face masks by exorbitant percentages in the context of a life-threatening outbreak of COVID-19. However, this does not mean the interpretation and application of law should be based on morality, as, at the end of the day, law is law and should be applied accordingly.

[295] *Dis-Chem* supra note 25 para 145.

5. THE ECONOMCIS OF PRICE GOUGING AND SUPPLY AND DEMAND

People tend to view markets in a negative way, such as having an impersonal nature, morally deficient and self-interested. Paul Rubin, an economist, has argued that most non-economists tend to think of prices as the allocation of wealth, rather than an influence of the allocation of resources or production of goods and services.[296] Another economist, Lee Dwight, emphasized that there usually is hostility based on the belief that only one party is benefiting at the expense of others.[297] This hostility is often impermeable to clear evidence that there are real benefits from higher prices that exceed the costs.[298] The practice of sellers and/or resellers increasing the prices of their goods and services to an amount that is not considered reasonable and fair is normally a response to abrupt increases in demand or decreases in supply triggered by crises such as natural disasters.[299] The exorbitant price increases are "generally short-lived and confined to a particular geographic area, especially those that are remote and have difficulty accessing coveted goods and services".[300] The name of this practice is price gouging.

[296] Paul H. Rubin "Folk Economics" (2003) 70 *Southern Economic Journal* at 157.
[297] Lee R. Dwight "Making the case against 'Price Gouging' Laws: A challenge and an opportunity" (2015) 19 *The Independent Review* at 587.
[298] Ibid.
[299] Mark Giancaspro "Perilous fires, Pandemics and Price Gouging: The need to protect consumers from unfair pricing practices during times of crisis" (2021) 44 *University of New South Wales Law Journal* 1458 at 1458-9. See Frederick F Wherry & Juliet B Schor "The SAGE Encyclopedia of Economics and Society" (SAGE 1 ed. 2015) at 1310.
[300] Ibid at 1458-9. See Frederick F Wherry & Juliet B Schor "The SAGE Encyclopedia of Economics and Society" (SAGE 1 ed. 2015) at 1459.

There is no single definition of price gouging; however, the term generally describes the practice of sellers pricing goods or services at a level significantly higher than what is objectively considered acceptable, reasonable, or fair.[301] The term price gouging could also refer to prices obtained by practices inconsistent with a competitive free market. It could mean peculation, as price gouging has both beneficial and detrimental attributes for society. Nonetheless, for the purpose of this chapter, the term price gouging is used to describe a situation in which firms take advantage of victims of a natural disaster or emergency by charging exorbitant prices for goods and services that are essential to the public during that crisis.[302] The need to protect the public is where the primary objective of price gouging Regulations emanated from, as price increases have serious adverse effects on poor individuals and small businesses that are already the most vulnerable during such a crisis.[303]

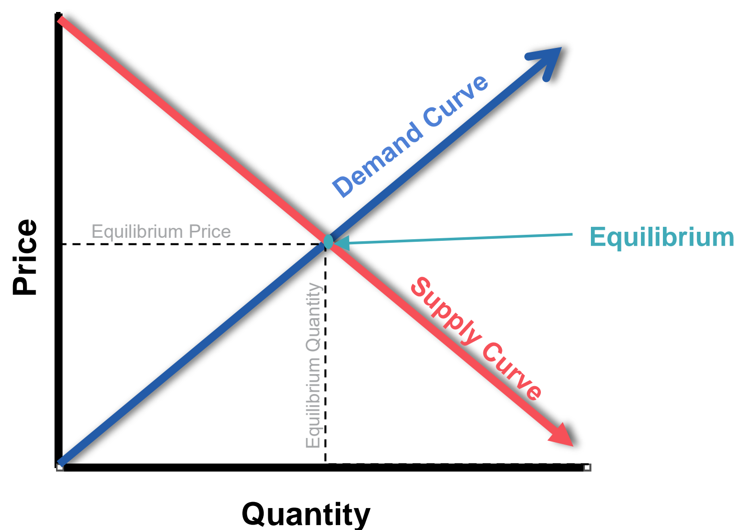
In order for one to understand how and why price gouging occurs, one has to have a rudimentary understanding of the micro-economics that underpin the competitive free market. Economists make use of the "supply and demand" model to analyse market behaviour and the movement of resources. The first step they take is to plot a graph whose *y-axis* represents an escalating scale of price and whose *x-axis* represents an

[301] Giancaspro op cit note 299 at 1458-9.
[302] Ibid at 1460.
[303] Ibid.

escalating scale of quantity.[304] The second step includes them adding two lines on the graph: the upward-sloping "supply curve" (representing the correlation between the cost of a good or service and the quantity supplied) and the downward-sloping "demand curve" (representing the correlation between the cost of a good or service and the quantity demanded).[305] The quantity of the good or service that sellers are willing and able to sell and the quantity that buyers are willing and able to purchase are equal at the equilibrium price.[306]

The figure below (Figure 4.1) illustrates the supply and demand curve graph during normal market conditions:

Figure 4.1: Supply and Demand Curve

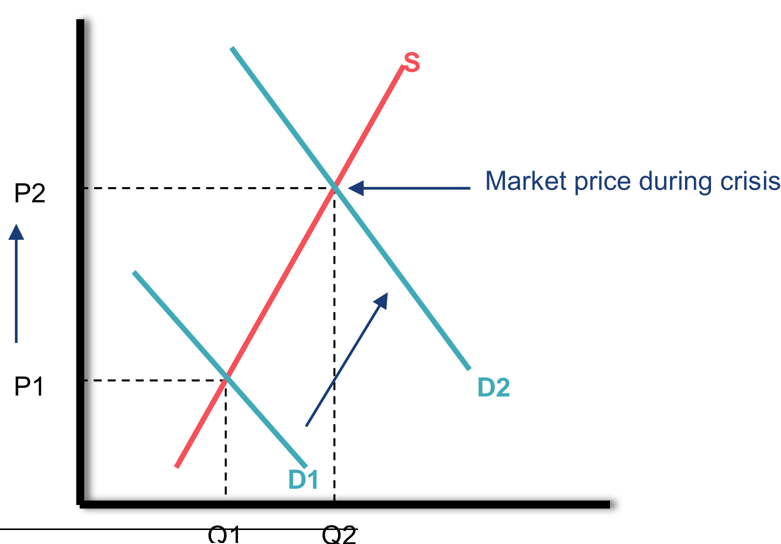


[304] Giancaspro op cit note 299 at 1460.
[305] Ibid.
[306] Ibid.

