

**IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA**

CASE NO: 186/CAC/JUN20

CT CASE NO: CR003Apr20

CC CASE NO: 2020Mar00101/2020Mar0063

In the matter between:

**BABELEGI WORKWEAR AND  
INDUSTRIAL SUPPLIES CC**

Appellant

and

**COMPETITION COMMISSION  
OF SOUTH AFRICA**

Respondent

**HEALTH JUSTICE INITIATIVE NPC**

First Amicus Curiae

**OPEN SECRETS NPC**

Second Amicus Curiae

**SOUTH AFRICAN HUMAN  
RIGHTS COMMISSION**

Third Amicus Curiae

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**HEADS OF ARGUMENT OF THE SOUTH AFRICAN HUMAN RIGHTS  
COMMISSION**

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## OVERVIEW

- 1 These are the written submissions prepared on behalf of the South African Human Rights Commission (“SAHRC”) in the appeal by the Appellant (“Babelegi”) against the decision of the Competition Tribunal (“Tribunal”), dated 1 June 2020. In its decision, the Tribunal found that Babelegi’s conduct constituted excessive pricing in contravention of section 8(1)(a) of the Competition Act, 89 of 1998 (“the Act”). It thereafter imposed an administrative penalty of R76 040 in respect of Babelegi’s conduct.
- 2 The Competition Commission’s complaint was that during the period 31 January 2020 to 5 March 2020 (the complaint period), Babelegi’s mark-ups for face masks, specifically Dust mask FFP1 Pioneer was in excess of 500%.<sup>1</sup> These excess prices for masks did not correspond to any cost increases that Babelegi had faced<sup>2</sup>. Babelegi itself did not dispute that between 31 January 2020 and 5 March 2020, its average mark-up was in excess of 500%.<sup>3</sup> Babelegi’s defence was that it effected its price adjustments to its selling price of face masks during the complaint period since it was warned by its suppliers of impending price increases<sup>4</sup> as demand started to challenge and outstrip supply<sup>5</sup>
- 3 After finding the price-hikes to be excessive and unreasonable, in its order and reasons for the decision, the Tribunal finds that the “*prices charged by Babelegi during the Complaint Period from a contextual and economic perspective were*

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<sup>1</sup> Competition Commission v Babelegi Workwear and Industrial Supplies CC (Case No: CR003Apr20) at para 121 (Babelegi decision).

<sup>2</sup> Babelegi decision at para 2

<sup>3</sup> Babelegi decision at paras 4, 91, 122.1.

<sup>4</sup> Babelegi decision, paras 4 and 131

<sup>5</sup> Babelegi decision, para 16

*of an exploitative nature. Babelegi knew full well that there was a significant increase in the demand for masks during the Compliant Period and took advantage of customers and consumers amid the international Covid-19 health crisis. This leads us to conclude that Babelegi's prices charged during the Complaint Period were to the detriment of consumers and customers."*<sup>6</sup>

- 4 In its Notice of Appeal, Babelegi challenges on appeal the finding that the increase in the price of face masks resulted in a detrimental impact to consumers<sup>7</sup> and that the administrative penalty imposed by the Tribunal was appropriate and proportionate as per section 59 of the Act.
- 5 In these proceedings, the SAHRC, as an amicus curiae, seeks to make discreet submissions that relate to the determination of detriment as per section 8 of the Act and the importance of imposing appropriate and proportionate sanctions in terms of section 59 of the Act.<sup>8</sup>
- 6 The SAHRC submissions are as follows:
  - 6.1 Firstly, by limiting access to such an essential items such as a face mask, by charging excessive prices and thereby profiting off of vulnerable groups during a pandemic impairs rights in the Bill of Rights, Babelegi's conduct violates section 9(4) of the Constitution in that it amounts to indirect discrimination based on socio-economic status or poverty. This conduct similarly violates sections 10 and 11 of the Constitution because the hiking of prices and preying on vulnerable people during a global

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<sup>6</sup> Babelegi decision at para 176.

