competitiontribunal
SOUTH AFRICA

COMPETITION TRIBUNAL OF SOUTH AFRICA

CT CASE NO: COVCR113Sep20

In the matter between:

THE COMPETITION COMMISSION Applicant

And

TSUTSUMANI BUSINESS ENTERPRISES CC Respondent

Panel:	M Mazwai (Presiding Member)
	A Wessels (Tribunal Member)
	A Ndoni (Tribunal Member)
Heard on:	8 March 2021
Order and Reasons Issued on:	28 April 2022

REASONS FOR DECISION AND ORDER

INTRODUCTION

[1] The Covid-19 virus and its effect on day-to-day life in South Africa and globally is now common knowledge. Indeed, this Tribunal and the Competition Appeal Court ("CAC") have had cause to consider the economic effect of the pandemic on the South African economy broadly and, in particular, on the supply and

demand of essential items such as masks and hand sanitiser in the *Babelegi*[1] and *Dis-Chem*[2] cases.

[2] This is an excessive pricing complaint brought by the Competition Commission ("Commission") against Tsutsumani Business Enterprises CC ("Tsutsumani") in terms of section 50(1) of the Competition Act, 89 of 1998, as amended ("the Act").

[3] It is the first case that falls to be determined under the Consumer and Customer Protection and National Disaster Management Regulations and Directions in Government[3] ("the Consumer Protection Regulations"), read with section 8(1)(a) of the Act. This is because while the Tribunal and CAC have previously considered excessive pricing in the context of a national disaster in the *Babelegi* decisions, the Consumer Protection Regulations were not yet in force at the time of Babelegi's conduct. It is also the first excessive pricing case referred by the Commission in the context of a tender process during the pandemic.

[4] The Commission alleges that Tsutsumani has contravened section 8(1)(a) of the Act, read with Regulation 4 of the Consumer Protection Regulations by charging excessive prices to the South African Police Services ("SAPS"), for the supply of bulk 3-ply surgical face masks ("masks") during the period 5 April 2020 to 29 April 2020.

[5] Tsutsumani was responding to a request for a quotation issued by the SAPS, necessitated by the Covid-19 pandemic and the National State of Disaster which required all SAPS staff to wear masks. SAPS required 9 million masks per month for use by its staff in the frontline of combating the corona virus during the lockdown.

---

[1] Competition Commission and Babelegi Workwear Overall Manufacturers and Industrial Suppliers CC CR003Apr20 ("*Babelegi*") and Babelegi Workwear and Industrial Supplies CC v Competition Commission of South Africa 186/CAC/JUN2020 ("*Babelegi appeal*").
[2] Competition Commission and Dis-Chem Pharmacies CR008Apr20 ("*Dis-Chem*").
[3] Published under Notice No. 350 of Government Gazette no. 43116, dated 19 March 2020.

[6] The matter was initially referred to us by the Commission pursuant to the Tribunal Rules for Covid-19 Excessive Pricing Complaint Referrals[4] ("the Covid-19 Rules") which allowed for the matter to be dealt with on an urgent basis. The matter was however not heard on an urgent basis due to delays in Tsutsumani complying with filing timelines in terms of the Tribunal Rules referred to herein. At the hearing the Commission confirmed that urgency was no longer a live issue.

[7] The matter was heard on the basis of a set of "agreed facts" as between the Commission and Tsutsumani as both parties agreed, following a pre-hearing held by the Tribunal, that the matter could be decided on the papers alone, without the need for oral evidence, as much was common cause between them.

[8] The Commission seeks the following relief against Tsutsumani:

8.1 an interdict and restraint preventing Tsutsumani from engaging in any further conduct in contravention of section 8(1)(a) of the Act;

8.2 the payment by Tsutsumani of an administrative penalty, in terms of section 58(1)(a)(iii) of the Act, equal to ten percent of Tsutsumani's annual turnover in the Republic and its exports from the Republic during its preceding financial year.

[9] We found that Tsutsumani had contravened section 8(1)(a) of the Act during the complaint period, read with Regulation 4 of the Consumer Protection Regulations.

[10] We imposed an administrative penalty on Tsutsumani of R3 441 689.10.

[11] We concluded that an interdict was not an appropriate remedy in this case.

[12] Our reasons for this decision follow.

---

[4] Competition Tribunal Rules for Covid-19 Excessive Pricing Complaint Referrals GN 448 *GG* 43205, 3 April 2020, read in conjunction with the Competition Tribunal's Directive for Covid-19 Excessive Pricing Complaint Referrals, issued on 6 April 2020.

ECONOMIC AND LEGAL CONTEXT

[13] When assessing alleged excessive pricing conduct in terms of section 8 of the Act, regard must be had to the economic and other relevant circumstances at the time of the alleged contravention. As Davis JP stated in the *Babelegi* appeal, "*context matters*", and in the context of the Covid-19 pandemic, "*the context is a market where market conditions have been altered by the unprecedented pandemic.*"

[14] The important contextual elements in the relevant period of the Covid-19 pandemic for purposes of our consideration of this case are, *in our view, the following:*

14.1 Covid-19 is an on-going health related crisis with both economic and social consequences for South Africa and the globe.