Typically, price gouging occurs “when the demand curve shifts to the [right,] leading to excessive demand for goods or services and a subsequent shortage of the same, promoting sellers to raise prices often well above the competitive market rate”.[307] After a natural disaster or other crisis, essential goods and services - often those with no substitutes and with inelastic demand - become increasingly critical for survival and safety.[308] An event of this magnitude usually makes it more difficult and, in some cases, more expensive for the seller to acquire necessary goods or services, inevitably leading to a reduction in supply and pushing the supply curve to the left, further raising the equilibrium price.[309] This inevitably results in the disruption of the principles of supply and demand.

The figure below (Figure 4.2) illustrates the shift in the supply and demand curve graph during abnormal market conditions as a result of a crisis.

Figure 4.2: Supply and Demand Curve during a crisis



[307] Giancaspro op cit note 299 at 1461.
[308] Ibid.
[309] Giancaspro op cit note 299 at 1460. See Emily Bae “Are Anti-Price Gouging Legislations Effective against sellers during disasters?” (2009) 4 *Entrepreneurial Business Law Journal* at 81.

In order to grasp the above graph, in Figure 2, and the general supply and demand model, it is important to_understand the four basic laws of supply and demand, which are: (i) if demand remains constant while supply increases, the price will fall; (ii) if demand remains constant and supply decreases, the price will rise; (iii) if demand increases while supply remains constant, the price will rise; and (iv) if demand decreases while supply remains constant, the price will fall.[310]

5.1 DISRUPTIONS IN THE SUPPLY AND DEMAND

Disruptions in the supply chain of products described as essential were one of the many consequences of the COVID-19 pandemic. Another consequence was the increase in demand for said products, as this has led to shortages. These shortages have further influenced the behaviour of firms, as some have taken advantage of the difficulties in production and distribution of a number of essential products by exponentially increasing their prices. Price increases may occasionally signify an increase in market participants' costs and act as a vital market signal to boost output in order to attract new entrants, but they may also be a sign of exploitative business

[310] Robert Henry Thurston "The Modern Version of the Law of Supply and Demand" (1896) 4 *Science* at 817-8. See David Gale "The law of Supply and Demand" Mathematica (1955) 3 *Scandinavica* at 155.

practices without any justification.[311] In the event that firms behave according to the latter conduct, then intervention by competition authorities will be justified.

The COVID-19 disaster period saw a lot of changes in the behaviour of consumers and competitors. These shifts, according to Boshoff, had the potential to give rise to a temporary increase in market power.[312] Conventional competition policy, both in South Africa and abroad, has dealt with market power as a long-run structural feature, where "economists view market power as the ability to influence the long-run level of mark-ups, i.e., the extent to which prices exceed cost in the long run".[313] Based on this, a sudden and substantial increase in price is not sufficient evidence of market power or its abuse.[314] This is because even under perfectly competitive conditions, a firm can always increase its price.[315] However, such price increases within a short period of time will be met with consumer substitution for other firms, forcing the firm to reduce its price or exit the market.[316] In the case of a firm-specific positive demand shift, "the resultant increase in price will draw heightened competition for customers, ultimately resulting in a demand shift away from the firm to its competitors". In turn, intense competition will ensure that firm-specific price increases are

[311] OECD "Exploitative pricing in the time of COVID-19" (2020) at 1, available at *https://www.oecd.org/competition/Exploitative-pricing-in-the-time-of-COVID-19.pdf*, accessed on 15 January 2022.
[312] Boshoff op cit note 32 at 114-115.
[313] Ibid at 115.
[314] Ibid at 115-116.
[315] Boshoff op cit note 32 at 116.
[316] Ibid.

transitory.[317] Thus, this boils down to whether a substantial or sudden increase in price has the ability to be sustained or not.

Contextually, the duration of the price increase, considering the complaint period in both *Babelegi* and *Dis-Chem*, was fairly short. This could arguably be because the pandemic made way for an increase in demand, which evidently resulted in an increase in supply as new suppliers and distributors entered the market.

Moreover, competition economists typically study price behaviour over a period of twelve months and beyond.[318] According to economists, the twelve-month period sufficiently allows an assessment of the equilibrium relationship between price and its underlying determinants, including rivalry.[319] Boshoff makes the argument that "[a twelve] month or longer horizon is broadly consistent with the empirical evidence on the speed with which equilibrium between price, demand, and cost is established in most markets".[320] For a proper assessment of abuse of dominance (excessive pricing) assessment, the duration of assessment by economists should at least be a year. In this regard, it is safe to conclude that both the Tribunal and CAC, in their assessment of dominance, erred in concluding that there was "temporary dominance", as there was no sufficient evidence of market power or abuse of dominance in both *Babelegi* and *Dis-Chem*. The only

[317] Boshoff op cit note 32 at 116. When a price is transitory, it means that the rate of inflation does not high permanently.
[318] Boshoff op cit note 32 at 116.
[319] Ibid.
[320] Ibid.

evidence they had was an increase in prices during a crisis, which is not sufficient for contravening section 8 of the Amendment Act. Therefore, the recently decided cases confirmed that competition authorities are more focused on particularly short-term horizons in assessing pricing conduct during a disaster period. This short "horizon may partly [be a] concern that a firm under investigation may enjoy significantly enhanced market power due to changes in consumer behaviour and limits on new entry during the COVID-19 disaster".[321] This is because it is usually during a disaster period, such as a pandemic, that competition authorities focus more on the moral right and wrong of market Regulations or lack thereof.

Another concern with short-term pricing power and conduct is that it bears resemblance to price gouging laws, which do not necessarily rely on market power considerations.[322] Although it is accepted that price gouging may constitute a form of excessive pricing, there is an important distinction between legislation aimed specifically at prohibiting price gouging in a time of crisis and price gouging under traditional competition laws.[323] In the case of the former, it is a matter of policy following a disaster that there is a limitation on any price increase beyond a certain threshold that is not justified by associated cost increases to avoid exploitative price increases that harm consumers.[324] The implementation of price hikes on essential products during a disaster, from a policy point of view, may warrant

[321] Boshoff op cit note 32 at 116.
[322] Ibid at 117.
[323] Oxenham, Currie & van der Merwe op cit note 148 at 528.
[324] Oxenham, Currie & van der Merwe op cit note 148 at 528.

intervention in order to protect consumers from exploitative behaviour.[325] Also, it provides a level of certainty when it comes to what price increases are permissible during such periods and places all firms with non-cost-associated increases on notice.[326] As a matter of economic principle, however, competition authorities are generally reluctant to intervene in matters of pricing, particularly when it comes to short-term price effects.[327] The reason for this is that prices present an essential incentive and signal to market conditions; higher price margins are likely to encourage entry and equilibrium in the long run.[328] Therefore, it is in the opinion of this paper that markets should be left to address variations in supply and demand to ensure that there is a delivery of benefits to consumers in the long run. This means legal intervention under section 8 of the Amendment Act should only be considered in markets where firms have durable market power and where barriers to entry are high.