<sup>7</sup> Babelegi Notice of Appeal para 13.

<sup>8</sup> Babelegi Notice of Appeal para 14.

pandemic and holding consumers to these increased prices for face masks, which are essential for saving lives and/or at the very least for restricting the spread of Covid-19 impairs their dignity and the right to life. The excessive price increases also violate section 27(1) in that it limits access to an item necessary to protect vulnerable groups from contracting or spreading the deadly Covid-19 virus and it impairs section 28 insofar as it affects the rights of children to health.

6.2 Secondly, section 39 of the Constitution provides that in interpreting the Bill of Rights, a court must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; it must consider international law and may consider foreign law. In considering the abovementioned constitutional considerations, this court is mandated to consider the international law instruments that inform and underpin sections 9, 10, 11, 27 and 28 of the Constitution. This requires an interrogation of the relationship between international human rights instruments and the interpretation of section 8 of the Competition Act.

6.3 Finally, the SAHRC submits that any penalty imposed in terms of section 59 of the Act should be an appropriate one. An appropriate penalty has been described as one that serves as a deterrent. In this vein, the SAHRC submits that the CAC should guarantee that appropriate penalties are imposed, particularly in the context of human rights violations.

7 The SAHRC will not make any submissions regarding the challenges that have been brought by Babelegi against the decision of the Tribunal and its

interpretation of “*market dominance*”, “*market power*” and “*excessive pricing*”. The SAHRC will not make submissions regarding the correct test for dominance. These written submissions will highlight the vulnerabilities of children and elderly persons when firms engage in abuse of dominance and price gouging in contravention of section 8(1)(a) of the Competition Act, in the context of the Covid-19 pandemic.

## Bill of Rights Analysis

### *The Right to Equality*

8 Section 9 of the Constitution provides that:

*“(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.*

*(2) Equality includes full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*

*(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*

*(4) No person may unfairly discriminate directly or indirectly against anyone on or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*

*(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”*

9 Section 9 of the Constitution guarantees everyone a right to equality. Section 9(4) prohibits unfair discrimination, directly or indirectly against anyone on one or more grounds in terms of subsection (3). These grounds include *inter alia*, ethnic or social origin, age, disability, etc.

- 10 Section 9 of the Constitution acknowledges and protects the notion of equal moral worth and the requirement that all persons be treated with equal concern and respect. Where persons are treated differently, that discrimination is unfair unless it can be justified.<sup>9</sup>
- 11 In **Minister of Finance and Another v Van Heerden**<sup>10</sup> the Constitutional Court held that the achievement of equality is linked to the achievement of a society based on 'social justice'. And that such an achievement would only be possible if there was a 'positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege'.<sup>11</sup>
- 12 In these proceedings, the SAHRC highlights that excessive pricing of clinical masks amounts to unfair discrimination on a prohibited ground. This is because the conduct of imposing excessive prices precludes poor and vulnerable persons from accessing them. This amounts to unfair discrimination based on social origin.<sup>12</sup>
- 13 Social origin discrimination is used to describe the differential treatment of people based on class. In this matter, it relates to the additional ground of 'socioeconomic status'. Socio-economic status is defined as 'a social and economic condition or perceived condition of a person who is disadvantaged by poverty, low employment status or lack of or low-level educational qualifications.

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<sup>9</sup> Section 9(3) – 9(4) and section 36 of the Constitution.

<sup>10</sup> 2004 (6) SA 121 (CC), 2004 (11) BCLR 1125 (CC)

<sup>11</sup> 2004 (6) SA 121 (CC), 2004 (11) BCLR 1125 (CC)('Van Heerden') at para 25.

<sup>12</sup> Section 9(3) – 9(4) and section 36 of the Constitution.