14.2 In an excessive pricing conduct context, the economic effects of Covid-19 are relevant. These include the crisis' effects on markets, including demand and supply disruptions, and other potential disruptions to the way in which markets would usually function, absent the crisis.

14.3 An international or global spike in demand for products such as masks could mean that import channels are no longer available for the importation of masks into South Africa, or that masks are not available in South Africa for local use, because they are being exported from South Africa due to the increased international demand for masks. A two-fold challenge may thus present itself: a surging domestic and global demand for masks and a major disruption to the global supply of masks, including in South Africa.

14.4 The global spread of Covid-19 has increased the demand for personal protective equipment ("PPE") and gear, such as the masks which form the subject matter of the Complaint Referral.

[15] The particular legislative detail of Covid-19 as it pertains to this case is the following:

15.1 On 15 March 2020 a national state of disaster is declared;

15.2 On 19 March 2020 the Consumer Protection Regulations are published, identifying "surgical masks" as a good for which suppliers must take reasonable measures to ensure equitable distribution and adequate stocks;

15.3 On 23 March 2020 the President of the Republic of South Africa announced the enforcement of a nationwide lockdown for 21 days with effect from midnight on Thursday, 26 March 2020. This lockdown, defined as the restriction of movement on persons during the period 23h59 on 26 March 2020, until 23h59 on 16 April 2020[5], was to be enforced by members of the SAPS and the South African National Defence Force ("SANDF"); and

15.4 In order to safely and effectively carry out their mandate, SAPS and the SANDF required PPE (including masks) at a time when the demand for masks far exceeded supply. SAPS thus faced a serious operational risk of having insufficient masks for the force on the ground if the SAPS could not provide the basic PPE requirements to its staff members. A shortage of masks would furthermore expose the staff members of the SAPS, as well as the public that they serve, to the coronavirus.

[16] Tsutsumani concedes the unprecedented consequences of the pandemic, its effects on the demand for masks in South Africa and that context matters. It states: "*It is common cause that the pandemic brought about unprecedented consequences, in as far as procurement of facemasks are concerned (and generally throughout the society), and lastly that there was a demand spike, as a result of the unprecedented consequences brought about by the pandemic.*"[6] "*This referral therefore need to be seen and adjudicated within the context as referred to in paragraph 15 above and the unprecedented consequences which the pandemic brought about, inclusive of the disruptions to supply and the spikes in demand.*"[7]

---

[5] Implemented by way of amendments effected to the Disaster Management Regulations, which amendments were published in Government Notice No. 398 of Government Gazette 43148 on 25 March 2020.

[6] Tsutsumani's Heads of Argument at paragraph 15.

[7] Tsutsumani's Heads of Argument at paragraph 16.

Tsutsumani

[17] Tsutsumani is a general trader that supplies a range of products through tenders issued by government departments and municipalities. We note that Tsutsumani is not a manufacturer of masks or any other product, but a trader that acts as an intermediary between manufacturers / importers / wholesalers and government. The "*overwhelming majority*" of Tsutsumani's work is done directly for the government.[8]

[18] Tsutsumani is registered on National Treasury's Central Supplier Database ("CSD") to which government departments such as SAPS are limited when securing suppliers in the event of emergency procurement. As a "general business trader" Tsutsumani supplies any product that is required by a buyer.

Factual background to the Complaint Referral

[19] As explained above, SAPS needed to urgently acquire masks for use on the front lines of combating the coronavirus.

[20] SAPS initially approached the holders of National Treasury transversal contracts for the supply of masks. These suppliers however were unable to provide stock to SAPS on an urgent basis. As a result, SAPS's alternative was to follow National Treasury emergency procurement processes to secure stock of masks. This involved identifying and selecting suppliers on National Treasury's CSD to supply masks.

[21] SAPS directed Requests For Quotations ("RFQ's") to suppliers, including Tsutsumani, requiring a response and actual supply, in a very short space of time given the urgent need for masks. Prior to the declaration of the National State of Disaster, Tsutsumani had never supplied masks to any party and SAPS did not require masks to perform its public duty.

[8] Answering Affidavit of the Respondent p18 at para 4.26.

[22] No single mask supplier had the capacity to satisfy the requirements of SAPS. This is because the declaration of the National State of Disaster; the announcement of the lockdown; and the emphasis on the wearing of masks for frontline workers, resulted in SAPS urgently requiring a change of mask three times daily for all of its 197 000 staff - amounting to a need of more than 9 million masks per month. When this sudden demand or spike emerged, SAPS had no masks in its provisioning stores as masks had not ordinarily been required for the execution of its duties.

[23] SAPS urgently sent out RFQ's on a daily basis in order to secure whatever stock of masks it could get hold of so as to ensure that it had enough stock for the next few days across the country.

[24] Many suppliers were unable to supply masks to SAPS, even where SAPS had placed an order. Consequently, SAPS had to order from any supplier that was capable of supplying masks on an immediate basis.

[25] On or about 5 April 2020, Tsutsumani responded to SAPS, tendering to supply SAPS with a bulk volume of masks. Tsutsumani submitted a quotation of R16 250 000 for the supply of 500 000 masks. SAPS accepted Tsutsumani's quotation on the same day, which illustrates its dire need for masks at the time.

