

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

CAC CASE NO.: 186/CAC/JUN20  
CT CASE NO.: 186CR008APR20  
CC CASE NO.: 2020APR0035

In the application of:

**HEALTH JUSTICE INITIATIVE**

First Applicant

**OPEN SECRETS NPC**

Second Applicant

and

**BABELEGI WORKWEAR AND INDUSTRIAL SUPPLIES CC**

First Respondent

**THE COMPETITION COMMISSION**

Second Respondent

In re the appeal of:

**BABELEGI WORKWEAR AND INDUSTRIAL SUPPLIES CC**

Appellant

and

**THE COMPETITION COMMISSION**

Respondent

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**HEALTH JUSTICE INITIATIVE AND OPEN SECRETS' FOUNDING AFFIDAVIT:  
APPLICATION TO ADDUCE NEW EVIDENCE**

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I, the undersigned,

**Fatima Hassan**

do hereby make oath and state as follows:

1 I am the Head of the first applicant ("**HJI**").

- 2 I am authorised to bring this application and to depose to this affidavit on behalf of HJI and the second applicant, Open Secrets NPC ("**Open Secrets**"). A confirmatory affidavit of Open Secrets is attached, marked "**FA 1**".
- 3 The facts that I depose to are true and correct and are, save where otherwise indicated, within my personal knowledge.
- 4 Where I make legal submissions, I rely on advice that HJI and Open Secrets have received from their legal representatives.

## **INTRODUCTION**

- 5 On 21 August 2020 HJI and Open Secrets ("**the amici**") were admitted as amicus curiae in the appeal of *Babelegi Workwear Overall Manufacturers & Industrial Supplies CC and the Competition Commission*. The amici had previously been admitted as amicus curiae in the appeal of *Dis-Chem Pharmacies (Pty) Ltd and the Competition Commission* dealing with substantially similar issues. Dis-Chem withdrew its appeal on 19 August 2020.
- 6 The amici approach this Court in terms of Rule 28 of the Rules for the Conduct of Proceedings in the Competition Appeal Court ("**CAC Rules**") for leave to adduce further evidence which does not appear in the record of appeal before this Court.
- 7 The amici have reviewed the non-confidential record in this appeal. It is clear from the record that there is little evidence before the Court dealing with the broader consequences of the Covid-19 pandemic, and the constitutional and

human rights implications of excessive pricing of personal protective equipment (“**PPE**”) during a national health crisis or a pandemic.

8 Open Secrets and HJI are non-profit organisations with a focus on, and expertise in, healthcare and the role of private organisations in the fulfilment and infringement of constitutional rights. The amici's experience in these fields provides unique insight into the various ways in which the conduct of private organisations, generally, and within the health sector, can implicate human rights.

9 The amici intend to present the evidence set out below in order to establish that excessive pricing of personal protective equipment (“**PPE**”) and medical supplies during a global pandemic and public health crisis, such as the present one:

9.1 threatens the right to access to healthcare, life, and dignity;

9.2 disproportionately affects poor and vulnerable members of society; and

9.3 is not adequately regulated through current medical supplies price regulation and, therefore, must be appropriately dealt with by competition authorities.

10 This evidence will enable the amici to advance their primary legal argument that, in the context of a pandemic, private organisations who trade in PPE and medical supplies are bearers of constitutional and human rights obligations towards members of the public. These obligations must be incorporated into the jurisprudence adopted by this Court regarding the pricing of PPE products and medical supplies during a pandemic, particularly in regard to:

- 10.1 the proper interpretation of section 8 of the Competition Act 89 of 1998 (“**the Competition Act**”);
  - 10.2 the determination of market power in the context of a pandemic;
  - 10.3 the kinds of justifications for price increases during a pandemic that should be acceptable to the Competition Tribunal (“**the Tribunal**”) or this Court;
  - 10.4 the threshold for the difference in the price charged by an organisation that supplies PPE products and medical supplies and the competitive price; and
  - 10.5 the need for organisations to be held accountable through appropriate penalties for economic crimes such as price gouging.
- 11 I am advised that, for an amicus to be granted leave to adduce new evidence before an appeal court, the following requirements must be met:
- 11.1 there must be a sufficient explanation for why the evidence was not introduced before the court *a quo*;
  - 11.2 there must be a *prima facie* likelihood that the evidence is true; and
  - 11.3 the evidence must be materially relevant to the outcome.
- 12 I respectfully submit that this legal standard – which I address more fully later in this affidavit – is met in this case.

- 13 The COVID-19 pandemic poses an unprecedented global health crisis. This is the worst pandemic in over 100 years since the ‘Spanish Flu’.
  
- 14 This is the first Covid-19 related excessive pricing case prosecuted by the Competition Commission (“**the Commission**”). It is not, however, an isolated incident. The Commission received thousands of complaints in respect of excessive pricing by retailers and suppliers during the national state of disaster (record p 211 para 25; Tribunal’s Reasons p563 para 18). South Africa has never experienced a pandemic of this magnitude. The COVID-19 global pandemic accordingly raises novel challenges: it presents not only global health and economic crises, but also significant legal challenges. Our law is therefore being stretched and developed in new and dramatic ways in order to deal with these crises.
  
- 15 In this matter, the Tribunal found that the Covid-19 health crisis, and its economic effects, *“is the prism through which Babelegi’s pricing conduct must be assessed”* (record p575 para 69). While the parties in the matter focussed on the economic consequences of the Covid-19 pandemic, the amici stress that the constitutional and human rights implications of the Covid-19 public health crisis provide an equally important context to the determination of excessive pricing conduct. In this regard, I am advised that our Courts have recently underscored the constitutional and human rights dimensions of the Covid-19 pandemic.
  
- 16 In the following sections of this affidavit:
  - 16.1 first, I set out salient facts about the COVID-19 pandemic;

- 16.2 second, I provide an overview of the proposed evidence; and
- 16.3 finally, I demonstrate that the proposed evidence meets the test for admission.

## THE COVID-19 PANDEMIC

- 17 The COVID-19 pandemic poses an unprecedented global health crisis.
- 18 I am advised that, over the last few months, our Courts have repeatedly made clear the extraordinary scale of harm and devastation that Covid-19 threatens to bring about and the need for government and all citizens to respond to this threat.
- 18.1 In *Democratic Alliance v President*, the Full Court of the Pretoria High Court explained that the “invasion of the Covid-19 virus into South Africa, threaten[s] untold physical, social and economic harm” (*Democratic Alliance v President of the Republic of South Africa and Others (Economic Freedom Fighters Intervening)* [2020] ZAGPPHC 237 (19 June 2020) at para 1.)
- 18.2 In *Mohammed v President*, the Pretoria High Court held:
- “This pandemic poses a serious threat to every person throughout South Africa and their right to life, dignity, freedom of movement, right to access healthcare and their right to a clean, safe and healthy environment. In a country where we are dominated by so much poverty, where people don’t have access to basic amenities such as clean running water, housing, food and healthcare, the potential risk to those households poses a further threat which places an additional burden on the Government to combat – the risk then, in light of those circumstances rises exponentially” (Mohamed and Others v President*

*of the Republic of South Africa and Others [2020] 2 All SA 844 (GP) at para 62.)*

18.3 In *Moela v Habib*, the Johannesburg High Court took a similar approach:

*“The world has changed, and we are all in a quandary as to how to go about our daily lives in view of the pandemic. I would implore the applicants and all other students seeking to ignore the Directives issued by the University, in the spirit of Ubuntu, to follow the protocols issued by the University, the President, the NCID and the WHO. This is an unprecedented time for all of us. We are stronger if we work together. Nkosi sikelel’ iAfrica.” (Moela and Another v Habib and Another (2020/9215) [2020] ZAGPJHC 69 at para 60).*

19 COVID-19’s underlying virus was first identified in late December 2019. By 30 January 2020, the World Health Organisation (“**WHO**”) had declared the outbreak a public health emergency of international concern. On 11 March 2020, the WHO had declared the COVID-19 outbreak a pandemic.