In South Africa, class tends to correspond with race and gender in as much as Africans and women constitute the greatest proportion of the poor.<sup>13</sup>

- 14 The imposition of excessive prices detrimentally impacts vulnerable members of society such as children and elderly persons who are unfairly discriminated against because they are unable to afford lifesaving masks during a global pandemic, particularly where the excessive prices are simply unjustified and unreasonable. The Constitutional Court has highlighted the need for the poor to be treated as equal members of society.<sup>14</sup>
- 15 In **Social Justice Coalition and Others v Minister of Police and Others**<sup>15</sup> held that poverty constitutes a prohibited ground of discrimination. The same has been said about unfair discrimination based on social origin. Consequently, price gouging has that discriminatory effect.

### *The Right to Dignity*

- 16 Section 10 of the Constitution states that: *“Everyone has inherent dignity and the right to have their dignity respected and protected.”*
- 17 The right to dignity is invariably inter-linked to other rights in the Bill of Rights. The Constitutional Court in **Soobramoney v Minister of Health, Kwazulu Natal**<sup>16</sup> held that *“in all the open and democratic societies based upon dignity,*

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<sup>13</sup> Fredman ‘Providing Equality: Substantive Equality and the Positive Duty to Provide’ (2005) 21 SAJHR 163, 182-5; M Jackman ‘Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination under the Canadian Charter and Human Rights Law’ (1994) 2 Review of Constitutional Studies 76-122; B Goldblatt & S Liebenberg ‘Achieving Substantive Equality in South Africa: The Relationship between Equality and Socio-Economic Rights’ (2007).

<sup>14</sup> Khosa & Others v Minister of Social Development & Others; Mahlaule & Another v Minister of Social Development & Others 2004 (6) SA 505 (CC), 2004 (6) SA 569 (CC) at para 74.

<sup>15</sup> 2019 (4) SA 82 (WCC)

<sup>16</sup> 1998 (1) SA 756 (CC)

*freedom and equality [...], the rationing of access to life-prolonging resources is regarded as integral to, rather than incompatible with, a human rights approach to health care.”<sup>17</sup>*

- 18 It explained that an intrusion on one right often implicates the right to dignity.
- 19 The SAHRC contends that where a member of society is deprived of the opportunity to develop their basic capabilities to function as individual and social beings, the right to dignity is impaired because they lack the basic material necessities of life to enable them to survive.<sup>18</sup>
- 20 In circumstances where vulnerable persons such as children and the elderly are unable to access essential healthcare items such as masks, impairs their right to dignity. These individuals are unable to protect themselves and are exposed to the COVID-19 virus simply because they have been priced out by the excessive prices.

### *The Right to Life*

- 21 Section 11 of the Constitution provides that everyone has the right to life.
- 22 The right to life is the most basic, most fundamental and supreme right which human beings are entitled to have. Where the right to life is not protected, the protection of all other human rights becomes either meaningless or less effective.

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<sup>17</sup> Soobramoney v Minister of Health, Kwa-Zulu-Natal 1998 (1) SA 765 (CC) at para 52.

<sup>18</sup> S Liebenberg 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 SAJHR at 12.



- 23 Academic authors state that the right to life must not be undermined by various acts and omissions that endanger it. The protection of life is, therefore, an essential pre-requisite to the full enjoyment of all other human rights.<sup>19</sup>
- 24 The Constitutional Court has recognised an obligation to fulfil the right to life in **S v Makwanyane**.<sup>20</sup> Sachs J wrote that *an 'objective approach in relation to the enjoyment of the right to life'* entailed that *'the State is under a duty to create conditions to enable all persons to enjoy the right'*.<sup>21</sup> This approach entails more than protecting the existence of citizens' lives from unlawful infringement by their peers. Instead the enjoyment of the right to 'human life' and to 'share in the experience of humanity' depends not only on biological existence and cognitive and intellectual ability but also on material means and access to social goods.
- 25 The SAHRC submits that the obligation to fulfil the right to life, therefore, involves satisfaction of the socio-economic dimensions of the right<sup>22</sup> and thus intersects with various positive obligations.
- 26 For persons to protect themselves from the COVID-19 virus, they need access to lifesaving means such as masks. Their inability to access them due to excessive pricing and their consequent exposure to a dangerous virus that has caused millions of deaths globally is a threat to their right to life, in particular, their ability to protect themselves. We submit that this conduct infringes the obligation to fulfil the right to life and is unjustifiable under section 36 of the Constitution.