[26] Given the large volumes of masks required SAPS ultimately contracted with eighteen suppliers (including Tsutsumani) for the supply of masks. These suppliers offered to supply SAPS with varying quantities of masks and SAPS accepted all of their quotations.

[27] Between 4 and 13 April 2020, Tsutsumani procured masks for reselling to SAPS from three suppliers, at the following prices (all VAT inclusive):

27.1 Afrimart Online (Pty) Ltd - R17.50 per mask;

27.2 Nako Nako Sole Prop - R17.00 per mask, and

27.3 TMTG Investments - R17.50 per mask.

[28] Applying simple arithmetic, this means that Tsutsumani procured the masks from its suppliers at an average cost to it of R17.35 per mask. It then charged SAPS an amount of R32.50 per mask, amounting to a mark-up of 87% per mask and a gross margin of 46% per mask.

[29] On 5 May 2020, the Commission received a complaint from SAPS against several firms that responded to individual SAPS RFQs, including Tsutsumani, and initiated an investigation.

[30] On 21 May 2020 in response to the Commission's letter to Tsutsumani regarding its pricing to SAPS, Tsutsumani confirmed that it had supplied the SAPS with all 500 000 masks and generated revenue of R16 250 000 from this.

ISSUES FOR DETERMINATION

[31] In order to assess if Tsutsumani charged an excessive price to SAPS, we are required to make the following determinations:

31.1 whether Tsutsumani was a dominant firm and, in particular, whether it had market power, for purposes of section 7(c) of the Act during the period covered by the Complaint Referral;

31.2 whether the price charged by Tsutsumani for the masks was excessive;

31.3 whether Tsutsumani accordingly acted in contravention of section 8(1)(a) of the Act, read with Regulation 4 of Consumer Protection Regulations, as alleged in the Complaint Referral;

31.4 under the circumstances, whether Tsutsumani should be interdicted from engaging in any further conduct in contravention of section 8(1)(a) of the Act; and

31.5 whether Tsutsumani should be ordered to pay an administrative penalty, if found to have contravened section 8(1)(a) the Act.

LEGISLATIVE FRAMEWORK

Excessive pricing under the Act

[32] Sections 8(1)(a) prohibits a dominant firm from charging an excessive price:

"*8(1) It is prohibited for a dominant firm to—*

(a) charge an excessive price to the detriment of consumers or customers" (emphasis added)

[33] The Act does not define what would constitute an excessive price. Rather, it sets out a test, in section 8(3), which must be satisfied in order for a price to be excessive. Section 8(3) provides that:

"*(3) Any person determining whether a price is an excessive price must determine if that price is higher than a competitive price and whether such difference is unreasonable, determined by taking into account all relevant factors...*" (emphasis added)

[34] Section 8(3) then goes on to set out a non-exhaustive list of factors to be considered in the enquiry of whether a price is higher than a competitive price and whether that difference is unreasonable, and most notably for our purposes, including "*any regulations made by the Minister...regarding the calculation and determination of an excessive price*" (section 8(3)(f)).

[35] The central tenets of section 8(3) are that the price charged will be excessive if it is: (i) higher than a competitive price; and (ii) the difference is unreasonable.

[36] Once the two elements of section 8(3) of the Act have *prima facie* been satisfied, section 8(2) of the Act shifts the onus on to the dominant firm when it states that:

"If there is a prima facie case of abuse of dominance because the dominant firm charged an excessive price, the dominant firm must show that the price was reasonable." (emphasis added)

[37] Section 8(1)(a) of the Act only prohibits dominant firms, as defined, from charging excessive prices. Sections 6 and 7 of the Act set out the test for whether a firm is dominant or not.

[38] Section 6 empowers the Minister to determine a minimum turnover threshold above which the abuse of dominance provisions of the Act will apply.

[39] Most relevant for purposes of this case is Section 7(c) of the Act which sets out the test for dominance applicable to those firms which have less than 35% of the market but have "market power". Market power is, in turn, defined in section 1 of the Act, 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.*" We discuss section 7 of the Act and its application to this case in detail below.

Consumer Protection Regulations

[40] On 19 March 2020 the Minister of Trade, Industry and Competition ("the Minister") published the Consumer Protection Regulations which aim to "*protect consumers and customers from unconscionable, unfair, unreasonable, unjust or improper commercial practices during the national disaster*".

[41] The Consumer Protection Regulations were specifically designed to deal with any excessive pricing complaints during the National State of Disaster. This is clear from the language of the Consumer Protection Regulations and from the kind of products that they seek to protect from excessive pricing by firms during the National State of Disaster.

[42] While section 8(3) of the Act applies to all products, the Consumer Protection Regulations have identified specific product categories which deserve special regulatory protection, given their critical value in fighting the spread of Covid-19. These products are listed in Annexures "A" and "B" to the Consumer Protection Regulations.

[43] It is common cause between the parties in this case that:

43.1 Masks fall under the category of medical and hygiene supplies in Annexure "A", as well as item 1.3. in Annexure "B" of the Consumer Protection Regulations;

43.2 Regulation 4 of the Consumer Protection Regulations is applicable to the conduct that is the subject matter of the Complaint Referral.