During a natural disaster, the principles of supply and demand temporarily go into shock as traditionally small and medium firms enjoy short-term market power due to a spike in demand and a drop in supply. Over time and as a result of the spike in demand, new entrants are attracted, and supply eventually increases as prices fall again. It is, therefore, within this reason that the Regulation of the market should be left to itself. This, however, was not the case in *Babelegi* and *Dis-Chem*, as the Tribunal highlighted the

[325] Ibid.
[326] Ibid.
[327] ibid.
[328] Ibid.

importance of competition authorities being able to regulate different market conditions, whether inverted or not. This was despite the fact that competition policy and section 8, read with section 6 and 7, of the Amendment Act advocated for the prosecution of firms that reached a certain financial threshold within a specific defined market over a period of time. Instead, the Tribunal in both cases emphasised how the enforcement of competition law is not concerned with the actual size of the firm but with its ability to exercise market power.[329] According to the cases, that is what competition authorities look for when they assess dominance. However, this, as seen in Chapter 3, is not true. There are a lot of elements that go into the assessment of a contravention of section 8. Even the CAC, in Sasol, held that "the mere possession of market power is not contrary to competition [law; indeed,] some important sources of market power are innovation and other, pro-competitive conduct".[330]

Ultimately, cost-based increases during a disaster period affect how competition authorities evaluate demand-based price increases. The changes in the assessment of market power raised questions about the relevant standards for excessive pricing under the Regulations. This is largely due to how the Tribunal seemed to have misinterpreted the assessment of anti-competitive conduct due to normal market conditions, as assessed under the Amendment Act.

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[329] *Dis-Chem* supra note 25 para 100 (Tribunal); *Babelegi* supra note 24 para 47.
[330] *Sasol* supra note 23 at para 2.

5.2 MARKET PRICING DURING A DISASTER

The practice of market prices rising in response to crisis-driven demand is not unusual or novel. There are historical accounts dating back centuries that show the reality of when disasters strike, and the market predictably reacts the same way. From a theoretical point of view, natural disasters can have both negative and positive effects on inflation.[331] According to Miles Parker, in "*The Impact of Disasters on Inflation*", the impact of natural disasters on inflation in developed countries is negligible, but it has a persistent effect on developing countries.[332] Conversely, Andreas Heinen, Jeetendra Khadan, and Eric Stobl, in "*The price impact of extreme weather in developing countries*", documented the positive impact of hurricanes and floods on inflation using a sample of fifteen (15) Caribbean countries.[333] While Eduardo Cavallo, Sebastian Galiani, Ilan Noy, and Juan Pantano, in "Catastrophic Natural Disasters and Economic Growth", found no significant effect on prices in the aftermath of the 2010 Chile and 2011 Japan earthquakes.[334] Ultimately, there is no single experience of a natural disaster, as different nations experience a similar disaster differently.

[331] Inflation is an increase of the general price levels of goods and services over a set period of time.
[332] See Miles Parker "The impact of disasters on inflation" (2018) 2 *Economics of Disasters and Climate* at 21-48.
[333] Andreas Heinen, Jeetendra Khadan & Eric Strobl "The price impact of extreme weather in developing countries" (2019) 129 *The Economic Journal* 1327-1342.
[334] Eduardo Cavallo, Sebastian Galiani, Ilan Noy & Juan Pantano "Catastrophic natural disasters and economic growth" (2013) 95 *The Review of Economics and Statistics* 1549-1561.

However, since the late 1970s, South Africa has experienced persistent economic issues. These issues were initially brought on by apartheid policies, which caused many nations to refuse foreign investment, impose increasingly strict trade sanctions, and implement numerous exchange controls against the nation. Around the 1970s and 1980s, most parts of the world, including South Africa, were faced with inflation due to a spate of oil price hikes. It was only in the 1990s, as sanctions were lifted and the economy was gradually liberated, did inflation start to decline. Even post-apartheid, South Africa (along with the rest of the world) was faced with the food and fuel inflation of 2008. Therefore, there are past examples that show that the habit of market prices rising in response to crisis-driven demand is nothing out of the ordinary.

Although different from past natural disasters and health crises, the COVID-19 pandemic has thus far exerted immense global economic damage in a short(er) period of time.[335] On a global scale, the COVID-19 pandemic has paralysed economies, disrupted financial markets, and caused unprecedented mass levels of unemployment to date. Businesses around the world are still struggling with the ramifications of the outbreak. Despite this, the COVID-19 pandemic, according to economists, is an additional example of the self-regulating free market at work. Adam Smith, a

[335] AP Opite, CG Iwu, O Adeola, VV Mugobo, OE Okeke-Uzodikem, O Fagbola & O Jaiyeoba "The COVID-19 pandemic and implications for businesses: Innovative retail marketing viewpoint" (2020) 16 *The Retail and Marketing Review: Special COVID Edition* at 86.

renowned Scottish economist and philosopher, famously described free market behaviour through the analogy of the "invisible hand".[336] This analogy suggests that the free market can motivate self-interested individuals to act through a network of interdependence. In terms of this analogy, individual self-interest and freedom of production and consumption result in the best of society as a whole being fulfilled. The natural movement of prices and the follow-up of trade are caused by the constant interplay of individual pressures on market supply and demand. Ultimately, the impact of COVID-19, according to economists, would have subsided with time as individual self-interests would have, through the principle of supply and demand, regulated the market economy.

Nevertheless, competition law in South Africa is interventionist. Which means there is no such thing as a free market (allowing the market to regulate itself), as competition authorities do not depend on the natural flow of the market and/or the invisible hand. Instead, the market is constantly mitigated and regulated by legal frameworks. Since the economic effects of the COVID-19 pandemic were novel in South Africa and the Amendment Act did not have a provision that deals specifically with price gouging, competition authorities found it difficult to regulate. However, this did not prevent competition authorities from attempting to regulate the conduct of Babelegi and Dis-Chem under the excessive pricing provision in section 8 of the Amendment Act, despite the facts falling outside the scope of the

[336] The "invisible hand" is a metaphor for the unseen forces that drive the free-market economy introduced by economist and philosopher Adam Smith in the 18th century in his famous work *The Wealth of Nations*.

provision. For instance, neither firm possessed sufficient market share to trigger and presumption, nor did they possess market power prior to the pandemic or durable market power during the pandemic. Both of these firms experienced short-term market power as a result of the surge brought about by the COVID-19 pandemic. However, this did not prevent the Commission from bringing both cases for prosecution by the Tribunal, and the Tribunal found them to have contravened section 8.