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<sup>19</sup> F Menghistu 'The Satisfaction of Survival Requirements' in BG Ramcharan (ed) *The Right to Life in International Law* (1985) 63.

<sup>20</sup> [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1.

<sup>21</sup> Makwanyane (at para 353).

<sup>22</sup> C Scott 'The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights' (1989) 27 Osgoode Hall LJ 769, 781, 875, 878; Menghistu (supra) at 78.

### *The Right to Health care*

27 Section 27 of the Constitution states that:

*1. Everyone has the right to have access to (a) health care services, including reproductive health care; (b) sufficient food and water; and (c,) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.*

*2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.*

*3. No one may be refused emergency medical treatment.*

28 The rights contained in section 27 are two-fold. On one aspect, they guarantee a right to have access to health-care services and the right to a healthy environment.

29 In this matter, both aspects are triggered. Not only do the excessive prices charged by firms like Babelegi deprive vulnerable persons of access to health care implements such as face masks but they consequently result in them living in unhealthy environments, where they are unable to protect themselves from the Covid-19 virus.

### *The Rights of the Child*

30 Section 28 of the Constitution states that:

*(1) Every child has the right— (a) to a name and a nationality from birth; (b) to family care or parental care, or to appropriate alternative care when removed from the family environment; (c) to basic nutrition, shelter, basic health care services and social services; (d) to be protected from maltreatment, neglect, abuse or degradation; (e) to be protected from exploitative labour practices; (f) not to be required or permitted to perform*

*work or provide services that— (i) are inappropriate for a person of that child's age; or (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development; Chapter 2: Bill of Rights 12 (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be— (i) kept separately from detained persons over the age of 18 years; and (ii) treated in a manner, and kept in conditions, that take account of the child's age; (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.*

*(2) A child's best interests are of paramount importance in every matter concerning the child.*

*(3) In this section, "child" means a person under the age of 18 years.*

- 31 The provisions of the section are the primary source of children's rights and stem from several international instruments. The primary text is the Convention on the Rights of the Child ('CRC') which is discussed in some detail below.
- 32 The CRC was ratified by South Africa in June 1995. The African Charter on the Rights and Welfare of the Child ('ACRWC'), a regional instrument that was ratified by South Africa in January 2000, also informs the interpretation of section 28.<sup>23</sup> Children are protected in various sections of the Constitution because section 28 is not the only section that confers constitutional rights on children.<sup>24</sup>

<sup>23</sup> S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC), 2007 (2) SACR 539 (CC), 2007 (12) BCLR 1312 (CC) ('S v M') at para 31 (the Court identifies a specific provision relating to the importance of avoiding the imprisonment of mothers, which appears in article 30(1) of the ACRWC, but does not have a counterpart in the CRC). See, further, B Mezmur 'The African Children's Charter versus the UN Convention on the Rights of the Child: A Zero-Sum Game?' (2008) SAPR/PL 1.

<sup>24</sup> B Bekink & D Brand 'Constitutional Protection of Children' in CJ Davel (ed) Introduction to Child Law in South Africa (2000) 177-181; J M Kruger 'The Protection of Children's Rights in the South African Constitution: Reflections on the First Decade' (2007) 70 THRHR 239, 241-245.