[44] The wording of Regulation 4.1 clearly situates the Consumer Protection Regulation within the context of section 8 of the Act when it states that:

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

[45] Regulation 4.2 issued by the Minister under section 8(3)(f) of the Act, states that:

"*during any period of the national disaster, a material price increase of a good or service contemplated in Annexure A which—*

4.2.1 does not correspond to or is not equivalent to the increase in the cost of providing that good or service; or

4.2.2 increases the net margin or mark-up on that good or service above the average margin or mark-up for that good or service in the three-month period prior to 1 March 2020,

is a relevant and critical factor for determining whether the price is excessive or unfair and indicates prima facie that the price is excessive or unfair." (emphasis added)

[46] It is common cause between the parties that: "*(t)he relevant economic test for determining whether a price is excessive in the context of the Covid-19 pandemic, as contemplated in Regulation 4 of the Consumer Protection Regulations, is whether prices charged have any corresponding cost justification from the supplier up the value chain.*"[9]

[9] "Parties' Joint Statement of Undisputed and Disputed Facts and Issues" at para 7.

[47] In addition, as we noted in *Dis-Chem*, where there has been a material price increase of the good(s) in question, Regulation 4.2 creates a rebuttable presumption that "*indicates prima facie that the price is excessive or unfair*".

RELEVANT MARKET

[48] It is common cause that the relevant product market is the supply of masks.[10] It is also common cause that masks are listed in the Consumer Protection Regulations as one of the products essential for combating the spread of the novel corona virus.

[49] As to the relevant geographic market and other market conditions at the time, the Commission submits that the immediacy and extent of the SAPS' need for the masks (for 197 000 police staff members three times a day, amounting to 9 million masks per month) meant that it did not have the luxury of shopping around. Simply put, SAPS was obliged to take what masks it could get from whichever supplier had immediate stock. Furthermore, the sheer quantity of masks it required meant that no single supplier would be able to supply the full quantity required. As such, given the quantities involved and the urgency thereof SAPS had to accept all, or most, tendered prices in order to secure the quantity required. This implies that SAPS was a price taker at the time in the procurement of masks and could not shop around. That notwithstanding, SAPS issued a tender for masks nationally which masks were required for use nationally by its force.

[50] Tsutsumani initially submitted in paragraph 4.60 of its Answering Affidavit, that "*(n)o evidence (had been) placed before th(e) Tribunal to show the differences in respect of the demand before the COVID-19 pandemic, and the demand since the first COVID-19 case was registered in the public and 5 March 2020 as per paragraph 12 of the founding affidavit*" and that "*(a)t best the allegations in respect of the demand for PPE is unsubstantiated*". However, Tsutsumani

[10] 'Parties' Joint Statement of Undisputed and Disputed Facts and Issues' clause 8 at para 8; Record p84 at para 52.

conceded (in its heads of argument) that the masks were required "*due to a demand spike as a result of the COVID-19 pandemic and the central role which the SAPS would play in the curbing of the pandemic in the coming months*"[11]

[51] In our view, the true position pertaining to the demand for masks is incontrovertible. The advent of Covid-19 was entirely unforeseeable, the means by which individuals could achieve some protection against the virus (and, in particular, the wearing of masks) was initially not known. As such, there was no way in which SAPS could have anticipated the need for such PPE or accumulated it in advance.

[52] PPE of this nature had never been a life preserving requirement for every member of SAPS. Once it became peremptory to wear masks for protection, there was a widespread and urgent need for masks leading to panic buying, causing individuals, companies and governmental entities to be price takers, extremely anxious to procure what they could, where they could, since lives were at risk. Furthermore, following the imposition of the national lockdown by the President on 23 March 2020, it was directed that the lockdown would be enforced by members of SAPS and the SANDF. As such, as stated above, SAPS required PPE (including masks) in large volumes (each one of its 197 000 staff required a change of mask three times daily, amounting to more than 9 million masks per month) at a time when the demand for masks in South Africa far exceeded the supply.

[53] We thus conclude that the relevant market is the national supply of masks on an urgent basis.

DOMINANCE

[11] Tsutsumani's Heads of Argument p6 at para 10.

[54] The first requirement for a contravention of section 8 of the Act, and regulation 4 of the Consumer Protection Regulations is that the firm in question must be dominant in terms of the Act.

[55] A jurisdictional pre-requisite for dominance, under section 6 of the Act, is that the firm in question must have assets or turnover equal to, or exceeding a particular financial threshold. This threshold is currently set at R5 million.

[56] Section 7 of the Act provides that a firm is dominant if:

(a) it has at least 45% of that market;
(b) it has at least 35%, but less than 45% of that market, unless it can show that it does not have market power; or
(c) it has less than 35% of that market but has market power.

[57] As stated above, the Act defines "market power" as "*the power of a firm to control prices, to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers*".

THE PARTIES' ARGUMENTS

[58] Tsutsumani contends firstly that the Commission should have undertaken a comparative analysis to confirm its dominance or market power. Tsutsumani submitted that it had never supplied masks prior to this transaction. A finding by the Tribunal that it had market power would mean that any firm taking advantage of a short-term dearth in supply would have market power and consequently found to be dominant. It argues further that such a conclusion could result in the creation of potential barriers to entry in respect of the market in question, an unwillingness on the part of potential / existing entrants to undertake "normal supply" into that market for fear of being found to be dominant, as well as increased prices due to the shortage in supply.