The fact that these were the first cases to be heard by the Tribunal since the Competition Act was amended in 2018 might potentially bring further confusion as to how excessive pricing should be assessed under the Amendment Act. Although the amendments brought about a different definition and test, the test under section 8 if formulated according to precedent (as is discussed in the chapter of this paper). Hence, the traditional approach of assessing excessive pricing is still viable. However, the Tribunal and CAC, in their assessment of excessive pricing in *Bablegi* and *Dis-Chem* failed to apply the traditional approach of section 8. Instead, the Tribunal and CAC informally integrated Regulation 4 into their assessment and application. Ultimately, it is in the opinion of this paper that the informal application of the COVID-19 Regulations by the Tribunal and CAC in *Dis-Chem* and *Babelegi* potentially has specific implications for judging when a price is to be considered excessive. For instance, the decision by the CAC in *Babelegi* could mean that small firms that may not otherwise have been regarded as dominant outside of the disaster period

(as they have little market share and temporary dominance or market power) may be found to have market power due to their ability to raise prices. With that said, it is evident that the assessment of both cases brought about confusion and legal uncertainty. Something that could have been avoided, for the sake of legal clarity, had both the Tribunal and CAC outline that their new approach to the assessment of “excessive pricing” (which technically is price gouging) is only applicable to cases heard during the disaster period.

6. COMMENTARY AND CRITIQUE

The independent (or unilateral) conduct of a dominant firm is abusive when it deviates from "normal" competition or "competition on the merits". The mere significant size of a firm or even the holding of a dominant position does not automatically mean the firm in question is anti-competitive or forbidden by Competition law.[337] The dominant size of a firm may be a result or reward of aggressive competition, innovation, efficient operations, a novel business model, superior production or distribution methods, or greater entrepreneurial efforts.[338] However, this does not mean there are no strategies identified by competition policy that can be used by dominant firms in the market to enhance or protect their market power. When this happens, the dominant firm is said to be abusing its dominant position.

It is evident that there is difficulty in balancing the economic effects of a dominant firm with the law regulating abuse of dominance. For a dominant firm, the law is set in black and white, while the economic effect of their conduct falls along a spectrum, with pro-competitive conduct on one extreme and prohibited anti-competitive conduct on the other extreme.[339] This then creates a challenge when it comes to calibrating the law in such a way as to ensure that abuse of dominance cases do not stifle competition, while also not allowing dominant firms to unfairly drive existing rivals out of

[337] Boshoff op cit note 32 at 117-8.
[338] Ibid at 119; and Anderson, Daniel, Heimler & Jakob op cit note 9 at 69.
[339] Motta & de Streel op cit note 11 at 2.

the market or discourage potential competition from entering the market.[340] The exclusion of competitors usually results in a reduction of competition, which ultimately leaves the market open to exclusion and exploitation by the dominant firm.[341]

Traditionally, the prohibition of excessive pricing in South Africa has been limited and highly selective, as enforcement has always been against large corporations in markets with a particular policy history.[342] This, however, changed following the introduction and wide application of the Regulations on small and medium corporations in narrow geographic markets.[343] The expansive use of the Regulations raised several important policy questions as they represent a break from past practice. One of the most important implications is that during the COVID-19 disaster period, market power was viewed differently, with competition authorities justifying intervention on the basis of "temporary" market power wielded by small players.[344] At present, the point of contention, as a result of the reasoning by the Tribunal and CAC in *Babelegi* and *Dis-Chem*, is the substance of market power durability. This is because both courts, in their assessments of market power and market power durability under section 8 of the Amendment Act, did not specify that their reasoning was only applicable to cases heard during a natural disaster. Therefore, since the state of natural disaster was

[340] Motta & de Streel op cit note 11 at 2.
[341] Ibid.
[342] Boshoff op cit note 32 at 117. In the *Sasol* and *Mittal* cases, the firms are identified as being dominant in the economy for controlling prices, excluding competition, and independently behaving in an appreciable manner.
[343] Ibid at 113.
[344] The term "temporary market power" was introduced and discussed in *Babelegi* supra note 24 para 65.

lifted and economic conditions have somewhat returned to normal, it is difficult to tell how the Tribunal and CAC will approach cases of excessive pricing.

Similarly, the fact that there is no time frame or limitation on dominance under the Competition Act and the Amendment Act has made the assessment thereof difficult as it is open-ended. At present, and as a result of the *Babelegi* and *Dis-Chem* judgments, the assessment of market power durability is complicated and uncertain for both regulators and firms. This uncertainty makes it difficult for firms to regulate their behaviour so as to ensure they do not contravene section 8 and are in compliance with competition law. As mentioned above, prior to the COVID-19 pandemic, arguments were made regarding the durability of market power. In *Sasol*, market power was argued to be "the ability to raise prices consistently and profitably over competitive levels".[345] The operative word is "consistently", which means a firm with market power can only be found guilty of excessive pricing if prices are set significantly and persistently above the competitive level. Thus, sufficient time needs to pass to observe if price increases persist. This, however, was not the case in both *Babelegi* and *Dis-Chem,* as the Complaint Period was just over a month.

The presumption behind the prohibition under section 8 is that small firms will lose their customers or consumers to competitors if the dominant firm

[345] *Sasol* supra note 23 para 2.

charges excessive prices.[346] Under normal economic conditions, there are pro-competitive instances where prices should be allowed to significantly increase. This happens when there is a shortage of a product, and a price increase will serve to ration the available supply to those buyers who value it the most.[347] Further, an increase in prices acts as a signal to suppliers – especially those who might not have been interested in producing for the market at a lower price – to enter the market as new entries. Therein, the assumption is that, without such price signals, shortages would persist. Said differently, an increase in demand inadvertently results in an increase in supply, which over a period of time results in prices going down and inevitably creating an equilibrium in that particular market. Nonetheless, insufficient time was allowed to pass during the pandemic before competition authorities intervened (using legal frameworks applicable under normal market conditions) in attempts to mitigate competition law. Therefore, it is unknown as to whether the market would have been able to immediately recover without immediate intervention.

6.1 A CRITICAL ANALYSIS OF *BABELEGI AND DIS-CHEM*

The cases of *Babelegi* and *Dis-Chem* were the first anti-competitive "price gouging" cases in South Africa and the first cases to be decided since the

[346] Reena das Nair "Measuring Excessive Pricing as an Abuse of Dominance – An assessment of the criteria used in the Harmony Gold/Mittal Steel Complaint" (2008) 11 *South African Journal of Economic and Management Sciences* at 280.

[347] Ibid.