- 33 This Court must bear in mind that section 28(2) requires that a child's best interests have paramount importance in every matter concerning the child. The plain meaning of the words indicates that the reach of section 28(2) cannot be limited to the rights contained in section 28(1) and 28(2) but that it must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in s 28(1).<sup>25</sup>
- 34 The SAHRC submits that this principle requires that the interests of children who stand to be affected receive due consideration. It calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely the interests of children who may be concerned.<sup>26</sup>
- 35 In *The Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp and Others*<sup>27</sup> the Constitutional Court held that a court should be slow to refuse evidence that may assist in arriving at a just outcome, in particular those relating to vulnerable groups like children. This dictum was recently accepted with approval in *Equal Education and Others v Minister of Basic Education and Others*<sup>28</sup>.
- 36 In this matter, the detrimental impact of excessive prices on children cannot be understated. The health impact of the COVID-19 virus on children is uncontroversial and must be accorded sufficient weight in this determination. The risks attendant to children are particularly evident in the case of school-going

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<sup>25</sup> Fitzpatrick at para 17.

<sup>26</sup> S v M at para 42.

<sup>27</sup> 2013 (2) SA 620 (CC) par 33

<sup>28</sup> (22588/2020) [2020] ZAGPPHC 306 (17 July 2020) at para 5

children who need to attend school and must wear masks to protect themselves and other learners in class.

- 37 In sum, the SAHRC submits that limiting access to such an essential item such as a face mask, by charging excessive prices and thereby profiting off of the vulnerable groups during a pandemic impairs the constitutional rights of consumers and customers particularly vulnerable persons to equality, dignity, life, healthcare and the best interests of the child principle.

## **INTERNATIONAL LAW OBLIGATIONS**

- 38 The provisions of the Bill of Rights cannot be considered in isolation. Section 39 of the Constitution provides that in interpreting the Bill of Rights, a court must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; it must consider international law and may consider foreign law.

- 39 In considering the constitutional considerations set out above, this court is mandated to consider the international law instruments that inform and underpin sections 9, 10, 11, 27 and 28 of the Constitution. This requires an interrogation of the relationship between the International Human Rights Instruments and the interpretation of section 8 of the Competition Act.

- 40 In this section, the SAHRC discusses the following instruments:

40.1 The Universal Declaration of Human Rights;<sup>29</sup>

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<sup>29</sup> Enacted in 1948.

40.2 The International Covenant on Civil and Political Right;<sup>30</sup>

40.3 The Convention on the Rights of the Child;<sup>31</sup> and

40.4 The International Covenant on Economic Social and Cultural Rights.<sup>32</sup>

41 These instruments all guarantee the constitutional rights identified above and are consequently implicated in the appeals.

### ***Universal Declaration of Human Rights***

42 The Universal Declaration of Human Rights (“UDHR”) is a foundational international human rights instrument. Article 2 states that *“everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.”*

43 Article 7 of the UDHR provides that *“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”*

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<sup>30</sup> Enacted in 1966.

<sup>31</sup> Enacted in 1989.

<sup>32</sup> Enacted in 1996.

- 44 Article 7 makes two important contributions to the UDHR that are of relevance in this matter. The open-ended statement that everyone is entitled to equal protection and the prohibition against incitement to discrimination. The thrust of Article 7 is protection by the law, which in turn requires the state or international body administering the legal system to affirmatively protect the individual. The phrase “without any discrimination” was intended to prohibit future types of discrimination that are not specifically enumerated in the Declaration.<sup>33</sup> The protections offered are considerable broad.
- 45 Article 25 of the UDHR states “*Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.*”
- 46 This provision has since been captured in the constitutions of various states that explicitly called for the protection of women and children and drew attention to the needs of children.<sup>34</sup>

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<sup>33</sup> Morsink, UDHR, pp. 45-47.

<sup>34</sup> UDHR: an archival commentary by Trudy Huskamp Peterson (2018) page 64.