[59] Secondly, Tsutsumani contends that the SAPS had over 18 firms that responded to its RFQ and therefore it was inconceivable that Tsutsumani had

market power in that context. To the contrary, Tsutsumani argues that the SAPS had bargaining power vis-à-vis the different mask suppliers.

[60] Thirdly, that even if Tsutsumani were found to have market power due to the unordinary market conditions, market power must be understood to mean substantial market power that is durable and should not be seen in isolation of specific events, such as a once-off transaction.

[61] On the other hand, the Commission argued that section 1 of the Act contemplates that market power can be ascertained or inferred with reference to the economic behaviour of a firm. It submitted that there was no merit in Tsutsumani's argument that market power cannot be inferred from economic behaviour in an ex-post facto analysis, as is accepted economic practice. The Commission relied on the Tribunal's decision in Dis-Chem which held that *"it cannot be refuted that market power can be inferred from a firm's economic behaviour"*. As we discuss later, the Commission relied on Tsutsumani's pricing to infer market power.

[62] The Commission submitted further that there was no merit in Tsutsumani's submission that it could not be found to be dominant at the time because there were 18 suppliers that responded to the SAPS RFQ. It relied on the CAC decision in *Babelegi* where the CAC held that: "*A store, by merely having PPE products in the context of such excess demand could enjoy market power. Multiple firms –even stores located in the same shopping mall –could conceivably exercise market power in the supply of PPE vis-à-vis their customers.*"

[63] The Commission further argued that the evidence shows that Tsutsumani had the ability to act independently of competitors, customers or suppliers. According to the Commission, Tsutsumani's ability to price as it did, without constraint, was not due to its own commercial efficiency or investment, but rather a direct result of the Covid-19 pandemic.

[64] Thus, the Commission submitted that Tsutsumani should be viewed as a lucky monopolist, a concept described by Jorge Ramos (Firm Dominance in EU Competition Law: The Competitive Process and the Origins of Market Power (2020) at Chapter 7 and endorsed by the CAC in the *Babelegi appeal.*

[65] According to Ramos, a lucky monopolist is a firm whose power comes not from the state or from natural efficiencies, unparalleled investment efforts, superior management ability or as a result of anticompetitive conduct, but rather from luck, being events that fall outside of the knowledge of the economic actor or its ability to determine the timing thereof. They do not require the firm to incur any cost in order to secure its market position in that the relevant factors are exogenous to the cost functions of the firm but are significantly meaningful to propel a firm to a position of dominance among existing firms.

[66] We now turn to consider these arguments on dominance / market power before we turn to whether Tsutsumani's pricing was excessive.

Our Assessment

[67] Tsutsumani meets the financial threshold for dominance since its turnover exceeds R5 million. We then have to consider whether Tsutsumani had market power.

[68] We were not persuaded by Tsutsumani's arguments that it did not have market power in the context of the Covid-19 health crisis given the volumes and urgency of the need for masks by SAPS to protect its staff and members of the public.

[69] In our view, Tsutsumani sought to place undue reliance on the fact that it had not previously provided SAPS (or anyone) with masks and as such was not an "*active role player*" in this market, or an "*active participant*" in the market for the sale of PPE. However, the sale by Tsutsumani of 500 000 masks to SAPS is a significant transaction in and of itself. As we previously stated in the

context of our decisions in the *Dischem* and *Babelegi* cases, a respondent may be liable for excessive pricing of a product that forms only a small part of its business.[12]

[70] As indicated above, Davis JP stated in the *Babelegi appeal* that "*context matters*" in a section 8(a) assessment. In the context of excess demand and short supply of masks, a firm may be regarded as a lucky monopolist. In our view, Tsutsumani can be regarded as a lucky monopolist. Therefore, in a crisis context, more than one supplier, who has stock of masks or can secure access to stock, can be in a dominant position in respect of its customer(s).

[71] Tsutsumani's argument that it cannot be found to be dominant or to have market power since 18 suppliers responded to the RFQ, cannot hold. This is because in Babelegi, the CAC stated: "*The lucky monopolist might not be a single firm in the relevant market. Given prevailing exogenous factors, multiple firms can be found to be dominant during the crisis, as the European Commission found in ABG Oil Companies IV/28:241, 77/327/EEC (decision of the European Commission 19 April 1977). Although the European Court of Justice overturned this decision, it did so on unrelated grounds. The finding of the Commission was that customers can be completely dependent on a firm for the supply of scarce products during a crisis. In such a case, more than one supplier can be in a dominant position in respect of its normal customers*"[13] (emphasis added).

[72] Furthermore, as previously indicated, the Covid-19 pandemic caused a spike in the demand for PPE's, including masks, as conceded by Tsutsumani. Firms that supplied PPEs in that context, regardless of their size (provided that they meet the prescribed turnover or asset threshold for dominance), are not exempt from the provisions of section 8 of the Act and the Consumer Protection Regulations. The Consumer Protection Regulations were

[12] *Dis-Chem* at para 20 and *Babelegi* at para 12.
[13] Paragraph 49.

specifically issued to warn against and to deal with excessive pricing of PPEs (including masks) during the period of the National State of Disaster.