Amendment Act was promulgated.[348] In both cases, the Tribunal and CAC failed to adopt the peremptory wording under section 8(3) in determining whether the differences in the prices charged and the competitive price were unreasonable. Also, there is no substantive explanation as to why the Tribunal and the CAC departed from existing precedent and informally applied the COVID-19 Regulations, by incorporating them onto the non-exhaustive list under section 8(3) of the Amendment Act. This takes away from the fact that the wording under section 8(3) is peremptory, which suggests that it is a must for all relevant factors be considered in determining whether a price is excessive. However, the Tribunal in both cases, when it came to assessing whether the differences in the prices charged and the competitive price were unreasonable, failed to adopt this as it followed a unique approach to the factors.

This paper acknowledges that not all the factors will be relevant or applicable in all cases, as certain factors will align with certain facts while others do not. This means only a few factors out of the list may be found applicable in different cases. Still, the Tribunal, in determining whether the factors were indeed relevant to the facts, did not engage with most of the factors. Instead, the Tribunal restricted itself to (indirectly) applying the simple price gouging test and focused on comparative prices to the exclusion of other potentially relevant factors. In other words, the Tribunal

[348] Anthony Felet & Amy Wager "Pricing enforcement during crisis period – What is the best way" *Competition Commission* available at *https://www.compcom.co.za/wp-content/uploads/2021/11/Pricing-interventions-in-crisis-periods.pdf* at 2, accessed on 19 November 2022. Mpe & De Beer op cit note 222 at 1.

departed from the peremptory wording of the Competition Act and informally applied the Regulations in contravention of the rule of law, despite the Regulations being time-period-specific and having no retrospective application. As a result, the Tribunal in both *Babelegi* and *Dis-Chem* departed from existing precedent and did not give any justification as to why various factors that the respondents sought to rely on were insignificant in substance. The courts also did not explain why they were informally incorporating the Regulations in their interpretation of section 8(3) of the Amendment Act.

The paper acknowledges that this departure could have been attributed to the removal of the originally formulated definition of excessive pricing when the Competition Act was amended. Conversely, this is not the case. Although the definition of excessive pricing removed the concept of "economic value" and replaced it with a non-exhaustive list of factors,[349] from an economic perspective, the factors under section 8(3) are similar to those considered by case law – those that gave content to the concept of "economic value".[350] Therefore, amendments to the Competition Act do not negate an entirely new way to assess and determine excessive pricing.

In summation, the proceedings against Dis-Chem Pharmacy and Babelegi Workwear & Industrial Supplies involved the sale of face masks, for which

[349] These factors are under section 8(3) of the Competition Amendment Act 18 of 2018.
[350] Boshoff op cit note 32 at 117-8.

both firms increased their prices in response to an increase in demand.[351] In both cases, the Tribunal and the CAC, in adjudicating excessive pricing, departed from the traditional approach.[352] The method used to determine whether market dominance existed led to a narrower definition of markets than would have otherwise been the case.[353] Additionally, a long-term (at least five-year) analysis of the relationship between realised prices and economic costs was not done. Rather, in both cases:

- Market power was determined using an inferential approach. The evidence of significant price increases was cited by the authorities as proof of the firm's market dominance. This was true despite the fact that neither firm held nearly enough market-share to be considered dominant.[354]
- In light of this, it was determined that when a firm significantly increased the price of essentials in the midst of a crisis or a major national catastrophe without also increasing costs, this established a prima facie case of prices being unreasonably excessive.[355]
- When it comes to the pricing of a good that is vital to public health and considered essential in the fight against the COVID-19 pandemic, the authorities argued that there should not be any room for price increases without any adjustments to underlying costs.[356]

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[351] Felet & Wager op cit note 348 at 3.
[352] Ibid.
[353] Ibid at 4.
[354] *Babelegi* supra note 28 para 84-86 and. *Dis-Chem* supra note 25 para 57 and 73.
[355] *Babelegi* supra note 24 para 58; *Dis-Chem* supra note 25 para 73
[356] *Babelegi* supra note 24 para 61-65; *Dis-Chem* supra note 25 para 82, 156, 195

6.1.1 **AMBIGUITY FOR FUTURE EXCESSIVE PRICING CASES**

The competition authorities' approach in *Dis-Chem* and *Babelegi* and the Commission's general application of the Regulations raise questions about excessive pricing matters. For example:

(1) The behaviour in these cases occurred prior to the implementation of the Regulations and was prosecuted under the traditional excessive pricing framework, which is section 8(1)(a) of the Competition Amendment Act.[357] This raises the question of whether the principles outlined in these decisions set a precedent for cases outside the disaster period. The implications for cases of excessive pricing in more traditional settings have always been centred on a dominant firm pricing significantly above economic value over the long-run.[358] Said differently, there is confusion as to the significance of the influence these two decisions will have on the assessment of future cases, seeing that the traditional approach focused on long-term market power while the new approach focused on short-term market power. The ambiguity was also created by the fact that the courts did not expressively distinguish that this new approach only applied to those cases because of the abnormal economic conditions and the lack of legislative frameworks available at the time.

[357] Felet & Wager op cit note 348 at 2.
[358] Ibid at 3.

Therefore, moving forward, it will be interesting to see how competition authorities handle cases outside the disaster period, as no distinction was made.

(2) When are demand-driven price-increases by dominant firms acceptable (even in the absence of a crisis or a natural disaster)?[359]

(3) When supply is impacted by a crisis, what is the appropriate price response from firms?[360] Should a retailer always be forced to sell essential items that are in short supply at their original economic cost when replacement stock is likely to cost much more?[361]

(4) During a crisis, what is the *de minimis* threshold (in terms of time and sales level) that should be used to evaluate the pricing behaviour of a firm?[362] The Tribunal imposed a R1.2 million penalty in *Dis-Chem*, based on a multiple of the excess profits earned during the complaint period (about one month).[363] In *Babelegi*, on the other hand, the CAC determined that, while there was a violation of section 8(1)(a), the small number of sales (76 boxes) caused minimal harm and the short duration of the complaint period (about a month) did not justify a penalty.[364] Given these

[359] Felet & Wager op cit note 348 at 7.
[360] Ibid.
[361] Ibid.
[362] Felet & Wager op cit note 348 at 7.
[363] Ibid at 8.
[364] Ibid.

variations in approach, it is unclear at what point and for what kind of sales a dominant firm must charge more than its actual costs in order to receive a punishment under section 8(1)(a).[365]

Regarding how future cases of excessive pricing will be handled, these queries raise serious ambiguities. What is evident is that some suppliers of basic food, medicine, and clean-up goods and services (not just dominant firms in the traditional sense) need to exercise caution when considering price increases.[366] In the current climate, price increases without corresponding cost increases present a significant risk to compliance.[367] Another significant concern is how these recent price gouging cases affect, and even confuse, the approach for determining dominance and assessing traditional excessive-pricing complaints outside of the sale of essential goods in a crisis.[368] Ultimately, during a crisis, governments tend to aim at maintaining the affordability of essential goods without considering the economic effects and consequences of their decisions on the market. This is why it is worth reassessing the judgments of the Tribunal and the CAC regarding the prices of goods that were deemed essential for consumers during the COVID-19 pandemic.