***International Covenant on Civil and Political Rights and the International Covenant on Civil and Political Rights***

- 47 The International Covenant on Civil and Political Rights recognises the right to life in Article 6. General Comment no. 36 provides that “Article 6 of the International Covenant on Civil and Political Rights recognizes and protects the right to life of all human beings. The right to life is the supreme right from which no derogation is permitted, even in situations of armed conflict and other public emergencies that threaten the life of the nation.<sup>35</sup>
- 48 The right to life has crucial importance both for individuals and for society as a whole. It is most precious for its own sake as a right that inheres in every human being, but it also constitutes a fundamental right,<sup>36</sup> the effective protection of which is the prerequisite for the enjoyment of all other human rights and the content of which can be informed by other human rights.”
- 49 The International Covenant on Economic Social and Cultural Rights acknowledges the right to health in articles 10 and 12 and provides in its preamble that all of the rights protected in the Covenant are derived from the inherent dignity of all persons.

***The Convention on the Rights of the Child***

- 50 The CRC is a binding treaty, which South Africa ratified. Article 2 mandates states to ensure equal protection and to prevent any discrimination against

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<sup>35</sup> International Covenant on Civil and Political Rights, art. 4; Human Rights Committee, general comment No. 6 (1982) on the right to life, para. 1; general comment No. 14 (1984) on the right to life, para. 1; *Camargo v. Colombia*, Communication No. 45/1979, para. 13.1; *Baboeram-Adhin et al. v. Suriname*, communications Nos. 146/1983 and 148–154/1983, para. 14.3.

<sup>36</sup> UDHR Preamble.



children on any ground. Article 3 provides that the best interests of the child shall be a primary consideration in all matters. These provisions are also incorporated in section 28 of the Constitution and section 28 of the Children's Act.<sup>37</sup>

51 Article 24 of the CRC places a duty on states parties to ensure that children obtain the highest attainable standard of health. This includes the duty to provide the necessary medical assistance and health care.

52 The Committee on the Rights of the Child has released statements calling on states to ensure that responses to the pandemic, including restrictions and decisions on the allocation of resources, reflect the principle of the best interests of the child. In the context of children, the excessive pricing of facial masks has a detrimental effect on children who are consequently unable to access face masks and face exposure to COVID19.

53 The Committee on the Rights of the Child released General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24).<sup>38</sup>

54 In the context of health, it states that the:

*“Convention places an obligation on public and private social welfare institutions, courts of law, administrative authorities and legislative bodies to ensure that the best interests of the child are assessed and taken as a primary consideration in all actions affecting children. This principle must be observed in all health-related decisions concerning individual children or children as a group. Individual children's best interests should be based on their physical, emotional, social and*

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<sup>37</sup> Act 38 of 2005

<sup>38</sup> Adopted by the Committee at its sixty-second session (14 January – 1 February 2013).

*educational needs, age, sex, relationship with parents and caregivers, and their family and social background, and after having heard their views according to article 12 of the Convention.*

*The Committee urges States to place children's best interests at the centre of all decisions affecting their health and development, including the allocation of resources, and the development and implementation of policies and interventions that affect the underlying determinants of their health.* (own emphasis).

55 In its General Comment No. 4, the Committee underlined the following principles as they apply to children.

55.1 Article 6 highlights the States parties' obligation to ensure the survival, growth and development of the child, including the physical, mental, moral, spiritual and social dimensions of their development.

55.2 The notion of "the highest attainable standard of health" takes into account both the child's biological, social, cultural and economic preconditions and the State's available resources, supplemented by resources made available by other sources, including non-governmental organizations, the international community and the private sector.

55.3 The entitlements of children include access to a range of facilities, goods, services and conditions that provide equality of opportunity for every child to enjoy the highest attainable standard of health.<sup>39</sup>

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<sup>39</sup> General Comment 4.