20 In South Africa, the COVID-19 pandemic moved as rapidly as elsewhere and increased at an alarming rate over a short period of time. South Africa’s first confirmed case was reported on 5 March 2020. By 15 March 2020, when the national state of disaster was declared, there were 61 cases. By 23 March 2020, when President Ramaphosa announced the planned lockdown, there were 402 cases. At the start of the lockdown, which took effect on 26 March 2020, the numbers had soared to 1170. South Africa’s cases were on an exponential trajectory. On the day the lockdown started, the Minister of Health announced the first death caused by Covid-19 in the country.

- 21 The exponential curve threatened to over-burden the health system, to the point of collapse. It was therefore crucial to “*flatten the curve*” by promptly implementing drastic measures in order to delay the peak of the outbreak so that steps could be taken to ensure that the country's health system was able meet the increased demands on its services. Significantly, the government needed time to, amongst others, procure required resources such as PPE and ventilators; increase the number of hospital beds; and establish field hospitals.
- 22 The initial lockdown assisted in slowing community transmission and “*flattening of the curve*”. It allowed crucial time to:
- 22.1 expand health care capacity, including setting up field hospitals;
  - 22.2 prepare and equip healthcare facilities, including PPE and ventilators;  
and
  - 22.3 scale up testing and prevention programmes. This includes screening, testing, contact tracing, and the isolation of infected persons.
- 23 The private sector, community organisations, and South Africans have also had to take certain preventive measures needed to reduce transmission of the virus. By way of example, all workplaces are required to adopt and implement stringent policies and protocols aimed at preventing further transmissions and, at worst, reducing the rate of spread of the virus in the workplace. Employers were also required to adjust work schedules and procure necessary protective equipment.
- 24 Following the initial “*hard lockdown*” there was then a slight relaxation of restrictions to Alert Level 4. Thereafter, and given the state of readiness of our

healthcare facilities and the need to balance lives and livelihoods, the government determined that South Africa was ready to move to Alert Level Three. Recently, on 18 August 2020, the country moved to Alert Level Two.

25 The COVID-19 pandemic presents an extraordinary and unprecedented health crisis and situation, unlike any that the country has faced thus far. There is no rulebook or certainty on how best to manage the virus and the effects of the virus.

26 At this stage, the South African government uses a risk-based approach to manage the virus while ensuring that lives and livelihoods are secured, while the virus is with us.

27 But the critical point is that the battle is far from won. The government and the public at large need to continue to take all measures they reasonably can to combat the spread of the virus and the speed of such spread within the country.

28 This is especially so as medical research has so far been outpaced by the rapid spread of SARS-CoV-2, which has left health workers and policy makers at a disadvantage. Our understanding of SARS-CoV-2 and COVID-19 changes on an almost daily basis as the results of additional scientific studies become available. This has been the global reality of trying to study this new threat to health while managing an active and evolving pandemic.