[365] Ibid.
[366] Felet & Wager op cit note 348 at 10.
[367] Ibid.
[368] Felet & Wager op cit note 348 at 10.

Furthermore, on 4 April 2022, President Ramaphosa announced the end of the National State of Disaster. In terms of Regulation 2.3 of the Regulations, "the regulations and directions will be of no force or effect when the COVID-19 outbreak is no longer declared a disaster".[369] This means that, in the absence of any transitional measures to ensure the continued validity of the COVID-19 Regulations, firms accused of excessive pricing can only be prosecuted under Section 8 of the Amendment Act.[370] This leaves the question of whether firms that contravened the Regulations during the complaint period could still be prosecuted in terms of those Regulations if no prosecution proceeding was initiated at the time.[371] Additionally, the fundamental question that arises when considering the post-COVID-19 era is whether cases prosecuted during the COVID-19 era can be used as precedent for post-COVID-19 prosecutions.[372] It will be interesting to see what impact, if any, the COVID Regulations have on post-COVID jurisprudence, as well as whether there is a general increase in prosecutions during normal market conditions.[373] It will be particularly interesting to see if competition authorities continue to embrace the concept of price gouging despite claims that it does not exist in our law.[374]

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[369] See regulation 2.3 of the COVID-19 Regulations.
[370] Nkonzo Hlatshwayo & Disebo Leokaoke "Competition Law post the national state of disaster" (2022) 22 *Without Prejudice* at 1.
[371] Hlatshwayo & Leokaoke op cite note 370 at 1.
[372] Hlatshwayo & Leokaoke op cite note 370 at 1.
[373] Ibid.
[374] Hlatshwayo & Leokaoke op cite note at 1.

7. CONCLUSION

Before the COVID-19 era, firms that were accused of engaging in excessive pricing were subject to prosecution under section 8 of the Competition Act (as amended). According to section 8 of Amendment the Act,[375] a dominant firm is prohibited from charging its customers (and consumers) a price that is excessive. In the original formulation of the Competition Act (before it was amended in 2019), an excessive price was to be determined by reference to "economic value", a concept that was given content in subsequent case law. The amended Act removes this concept and sets out factors that should be considered in determining a benchmark competitive price and whether a price is deemed excessive relative to such competitive a price.[376]Despite the definition of excessive pricing under section 8 being reformulated under the Amendment Act, it is still largely reflective of existing case law. Which is why deviation from existing precedent under the premise of changes brought about by the new definition during the disaster period is not substantial. Therefore, the enforcement and application of section 8 of the Amendment Act in both *Babelegi* and *Dis-Chem* were inconsistent with the intention of the legislature, which includes providing protection to small and medium businesses or firms controlled by historically disadvantaged groups from unfair prices. Instead, the courts prosecuted firms that did not even meet the necessary requirements of dominance and market power. The explanation the courts gave was inconsequential, as it based it on how

[375] Competition Act 89 of 1998, (as amended) or Competition Amendment Act 18 of 2018.
[376] Although the concept "economic value" has been removed in the amended Act, from an economic perspective, it is useful to note that the factors under section 8(3) are similar to the factors considered by case law to give content to the concept of "economic value". See Boshoff op cit note 32 at 117-8.

the firms failed to give reasonable explanations as to why they raised the prices of essential products during a health crisis. This inconsistency brings about ambiguity and uncertainty in an already complex and controversial area of competition law.

In South Africa, competition law develops largely through case law, and as such, tremendous value is placed on court decisions. This is why it is important for the judiciary to interpret and apply legislation in a manner that is within the scope and nature of competition law. For instance, it is important for the judiciary to understand that not all price increases (or even opportunities) that may be unwarranted will necessarily constitute excessive pricing in terms of the Competition (Amendment) Act. This is an error both the Tribunal and CAC made in *Babelegi* and *Dis-Chem*, as both courts concluded that Babelegi and Dis-Chem were in contravention of section 8(1)(a) of the Amendment Act when they raised their prices during the pandemic.

Ordinarily, excessive price actions require the finding of dominance. However, during the National State of Disaster, a number of firms accused of excessive pricing, including Babelegi and Dis-Chem, were not necessarily dominant in the ordinary sense. In fact, most of them had little market share – one of the many things both the Tribunal and CAC failed to assess in their determination of whether there was a contravention of section 8(1)(a). During this time, competition authorities managed to

investigate and prosecute a record number of abuse of dominance cases, primarily related to excessive pricing. Most of these cases were resolved by means of settlement agreements. However, few cases, such as *Babelegi* and *Dis-Chem*, made it to the Tribunal. This is in sharp contrast to the pre-COVID-19 era, where excessive pricing cases were difficult to determine, as the assessment thereof was incredibly complex.

The implementation of the Regulations, and hence the concept of price gouging, resulted in the first technical meaning of the term "market power". [377] In *Babelegi*, the Tribunal and CAC held that even though Babelegi had a market share of less than 5%, “one can reasonably infer that Babelegi had market power during the Complaint Period since it behaved to an appreciable extent independently of its competitors, customers, or suppliers”.[378] However, the principle of price gouging does not form part of competition law in South Africa, as it is not expressly mentioned in the Regulations or Competition Act (as amended) and has no tangible history in competition policy. Consequently, this did not prevent competition authorities from prosecuting a number of firms, including Babelegi and Dis-Chem, for price gouging under section 8 of the Amendment Act and Regulation 4 of the COVID-19 Regulations. Although the competition authorities acknowledged that, due to the principle of retrospectivity, the COVID-19 Regulations did not apply to cases prior to the complaint period; both the Tribunal and CAC applied them indirectly through

[377] Hlatshwayo & Leokaoke op cite note 370 at 1.
[378] Babelegi supra note 24 para 22.

section 8(3) of the Amendment Act. The most recent case to be prosecuted in this manner was *Tsutsumani Business Enterprise*. According to the Tribunal, Tsutsumani contravened section 8(1) of the Amendment Act and Regulation 4 of the Regulations. This case, however, is contextually different from the first two cases of price gouging. This is because both the Amendment Act and the Regulations were applicable, and the Tribunal did not have to extend section 8(3) to accommodate Regulation 4.