### ***Ruggie's Principles***

- 56 In 2008, the Special Representative of the Secretary-General to the United Nations on the issue of human rights and transnational corporations and other business enterprises commenced the development of a business and human rights framework. The 2008 framework was the 'Protect, Respect and Remedy Framework' or 'Ruggie Framework', and was subsequently 'operationalized' in the United Nations Guiding Principles on Business and Human Rights ('Guiding Principles') from 2011. Both the Ruggie Framework and Guiding Principles nearly universally accepted by all relevant actors: Governments and the business community.
- 57 The 2011 UN Guiding Principles on Business and Human Rights (Ruggie's Principles), require states and business enterprises to comply with all applicable laws and respect human rights.
- 58 The goal of the principles is to recognize and realize the following principles:
- 58.1 States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
  - 58.2 The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; and
  - 58.3 The need for rights and obligations to be matched to appropriate and effective remedies when breached.

- 59 Principle 11 of the Guiding Principles directs business enterprises to ‘respect human rights’, irrespective of the ‘size, sector, operational context, ownership and structure’ of the business enterprise. Principle 11 means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved’. In the earlier reports, Ruggie similarly defines the corporate responsibility to respect rights as ‘*essentially [...] not to infringe on the rights of others*’, but adds that this means, ‘*put simply, to do no harm*’.<sup>40</sup> In the 2009 and 2010 reports, Ruggie summarises the corporate responsibility as ‘acting with due diligence to avoid infringing on the rights of others’.<sup>41</sup>
- 60 Whilst the principles contained in Ruggie’s Principles do not create binding international law or impose obligations on enterprises. The SAHRC contends that the value of the principles lie “in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved.” The Principles provide a sliding-scale approach for corporations based on their size and, ostensibly, their location against which their conduct must be viewed.
- 61 These principles are of relevance in this appeal as they illustrate the international law principles that bear reference on the conduct of enterprises where it impacts human rights.

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<sup>40</sup> Ruggie, Framework, para. 24; Ruggie, Clarifying, para. 3.

<sup>41</sup> Ruggie, Operationalizing, para.2; Ruggie.

62 The Convention on the Rights of Older Persons is presently being drafted. A number of submissions have been made in order to endure the protection of the rights of older persons. They include conduct that places the lives of older persons in danger. There have been serious reportage around how Covid-19 is particularly ravaging to older persons, particularly those with co-morbidities. This is why the issue of excessive pricing which excludes millions of South Africans from accessing face masks, for no reason other than corporate greed, is particularly detrimental to the health and in most cases the lives of older persons.

63 At the domestic level the Older persons Act<sup>42</sup> imposes various obligations to ensure that the lives of older persons are protected and that they are not exposed to risks that endanger their lives. It is on this basis that we ask that this Court considers the rights of older persons who may have suffered from the conduct of Babelegi, who admitted to have increased its mark-up in excess of 500% during the complaint period.

### **The role for appropriate penalties**

64 Babelegi appeals against the imposition of a sanction against it by the Tribunal.

65 The SAHRC contends that administrative penalties play an important role in the context of a global pandemic and the impact of excessive pricing on vulnerable persons.

66 In determining an appropriate penalty, section 59(3) of the Act requires that the following factors be considered:

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<sup>42</sup> Act 13 of 2006.

- (a) *the nature, duration, gravity and extent of the contravention;*
- (b) *any loss or damage suffered as a result of the contravention;*
- (c) *the behaviour of the respondent;*
- (d) *the market circumstances in which the contravention took place, including whether, and to what extent, the contravention had an impact upon small and medium businesses and firms owned or controlled by historically disadvantaged persons;*
- (e) *the level of profit derived from the contravention;*
- (f) *the degree to which the respondent has co-operated with the Competition Commission and the Competition Tribunal;*
- (g) *whether the respondent has previously been found in contravention of this Act; and*
- (h) *whether the conduct has previously been found to be a contravention of this Act or is substantially the same as conduct regarding which Guidelines have been issued by the Competition Commission in terms of section 79.*

67 In determining an appropriate penalty, regard must not only be had to the above factors but also the overarching purpose of administrative penalties.