[73] Tsutsumani ignores the important exogenous factors at play in the market:

73.1 as a result of the declaration of the National State of Disaster, SAPS urgently required a change of mask three times a day for its 197 000 front line employees;

73.2 SAPS itself did not have stock of masks as this was not a product which it had previously stocked: the Covid-19 pandemic, with its consequent need for PPE had not and could not have been foreseen;

73.3 many suppliers were unable to supply masks and in the context of the Covid-19 health crisis SAPS was forced to order from any supplier that could supply a quantum of masks on an immediate basis;

73.4 no single supplier had the capacity to satisfy the requirements of SAPS for masks;

73.5 Tsutsumani admits that it was aware that SAPS had awarded quotations to other suppliers that had failed to raise the finance required to deliver on the order[14];

73.6 suppliers registered on the CSD - such as Tsutsumani - were aware of the immediacy of the need to respond to the RFQ's and the lack of scope to shop around, hence the emergency procurement[15]; and

73.7 Tsutsumani admits that it was aware that its price was higher than that charged by other suppliers to government. It was, however, apparently not sufficiently concerned about this to lower its prices but elected to "*wait on (SAPS') supply chain to accept or reject (its) quote*".

[74] Turning to Tsutsumani's argument that market power cannot be inferred from pricing conduct, we found the following quote by the CAC in Babelegi

[14] Record p43 (Annexure "C"), clause 3.
[15] Record p76 at para 34.

instructive: "*The recourse to this literature indicates that in a crisis situation, such as that induced by the Covid 19 pandemic, one needs to use a somewhat different conceptual framework from what ordinarily would be employed in an excessive pricing case… Recall however that the test for dominance for a firm that has less than 35% share of the defined market is that it has market power; that is 'the power to control prices or to exclude competition or to behave in an appreciable extent independently of its competitors, customers or suppliers'. Within the context of this case, this definition requires evaluation in terms of the cost, prices and mark-ups prior to or during and after the complaint period* …"[16] (own emphasis).

[75] It is clear from the above quote that in a crisis situation, such as that caused by the Covid-19 pandemic, a different conceptual framework from that which would ordinarily be employed in an excessive pricing case is required. This is *inter alia* because market forces may be disrupted during the pandemic causing an increase in demand and a shortage of supply of certain products, in this case masks. In the current context it is common cause that the increase or spike in the demand for masks is directly linked to the pandemic.

[76] The direct evidence of Tsutsumani's pricing conduct during the complaint period (discussed below) clearly demonstrated its ability to price independently of suppliers, customers and consumers – the essence of market power.

[77] Tsutsumani procured the masks at an average cost of R17.35 per mask and then charged SAPS an amount of R32.50 per mask, amounting to a mark-up of 87% and a gross margin of 46%. We shall, as discussed below, take into account certain costs in favour of Tsutsumani, despite these costs not being substantiated by Tsutsumani, and show that even under those assumptions the price charged by Tsutsumani to SAPS for masks was excessive.

[16] *Babelegi* at para 50.

[78] As this Tribunal confirmed in *Dis-Chem*[17], in the context of te pandemic, "*the enquiry (is) focused on the behaviour of that firm (what it does) and the economic environment or conditions which enable that firm to act in an exploitative matter.*"

[79] In much the same way as the CAC observed that Babelegi had been able to "*price higher without any constraint imposed upon it by either its consumers or customers, not as a result of any new investment or commercial efficiency produced but simply because the onset of the pandemic created entirely different conditions for the market in which appellant was located*"[18], Tsutsumani's high mask prices (as a reseller of masks) are not the result of any efficiency on the side of Tsutsumani but a consequence of the changed market circumstances due to the pandemic. Tsutsumani did not face any additional or extraordinary business risks in supplying SAPS with masks. It was able to obtain stock of a product in respect of which there was unprecedented demand at a time when other suppliers did not have stock, and customers – in this case SAPS - had no option but to accept the prices sought by Tsutsumani, which were unconstrained by other suppliers or by any exercise of demand-side market power by SAPS.

[80] We find that the reason SAPS purchased masks from Tsutsumani at high prices is because it had no other choice given the crisis context, amplified by the large volumes of masks required as well as the utmost urgency in order for SAPS staff to safely fulfil their duties during the state of disaster.

[81] As the CAC found in *Babelegi*: "*The only explanation for the customers nevertheless buying from appellant at high prices is that the pandemic was causing them to believe that if they did not buy promptly they would be left without masks altogether. Lacking information about the status of other suppliers, and not wishing to delay in order to find out, they took what they could get from appellant. Notionally other suppliers could have exploited the*

[17] *Dis-Chem* at paras 103-104.
[18] *Babelegi CAC decision* p20 at para 58.

same state of affairs. Either way, it was a state of affairs which conferred market power on appellant over those who sought supply from it."[19]