## **OVERVIEW OF THE PROPOSED EVIDENCE**

29 The amici request that this Court admit the evidence of four experts:

- 29.1 **Dr Tracey Naledi**, a public health physician, and the Deputy Dean: Health Services at the School of Public Health, University of Cape Town (UCT). Dr Naledi was previously the Chief Director: Health Programmes in the Western Cape Department of Health. Dr Naledi's curriculum vitae is attached as "**NN 1**" to her expert affidavit, which is attached as "**FA 2**".
- 29.2 **Mr Andy Gray**, a pharmacist and Senior Lecturer in the Division of Pharmacology Discipline of Pharmaceutical Sciences at the School of Health Sciences at the University of KwaZulu-Natal in South Africa. Andy Gray's curriculum vitae is attached to his expert affidavit as "**AG 1**", which is attached as "**FA 3**".
- 29.3 **Ihsaan Bassier**, an academic, and PhD candidate in Economics at the University of Massachusetts, with a research focus on labour and the political economy of development and the need for state intervention to provide social assistance in the time of a pandemic. Ihsaan Bassier's curriculum vitae is attached to his expert affidavit as "**IB 1**", which is attached as "**FA 4**".
- 29.4 **Professor David Bilchitz**, Professor of Fundamental Rights and Constitutional Law at the University of Johannesburg and Director of the South African Institute for Advanced Constitutional, Public Human Rights and International Law (SAIFAC) since 2009. Professor Bilchitz's curriculum vitae is attached to his expert affidavit as "**DB 1**", which is attached as "**FA 5**".

30 In this section, I provide an overview of the evidence of each expert. In the following section, I explain how the evidence provides the factual foundation for the legal submissions that the amici will advance, and the manner in which the evidence is relevant, true and required in order for this Court to determine the appeal.

***Dr Tracey Naledi***

31 Dr Naledi provides an overview of the impact of Covid-19 on South Africa's health system and on access to health services. She emphasises the important role of prevention in managing the pandemic, and explains the peculiar challenges facing many South Africans in trying to take the preventative measures – such as wearing face-masks.

32 Dr Naledi outlines the challenges faced by the health system – the key vehicle to deliver health rights to people in South Africa. She argues that in the context of a vulnerable and struggling public health system, it is absolutely essential to prevent and manage a communicable and fast-moving virus within our country. Non-pharmaceutical interventions are being proven to be lifesaving, and are a key element of many countries, including South Africa's, public health response to the pandemic.

33 Dr Naledi also explains how socio-economic factors influence access to health services and health outcomes during a pandemic. This is particularly noticeable in the present pandemic where communities are being asked to prevent the disease themselves through behaviour change or individual action such as wearing a mask in public. These steps are extremely difficult for large sections

of society who rely on public transport, do not have access to proper sanitation, and live in densely crowded neighbourhoods. The state has not implemented a national roll-out of face-masks, instead, it requires everyone to purchase or make their own mask. In this context, the excessive pricing of PPE creates a further (and potentially insurmountable) barrier to access to healthcare and has the potential to constrain the population's response to Covid-19.

***Ihsaan Bassier***

- 34 Ihsaan Bassier shares his expertise and research on the impact of COVID-19, and the national lockdown, on South Africans who are on the lower economic spectrum. He provides evidence of the devastating job losses in the formal and informal employment sectors during this period and the increase in poverty flowing from the loss of income.
- 35 He explains how people's socio-economic circumstances impact their access to PPE because:
- 35.1 people in lower social and economic classes bear the brunt of the socio-economic consequences of the pandemic. This means that increases to the prices of essential items, such as PPE to reduce risk of infection from COVID-19, become substantially more prohibitive;
  - 35.2 people in lower social and economic classes are often required to work at the 'frontline' of the pandemic or are unable to negotiate appropriate social isolation in the workplace, or at home, and are in particular need of PPE.

36 In his view, access to essential preventative equipment cannot be considered or addressed in isolation from this context. Access to essential products became substantially constrained for large proportions of the South African population. For this reason, he concludes that excessive pricing of PPE and medical supplies in a pandemic has a disproportionate effect on people in lower social and economic classes in our country.

**Andy Gray**

37 Andy Gray provides an overview of South Africa's regulatory pricing mechanisms introduced through the National Drug Policy in 1996.