68 Firstly, regard must be given to the constitutional dispensation in terms of which the Act is located, and the further injunction of section 39(2) of the Constitution that, in interpreting any legislation, a court must promote the spirit, purport and object of the Bill of Rights. From the above, it is evident that the doctrine of proportionality constitutes a further applicable factor in the determination of an appropriate constitutional penalty.<sup>43</sup>

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<sup>43</sup> Southern Pipeline Contractors and Another v Competition Commission (105/CAC/Dec10, 106/CAC/Dec10) [2011] ZACAC 6 para 9.

- 69 The Supreme Court of Appeal in ***Woodlands Dairy v Competition Commission***<sup>44</sup> explained that a sanction must be effective when it stated that “*the so-called ‘administrative penalties’ (more appropriately referred to as ‘fines’ in s 59(2)) bear a close resemblance to criminal penalties.*”<sup>45</sup>
- 70 Secondly, the approach adopted by the Supreme Court of Appeal requires that a penalty should be proportional in severity to the degree of blameworthiness of the offending party, the nature of the offence and its effect on the South African economy in general and consumers in particular. These factors must be assessed in light of the detrimental effect of excessive pricing on consumers and customers, in particular the elderly and children.
- 71 Thirdly, the Court stated in ***Federal-Mogul Southern Africa v Competition Commission***<sup>46</sup> that a balance must be struck. The imposition of an administrative penalty should not only promote the important objective of deterrence, but that sight should not be lost of fairness to the offending party. In particular, a penalty should not be imposed to destroy the business of the offending party but that at the same time it should serve as a deterrent in that it aims to reduce the incentive on the part of the potential transgressor to engage in anticompetitive practices.<sup>47</sup>
- 72 In sum, the SAHRC contends that the CAC must guarantee that appropriate penalties are imposed. This is because the most optimal of fines has been

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<sup>44</sup> 2010 (6) SA 108 (SCA).

<sup>45</sup> Ibid at para 10.

<sup>46</sup> [2005] 1 CPLR 50 CPAC at 67 – 72.

<sup>47</sup> Joshua ‘The European Commission’s New Fining Guidelines and How They May Affect Cartel Enforcement’ George Mason Law Review (13 September 2006) at 5 and 7.

described by commentators as one that fulfils the aim of deterrence.<sup>48</sup> The efficacy or appropriateness of an administrative penalty should therefore be measured with reference to the degree of deterrence that that penalty will ultimately yield.<sup>49</sup>

73 This principle is uncontroversial and has been accepted by the Tribunal and in some instances by this Court.

74 The SAHRC contends that deterrence is best achieved by setting the quantum of a fine as high as possible, provided that:

74.1 The fine does not exceed a firm's ability to pay;

74.2 The burden of the fine is proportional to the actual harm caused to society; and

74.3 The gravity of the fine does not discourage firms from engaging in conduct which would otherwise represent an efficiency gain.<sup>50</sup>

## CONCLUSION

75 In sum, these written submissions set out the public law and public interest considerations that must bear on this Court as it determines this dispute.

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<sup>48</sup> Wehmhörner 'Optimal Fining Policies' Paper presented at the Remedies and Sanctions in Competition Policy Conference, Amsterdam Centre for Law and Economics, February 2005 at 8.

<sup>49</sup> See also Joshua at 5 and 7; *The Competition Commission of South Africa v Federal-Mogul Aftermarket Southern Africa (Pty) Ltd and others* – Case Number: 08/CR/Mar01 ("the Federal Mogul case") at para 166.

<sup>50</sup> Wehmhörner (n 12) at 7-8. Wehmhörner suggests that market allocation and horizontal price-fixing may, in certain circumstances, represent an efficiency gain where cost savings are generated, and profit is maximised for the market as a whole. See also WPJ Wils 'Optimal Antitrust Fines: Theory and Practice' *World Competition* Vol 29, No 2, June 2006 at 18-22.



76 These submissions further set out the international obligations that South Africa has consented to be bound by and which this court is enjoined to consider in reaching its decision, in accordance with section 39 of the Constitution.

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**CHAMBERS, SANDTON**

**1 SEPTEMBER 2020**