[82] The same state of affairs applies here. SAPS was lacking information about the status of suppliers of masks, both in terms of available volumes and prices[20], and could not delay placing an order to secure stock given the volumes required and the urgency as that would put many lives at risk. Not only SAPS but all businesses in South Africa (and globally) needed to secure the supply of masks. Crucially, SAPS had an important public duty to fulfil during the pandemic, it had no choice but to urgently procure masks. Furthermore, Tsutsumani was acutely aware that SAPS was battling to get masks, since SAPS had issued quotations, but some suppliers had failed to deliver on those quotations: "*We also were informed that SAPS has awarded quotations to a number of suppliers who had failed to raise the money to purchase the stock and supply.*"[21]

[83] There is no conceivable explanation which might account for Tsutsumani's pricing other than the existence of market power on the part of Tsutsumani in the context of the Covid-19 health crisis that disrupted the demand and supply of masks. In the relevant period, Tsutsumani had the power to act independently of its competitors on the supply side and independently from SAPS as a customer on the demand side. This is the very definition of market power. Tsutsumani knew that it could price independently of any other supplier and still secure an order with SAPS. SAPS, given the volumes of masks required and the urgency thereof, was not in a position to defer procurement from suppliers that had or could secure stock at short notice or search for alternative suppliers at cheaper prices.[22] In other words, in the circumstances SAPS was a price taker and had to secure any volumes of masks that it could get on an urgent basis.

---

[19] Paragraph 57.
[20] The SAPS would have no way of knowing what potential suppliers' input prices were.
[21] Competition Commission" Supporting Affidavit deposed to by Jason Aproskie at para 55 citing Tsutsumani letter dated 21 May 2020 (trial bundle p86 at para 3).
[22] Record pp 174-175 at para 91; Record p179 at para 103; Record p34 (Annexure A).

[84] As the CAC found in *Babelegi*: "*In short, for the relevant period, it [Babelegi] had the power to control its prices and not be concerned that a countervailing power of a competitor would cause it to reduce its prices during that particular period. In this sense it must be viewed, as Ramos has described, as a lucky monopolist. No other plausible explanation is available for the massive increases which appellant was able to sustain throughout the complaint period.*"[23]

[85] In the circumstances, we conclude that Tsutsumani enjoyed market power during the complaint period and was dominant in the market for the emergency procurement of masks by SAPS from suppliers registered on the CSD who were able to satisfy the requirements of SAPS' RFQ's, to supply the masks within a very short time period.

[86] The only remaining issue is Tsutsumani's argument that market power must be durable. The CAC in Babelegi held "*In the complaint period, it [Babelegi] acted as a monopolist, no matter that other firms may have done the same. It extracted a surplus that could only be achieved by virtue of the independence it enjoyed as a result of being "lucky". It had a stock of face masks acquired at what was a competitive price; that is acquired under pre Covid 19 market conditions. Thanks only to the outbreak of the pandemic, it possessed market power which allowed it for at least six weeks to mimic the conduct of a monopolist.*" Tsutsumani acted in a similar way in that due to the outbreak of the Covid-19 pandemic, Tsutsumani could mimic the conduct of a monopolist and sell the substantial volume of 500 000 masks to SAPS at the price that it did.

[87] Having concluded that Tsutsumani had market power in the relevant period, we turn now to analysing whether Tsutsumani, as a dominant firm in terms of section 7(c) of the Act at the relevant time, engaged in excessive pricing.

WAS TSUTSUMANI'S PRICING EXCESSIVE?

[23] *Babelegi* (CAC) at para 51.

[88] As this Tribunal stated in *Babelegi,* the relevant economic test for determining whether or not a price is excessive in the context of disrupted competitive conditions, and for purposes of section 8 of the Act, is "*whether the firm's price or mark-up or margin increased materially relative to what was previously charged or applied, and if so, whether that increase is justified by any cost increases from a supplier further up the value chain.*"[24]

[89] The parties in their joint statement were in agreement that the relevant economic test is "*whether prices charged have any corresponding cost justification from the supplier up the value chain.*"[25]

[90] Recall that section 4 of the Consumer Protection Regulations was not in force at the time Babelegi was alleged to have charged excessive prices. The Consumer Protection Regulations, which were in force during the complaint period, set a benchmark of a 10% increase in net margin or mark-up above the average margin or mark-up for the same good or service in the three month period prior to 1 March 2020 as a relevant critical factor in determining whether a price is excessive and an indication *prima facie* that the price is excessive.

[91] The test for an excessive price therefore has two legs:

91.1 does the price exceed what the firm would have obtained in the counterfactual world of normal sufficiently effective competition?; and

91.2 if so, can this increase be justified by any cost increases from a supplier further up the value chain?

[92] As indicated above, Tsutsumani's mark-up on the masks that it supplied to SAPS was 87% and its gross margin 46%, before considering certain other costs in favour of Tsutsumani (as discussed below).

---

[24] *Babelegi*, para 99.

[25] "Parties' Joint Statement of Undisputed and Disputed Facts and Issues" at para 7.

[93] It is common cause that Tsutsumani had not previously sold masks and we cannot compare the prices at which it sold masks pre-pandemic and the prices at which it offered to sell the masks to SAPS in its RFQ.

[94] Mr Aproskie suggested several benchmarks that can be used in the excessive price analysis.

[95] He contended that where there is no historic pricing and margins of the supplier in question against which comparisons may be undertaken, *the relevant factors amongst those listed under s8(3) still provide the basis for a competitive benchmark and the reasonableness test.*"[26]

[96] One benchmark considered was National Treasury's price list dated 15 April 2020 and submitted by the SAPS in its complaint. This price list indicates a price range from [redacted] for (surgical) masks[27].