38 Andy Gray explains that the pricing of PPE is not covered by South Africa's current health pricing regime. At this stage, excessive pricing of certain essential medical supplies for the prevention of COVID-19, such as face-masks must be regulated by the Competition Act and emergency regulations. Andy Gray stresses that:

38.1 access to essential medicines and health commodities must be addressed within the socio-political and economic context of the country;

38.2 the market alone cannot be relied upon to deliver affordable health products during a pandemic when demand can be expected to outstrip supply; and

38.3 an appropriate regulatory system is needed to protect the public, and public health, against the potential of exploitation and harm.

- 39 Andy Gray describes the health sector reforms implemented over the last three decades including the creation of the South African Health Products Regulatory Authority (“**SAHRPA**”), a statutory body responsible for health product regulation (but not for pricing interventions), the Single Exit Price (“**SEP**”) regulating the pricing of medicines in the private sector, and the phased introduction of medical devices and in vitro diagnostic devices (“**IVDs**”) price regulation through the Medicines and Related Substances Control Act No. 101 of 1965 and the Regulations thereto.
- 40 He discusses the limitations of the current health pricing regime, including:
- 40.1 PPE is exempted from the ambit of the SEP review and policy proposals. The opportunity to issue regulations for the selection of essential medical devices is provided by the National Health Act 61 of 2003, but has yet to be used to its full capacity;
  - 40.2 the SEP is not designed to remedy unjustified pricing conduct or behaviour. For example, it permits a dominant player – even a single dominant manufacturer / supplier – to determine the initial private sector entry price of a medicine; and
  - 40.3 a non-surgical mask is not currently considered a medical device for the purposes of the Medical devices and IVD price regulation.
- 41 In consequence of the position described above, the provisions of the Competition Act and/or the emergency regulations currently in place are the sole means by which to regulate pricing and pricing conduct for the items listed above.

***Professor David Bilchitz***

- 42 Professor Bilchitz provides his expert views on the need for corporate accountability in times of crisis, such as those created by the COVID-19 pandemic.
- 43 He provides an overview of the recent research and jurisprudential developments on the intersection of business and human rights. Professor Bilchitz concludes that the international trend is for greater accountability for corporations in relation to their impact on fundamental rights. This is mirrored in the South African jurisprudence and section 8 of the Constitution where non-state actors such as corporations clearly have constitutional obligations (both negative, and in some cases, positive) which are determined on a case by case basis. Professor Bilchitz provides a useful comparative analysis of the position in Colombia as well.
- 44 Using this framework and against this backdrop, Professor Bilchitz undertakes an analysis of the conduct of excessive pricing for medical equipment such as face-masks during the outbreak of a potentially life-threatening disease, and the obligations of businesses in this context.
- 45 He concludes that the conditions created by the pandemic support the finding both of the duty of the state to ensure heightened protections for its residents against harm to their fundamental rights during times of pandemic, but also the obligations of corporations themselves to behave with a heightened sensitivity to vulnerability during such a period.

## THE PROPOSED EVIDENCE MEETS THE REQUIREMENTS FOR ADMISSION

46 In the ordinary course, section 16(8) of the rules of the Supreme Court of Appeal limits an amicus curiae to the record on appeal. But the Court may vary this position through its inherent power to regulate its own processes.

47 The overarching consideration is whether the admission of further evidence would promote the interests of justice.

48 The Supreme Court of Appeal has held that it may permit an amicus to adduce evidence if the following requirements are met:

48.1 a sufficient explanation is provided for why the evidence was not introduced before the court *a quo*;

48.2 there is a *prima facie* likelihood that the evidence is true; and

48.3 the evidence is materially relevant to the outcome.

49 I respectfully submit that the interests of justice would be best promoted if the evidence set out below is admitted by this Court and included in the appeal record. I am advised that the Constitutional Court and Supreme Court of Appeal, when considering the interests of justice, have recognised that an amici's legal submissions will in many cases draw on broader considerations and inevitably be premised on facts and evidence not before the Court. This is so in the present case where the proposed evidence will provide the factual foundation and context for the amici's legal submissions.