Nonetheless, this still does not excuse deviation from the ordinary application of section 8 of the Competition Act (as amended) by the Tribunal and CAC in *Babelegi* and *Dis-Chem*. However, it will definitely be interesting to see how competition authorities deal with this deviation in future cases of excessive pricing.

In conclusion, the paper is of the view that deviation from traditional methods of investigating, assessing, and prosecuting complaints of excessive pricing during the COVID-19 pandemic has potential adverse effects on future cases – cases where firms violated COVID-19 Regulations during the complaint period but were not initiated – and whether precedent from the COVID-19 era will apply to post-COVID-19 cases. Essentially, the impact of the deviation will be interesting to see unfold as competition authorities attempt to reconcile both the novel approach (introduced during the natural disaster) and the traditional approach (used prior to the natural disaster) in future excessive pricing cases. These future cases of excessive pricing will be assessed of outside the disaster period. Thus, it is difficult to

ascertain which approach competition authorities will take, as both the Tribunal and CAC, in their assessment, were not explicit on whether their assessment was context-specific. Fundamentally, the paper analysed how legal frameworks, especially the express wording of the Competition Act, Amendment Act, and Regulations, affect the assessment of abuse of a dominant position in relation to excessive pricing. The paper also looked at the implications of the legislature's omission in defining certain concepts – important for assessing and determining when a price is excessive – at the discretion of competition authorities. The interpretation of competition law has largely developed through jurisprudence. Therefore, tremendous value is placed on judgments, as they inform how competition law is regulated. Further, this paper argues that under normal economic conditions, the assessment of excessive pricing is usually triggered by the unreasonable unilateral behaviour of a dominant firm over an extended time-period. Meanwhile, the assessment of excessive pricing under abnormal economic conditions, such as COVID-19, has proven to be entirely different.

8. BIBLIOGRAPHY

Primary Sources

Statutes

Competition Act 89 of 1998.

Competition Amendment Act 18 of 2018.

Consumer Protection Act 68 of 2008.

Consumer and Customer Protection and National Disaster Management Regulations and Directions. Government Gazette 43116 (19 MARCH 2020). R. 350. Competition Act (89/1998). Accessed on 27 October 2022 *https://www.gov.za/documents/competition-act-regulations-consumer-and-customer-protection-and-national-disaster.*

Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abuse exclusionary conduct by dominant undertakings OJ (2009) C 45/07.

Guidance on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreement (14 January 2011) [39]; and Directorate for Financial and Enterprise Affairs Competition Committee: Market Concentration (20 April 2018).

Treaty of the Functioning of the European Union ("TFEU"). 13 December 2007

The Treaty of Rome or the Treaty establishing the European Community.

Cases

South African:

Competition Commission v Babelegi Workwear and Industrial Supplies CC (CR003Apr20) (1 June 2020).

Babelegi Workwear and Industrial Supplies CC v Competition Commission of South Africa (186/CAC/JUN20) [2020] ZACAC 7 (18 November 2020).

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

Competition Commission v Sasol Chemical Industries Ltd (48/CR/Aug10) [2011] ZACT9 (24 February 2011).

Competition Commission v Tsutsumani Business Enterprise CC COVCR113Sep20 (18 April 2022).

Harmony Gold Mining Company Ltd & another v Mittal Steel South Africa Ltd & another ((reported case no 13/CR/Feb04) [2007] ZACT 21 (27 March 2007)).

Mittal Steel South Africa and Mac Steel International BV v Harmony Gold Mining Company Ltd and Another (70/CAC/APR07) [2009] ZACAC 1 (29 May 2009).

S v Mhlungu and others 1995 (3) SA 867 (CC)

Sasol Chemical Industries Limited v The Competition Commission ((unreported case no 131/CAC/Jun14 [2015] ZACAC 4 (17 June 2015)).

Foreign:

Attheraces Ltd v British Horseracing Board Ltd. [2005] EWHC 3015 (Ch.), [2005] UKCLR 757 (Ch. D).

Attheraces Ltd v British Horseracing Board Ltd. [2007] EWCA (Civ) 38, [2007] UKCLR (CA).

Comite des Industries cinèmatographiques des Communautès Europèennes (CICCE) v Commission of the European Commmunities [ECLI: EU: C: 1985: 150].

European Commission, Scandlines Sverige AB v Port of Helsingborg, Case No COMP/A.36.568/D3 (2004).

General Motors Continental NV v Commission of the European Communities, Case 26/75, [1975] ECR 1367.

Hoffmann-La Roche & Co. AG v Commission of the European Commiunities [1979] ECR 461.

United Brands Company and United Brands Continental BV v EC Commission, Case 27/76, [ECLI: EU: C: 1978: 22].

<u>Secondary Sources</u>

Anufriev, Mikhail & Kopànyi, Dàvid "Oligopoly Game: Price Makers Meet Price Takers" (2018) 91 *Journal of Economic Dynamics and Control* 84.

Bae, Emily “Are Anti-Price Gouging Legislations Effective against sellers during disasters?” (2009) 4 *Entrepreneurial Business Law Journal* 79.

Bailey, David & John, Laura Elizabeth “Bellamy & Child: Materials on European Union Law of Competition” 8ed (2018) Oxford University Press, United Kingdom.

Baker, Jonathan B. & Salop, Steven C. “Antitrust, competition policy, and inequality” (2015) 104 *Georgetown Law Journal* 1.

Calcagno, Claudio; Chapsal, Antoine & While, Joshua "Economics of Excessive Pricing: An Application to the Pharmaceutical Industry" (2019) 10 *Journal of European Competition Law & Practice* 166.

Calcagno, Claudio & Walker, Mike “Excessive Pricing: Towards Clarity and economic coherence” 6 *Journal of Competition Law and Economics* 891.

Cavallo, Eduardo; Galiani, Sebastian; Noy, Ilan & Pantano, Juan “Catastrophic natural disasters and economic growth” (2013) 95 *The Review of Economics and Statistics* 1549.

Choudhary, Kunal “Abuse of Dominance in Competition Law” (2021) 2 *Jus Corpus Law* 490.

das Nair, Reen & Mondliwa, Pamela “Excessive pricing under the spotlight: What is a competitive price?” in Jonathan Klaaren, Simon Roberst & Imraan Valodia (eds) *Competition Law and Economic Regulation* (2017) Wits University Press, South Africa.

das Nair, Reena “Measuring Excessive Pricing as an Abuse of Dominance – An assessment of the criteria used in the Harmony Gold/Mittal Steel

Complaint" (2008) 11 *South African Journal of Economic and Management Sciences* 279.

Dwight, Lee R "Making the case against 'Price Gouging' Laws: A challenge and an opportunity" (2015) 19 *The Independent Review* 583.