50 It is common cause that the Commission was inundated with excessive pricing complaints in the first few weeks of the national lockdown (record p32 para 77). It was required to consider and investigate all complaints and formulate its referrals against the offending firms without delay. The initial matter was brought on an extremely urgent basis before the Tribunal and within two days of the Commission's decision to prosecute the matter (record p30 para 70 & p207 para 11). Moreover, it also bears emphasis that this was the first Covid-19 related case to be referred to the Tribunal for determination (record p207 para 11). It is therefore understandable why the current record may have gaps and deficiencies, and does not include evidence dealing with all aspects relevant to the determination of the case in its proper context.

51 In any event, the urgency in the matter has now passed. This is the appropriate moment for additional evidence to be included in the record to ensure that the appeal is determined with reference to all available information.

***Explanation for not providing evidence at the Tribunal***

52 The amici did not lead this evidence before the Tribunal because it was not a party to those proceedings and did not apply to be admitted as an *amicus curiae* then.

53 The amici were not aware that the Commission had initiated a complaint against Babelegi on 23 March 2020 and that it referred the matter to the Tribunal for prosecution on 9 April 2020. The proceedings received little media coverage at the time and, in any event, HJI was only established in July 2020.

- 54 The amici originally intended to intervene in the Dis-Chem appeal. The present matter was brought to the amici's attention on 14 August 2020 when ENS, attorneys for Dis-Chem, pointed out that the Babelegi appeal dealt with substantially the same issues as the Dis-Chem appeal.
- 55 The amici decided, at that stage, that they would confine their involvement to the Dis-Chem appeal. Dis-Chem, however, withdrew its appeal after the amici, and later the South African Human Rights Commission ("**SAHRC**"), were admitted as amicus curiae on Friday 21 August 2020.
- 56 At this stage it became apparent to the amici that it must intervene as amicus curiae in the Babelegi appeal so that it could advance its legal submissions and, if necessary, ensure that its evidence was before Court. In particular, the amici apprehended that there would be little, if any, evidence in the appeal record before the Court dealing with the broader consequences of the Covid-19 pandemic, and the constitutional and human rights implications of excessive pricing of PPE during an unprecedented health crisis or pandemic.
- 57 The amici obtained the full record on Friday, 21 August 2020. Our legal representatives, colleagues and I perused the record and found similar deficiencies in the factual information before the Tribunal. The record accordingly bore out the amici's concerns regarding the insufficiency of the record.
- 58 For this reason, the amici considered it necessary and important to pursue this application to adduce new evidence in the present appeal. We were admitted by consent on the same day, with the Court issuing its directions later that evening, conforming with the time- lines requested by Babelegi, being those issued by the

Court in the Dis-Chem matter. The Commission also consented to the amici adducing further evidence.

***The evidence is incontrovertible***

59 The evidence that the amici wish to adduce on appeal is true and in most cases, incontrovertible. The evidence does not raise new factual disputes and does not address the particular facts of Babelegi's conduct. It is also unlikely that either party will dispute the evidence, or that it would be able to do so.

60 The evidence is provided by experts in their fields, and is based on their personal experience and professional research.

60.1 Dr Naledi provides first-hand evidence of her experience regarding the impact of the virus on the already stretched public and private health care systems. Dr Naledi has personally observed how this virus and disease is creating havoc on our already stretched public and private health care systems, thereby placing frontline workers at even greater risk. Dr Naledi provides statistics from the South African Medical Research Council (SAMRC), peer-reviewed journals and the WHO. These official statistics are unlikely to be disputed by either the Commission or Babelegi.

60.2 Andy Gray draws on his extensive subject matter experience and research, and provides an explanation of the current pricing regulation for medical supplies and offers an expert opinion on the limitations of this legislative framework in the context of a pandemic, and the need for competition law to step into the breach. His evidence is derived from

his own extensive research, published in peer-reviewed journals on this topic.

60.3 Ihsaan Bassier shares his expertise and research on the socio-economic consequences of Covid-19 and the national lockdown. His evidence is derived from his own published research.

60.4 Professor Bilchitz draws on his extensive experience, and research, to analyse the conduct of firms trading in PPE during times of health emergencies. His conclusions are based on his extensive academic research and domestic and international jurisprudence.

61 I note that it was common cause before the Tribunal that face-masks are an essential product and a necessary one to respond to the pandemic (record p524 & p533). The expert evidence proceeds on this basis.

***The evidence is materially relevant to the outcome of the appeal***

62 The Tribunal accepted the Commission's contention that the complaint referral must be considered within the context of the Covid-19 outbreak and its impact on the world, in general, and on South Africa in particular (record p558 para 6 and 9).

63 The Tribunal found that "Covid-19 is an ongoing health-related crisis with both economic and social consequences for South Africa" and that "in an excessive pricing conduct context, the economic effects of Covid-19 are relevant" (record 561 para 12).

- 64 The amici submit that it is not only the economic impact of the pandemic that is relevant to the current matter and the legal issues at hand. The full context of Covid-19 includes a consideration of how the pandemic exacerbates the strains and challenges of the South African healthcare system, how socio-economic factors determine access to healthcare and PPE, the inability of the current pricing framework to regulate price gouging, and the broader social consequences and the human rights implications of the pandemic.
- 65 This is the evidence of the amici's expert witnesses. It will support the amici's case that an exceptional, and human-rights based, approach to excessive pricing jurisprudence is warranted in the context of a pandemic.
- 66 Evidence of this nature has not been adduced by either party and is not part of the record before this Court.
- 66.1 the Commission's case does not focus on the broader impact of the pandemic but focusses more narrowly on the economic consequences of COVID-19;
- 66.2 the Commission describes the COVID-19 pandemic in just two pages of its referral affidavit (record p10 – 11). The Commission describes the government's initial steps to prepare for the inevitable spread of coronavirus to South Africa, and later its plans and action taken to manage the pandemic. The Commission's evidence deals primarily with the increased demand for non-surgical masks in South Africa;
- 66.3 the Commission does note in the referral affidavit that the livelihoods and incomes of millions of South Africans have been impacted by the

national state of disaster and that this requires the rights and interests of consumers to be protected to the greatest degree possible (record p31 para 76);

66.4 the Commission's referral is supported by the expert evidence of Themba lethu Buthelezi, a principal economist in the Economic Research Bureau Division of the Competition Commission (record p90). Themba lethu Buthelezi explains the economic reasons for temporary market power during disaster periods. She explains how and why from an economic perspective masks are essential items during this pandemic (record p102). Much of her evidence comprises the economic assessment of Babelegi's price increases in the context of the pandemic;

66.5 the respondent's expert report by FTT Consultants focusses on its view of market definition and dominance, market shares and excessive pricing. It does not address issues arising from the pandemic (record p278). The Tribunal noted that the FTI report produced by the respondents did not consider non-ordinary market circumstances in the context of Covid-19 (record p574 para 67);

66.6 similarly, in the Dis-Chem matter, the Tribunal noted that Dis-Chem's expert report did not deal with the notion of market power under economic conditions associated with COVID-19 (para 95). The Tribunal resorted to reliance on several media reports and academic articles in reaching its conclusion on the exercise of market power by Dis-Chem in these circumstances.

67 In addition, I am advised that evidence relating to the practical impact of a particular construction of legislation – in this case sections 7 and 8 of the Competition Act – will ordinarily be materially relevant.

## **CONCLUSION**

68 For all the reasons set out in this affidavit, the amici ask that the relief set out in of the notice of motion be granted.

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**FATIMA HASSAN**

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at \_\_\_\_\_ on this the \_\_\_\_ day of August 2020, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.

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**COMMISSIONER OF OATHS**

**Full names:**

**Address:**

**Capacity:**