Evans, David S & Padilla, Jorge A "Designing antitrust rules from assessing unilateral practices. A neo-Chicago approach" (2005) 72 *University of Chicago Law Review* 73.

Felet, Anthony & Wager, Amy "Pricing enforcement during crisis period – What is the best way" (2022) *Competition Commission* available at *https://www.compcom.co.za/wp-content/uploads/2021/11/Pricing-interventions-in-crisis-periods.pdf* at 2, accessed on 19 November 2022

Furse, Mark "Excessive Prices, Unfair Prices and Economic Value: The Law of Excessive Pricing Under Article 82 EC and the Chapter II Prohibition" (2015) 4 *European Competition Journal* 59.

Giancaspro, Mark "Perilous fires, Pandemics and Price Gouging: The need to protect consumers from unfair pricing practices during times of crisis" (2021) 44 *University of New South Wales Law Journal* 1458

Gale, David "The law of Supply and Demand" Mathematica (1955) 3 *Scandinavica* 155.

Goodman, Isabel; Smith, Patrick; Youens, Paula; Kelly, Luke & Unterhalter, David "Abuse of dominance" in Isabel Goodman, Patrick Smith, Paula Youens Luke Kelly, David Unterhalter (eds) *Principles of Competition Law in South Africa* (2017) Oxford University Press, South Africa.

Hlatshwayo, Nkonzo & Leokaoke, Disebo “Competition Law post the national state of disaster” (2022) 22 *Without Prejudice* 1.

Heinen, Andreas; Khadan, Jeetendra & Strobl, Eric “The price impact of extreme weather in developing countries” (2019) 129 *The Economic Journal* 1327.

Hovenkamp, Herbert “The rule of reason” (2018) 70 *Florida Law Review* 81.

Irvine, Heather "Minister of Trade Industry and Competition responds swiftly to COVID-19" (2020) 20 *Without Prejudice* 1.

McKerrow, Ryan David "Excessive pricing in South African competition law: elucidating the nature and implications of the consumer-determent requirement" (2017) 29 *South African Mercantile Law Journal* 173.

Motta, Massimo “Price regulations in times of crisis can be tricky” *Daily Maverick* (22 April 2020) https://www.dailymaverick.co.za/opinionista/2020-04-22-price-regulation-in-times-of-crisis-can-be-tricky/ Accessed on 07 November 2021.

Motta, Massiom & de Streel, Alexandre "Excessive pricing and price squeeze under EU law" in Claus-Dieter Ehlermann and Isabela Atanasiu (eds) European Competition Law Annual 2003: What is an Abuse of a Dominant Position? (2006) Hart Publishing, Oxford.

Muris, Timothy J “The new rule of reason” (1988) 57 *Antitrust Law Journal* 859.

OECD "Competition Law and Policy in South Africa" (2003) available at *https://www.oecd.org/daf/competition/prosecutionandlawenforcement/2958714.pdf*, accessed on 9 July 2022.

OECD "Economic analysis and evidence in abuse cases in South Africa: Context maters – Lessons from the *Babelegi* Excessive Pricing Case" (2021) available *https://one.oecd.org/document/DAF/COMP/GF/WD(2021)7/en/pdf*, accessed on 22 November 2022.

OECD "Exploitative pricing in the time of COVID-19" (2020). available at https://www.oecd.org/competition/Exploitative-pricing-in-the-time-of-COVID-19.pdf, Accessed on 15 January 2022.

Opite, Abdullah Promise; Iwu, Chux Gervase; Adeola, Ogechi; Mugobo, Victor Virimai; Okeke-Uzodikem, Obianuju E; Fagbola, O & Jaiyeoba, Olumide "The COVID-19 pandemic and implications for businesses: Innovative retail marketing viewpoint" (2020) 16 *The Retail and Marketing Review: Special COVID Edition* 86.

Oxenham, John "South Africa Excessive Pricing – An Evaluation of the *Sasol Chemical Industries* Decision – A New Dawn, or a Continuation of the status quo" (2015) *American Bar Association Fall Forum* 1.

Oxenham, John; Currie, Michael-James & van der Merwe, Charl "COVID-19 Price Gouging cases in South Africa: Short-term market dynamics with long-term implications for Excessive Pricing cases" (2020) 11 *Journal of European Competition Law & Practice* 524.

Palesa Mpe & Jeremy De Beer “What’s with the price gouging?” (2020) 20 W*ithout Prejudice* 1.

Parker, Miles “The impact of disasters on inflation” (2018) 2 *Economics of Disasters and Climate* 21.

Rapp, Geoffrey C "Gouging: Terrorist Attacks, Hurricanes and the Legal and Economics Aspects of Post-Disaster Price Regulations" 94 *Kentucky Law Journal* 535.

Robert Anderson, Timothy Daniel, Alberto Heimler & Thinam Jakob “Abuse of Dominance” in Rughvir Shyam Khemani & Catherine R. Ruglisi (ed) A framework for the design and implementation of Competition Law and Policy (1998) The World Bank and the Organisation for Economic Co-operation and Development, Washington.

Roberts, Simon “Assessing Excessive Pricing: The case of Flat Steel in South Africa” (2008) 4 *Journal of Competition Law and Economics* 1.

Roberts, Simon "Effects-based tests from abuse of dominance practice: The case of South Africa" (2012) 4 *Centre for Competition Economics* 1.

Rubin, Paul H. “Folk Economics” (2003) 70 *Southern Economic Journal* 157.

Smith, Patrick "Observation of the economics of excessive pricing during a crisis" (2020) 16 *Competition Law International* 61.

Sutherland, Philip & Kemp, Katharine “Competition Law of South Africa” (2014) 18 *LexisNexis Service Issue* 1.

Sylvester, Andrew "A critical evaluation of the proposed treatment of special cost advantage in excessive prices law" (2014) 7 *Journal of Economic and Financial Science* 607.

Thurston, Robert Henry “The Modern Version of the Law of Supply and Demand” (1896) 4 *Science* 817.

van Tonder, Jan Louis “Predatory pricing: Single-firm dominance, exclusionary abuse and predatory prices (Part 1)” (2020) 42 *OBITER* 470

Warkentin, Spencer "Price Gouging in the time of COVID-19: How U.S. Anti-Price Gouging Laws fail consumers" (2021) 36 *Maryland Journal of International Law*.

Wherry, Frederick F & Schor, Juliet B “The SAGE Encyclopedia of Economics and Society” (2015) SAGE Publication, Los Angeles.

Willem H. Boshoff "South African Competition Policy on Excessive Pricing and its relation to Price Gouging during the COVID-19 disaster period" (2021) 89 *South African Journal of Economics* 112.