[97] In substantiation of this, the Commission relied on pricing from other RFQs by government, specifically the National Health Laboratory Services ("NHLS") that procured masks during the crisis period. Prices obtained by NHLS from four different suppliers ranged between R10.22 and R14.50.[28]

[98] Other benchmarks that can be utilised are the mark-ups and margins[29] earned by firms (i.e., resellers or traders) similar to Tsutsumani under normal competitive conditions.

[99] We note that in the case of distributors or traders such as Tsutsumani, the gross margin or mark-up is the relevant measure. The cost to source the product is the primary cost, together with any externally paid logistics fees if the cost is not a delivered cost. The customary gross margin added to this cost of sourcing the product in tenders typically would cover all other internal costs

[26] Record p80 at para 44.
[27] Record p35 (Annexure A).
[28] Record p87 at para 58.
[29] Tsutsumani is a reseller of masks and not a manufacturer. Therefore, gross margin as opposed to net margin is the appropriate benchmark.

such as working capital and a contribution towards overhead costs (management of logistics and warehousing).

[100] We now turn to the assessment of the case in terms of these benchmarks.

Pricing Benchmarks

[101] It is common cause that Tsutsumani sold the masks to SAPS at R32.50 (VAT inclusive) per mask. National Treasury's price list of 15 April 2020 indicates prices ranging between [redacted] for masks.

[102] According to the Commission, on this benchmark, Tsutsumani's price was roughly three times the National Treasury price list. We note however that Tsutsumani procured the masks at an average price of R17.35 which is higher than the highest price on National Treasury's price list [redacted].

[103] As indicated NHLS received prices ranging between R10.22 to R14.50 per mask.[30] Again we note that Tsutsumani procured the masks it sold to SAPS at an average price of R17.35, which is higher than the highest NHLS price (R14.50).

[104] It bears mention that when considering other tender prices during a crisis period as a benchmark one has to be extremely cautious because multiple firms may possess market power as a result of disruptions to the market in question and thus exploiting the crisis situation. As the CAC noted in *Babelegi: "Notionally other suppliers could have exploited the same state of affairs."*[31] We therefore do not consider the tender prices charged by other suppliers to SAPS as a reliable and appropriate benchmark since these other suppliers to SAPS could also be exploiting the crisis situation. As indicated above, SAPS complaint of 5 May 2020 to the Commission relates to several firms that

[30] Record p87 at para 58.
[31] *Babelegi* at para 57.

responded to individual SAPS RFQs, including Tsutsumani, that in its view charged it unreasonably high prices during the pandemic.

[105] Turning then to mark-ups and margins charged by traders / resellers similar to Tsutsumani in normal times as an appropriate benchmark, Mr Aproskie sets out in his affidavit the range of gross margins earned by comparative traders / resellers in normal times as between 10-15%. For this, he relies on prior settlement agreements confirmed by the Tribunal where this benchmark was regarded as appropriate.[32] As explained by Mr Hodge in argument, this range is an acceptable benchmark since traders / reseller's cost are the cost of procurement of a finished product, with the 10-15% margin covering overhead costs such as head office costs, securing contracts, distribution and other ancillary costs.

[106] Recall that, applying simple arithmetic, Tsutsumani procured the masks from its suppliers at an average cost to it of R17.35 per mask. It then charged SAPS an amount of R32.50 per mask, amounting to a mark-up of 87% per mask and a gross margin of 46% per mask. In its answering affidavit, Tsutsumani alleges that the average price at which it procured the masks is R18.10 if one takes into account the cost justification it argues should be reckoned namely the costs of transportation of the masks, labour for loading and off-loading of the masks, and an administration fee, which amount jointly to R376 075.[33] We deal with this when we consider Tsutsumani's cost justifications.

[107] Regulation 4.2.1 of the Consumer Protection Regulations clearly contemplates a determination of an excessive price with reference to the costs of providing that product. For the distribution and trading of products the main cost is the sourced cost of the products and therefore margin levels of 10%-15% on top of the cost of sales are observed for such trading operations prior to the pandemic for PPE.

---

[32] *The Competition Commission and Sicuro Safety CC*; *The Competition Commission and Hennox 63A CC t/a Hennox Supplies*; *The Competition Commission and [confidential] t/a T.N T Basic Trading.*
[33] Record p120 at para 4.71.4

[108] The mark-up and margin earned by Tsutsumani were accordingly significantly higher than a competitive benchmark[34] of 10-15% margin for resellers and meet the first part of the test for an excessive price under section 8(3) of the Act, namely that the price charged by Tsutsumani is significantly higher than a competitive price.

[109] The above, in terms of the CAC jurisprudence in *Babelegi*, means that *prima facie*, the price charged by Tsutsumani for the supply of masks to SAPS was excessive in terms of section 8(2) of the Act. This conclusion shifts the evidential ball into Tsutsumani's court.[35]

[110] Section 8(3) of the Act now comes into play. It enjoins the Tribunal to determine whether the price charged by Tsutsumani is unreasonable.[36] We next consider this.

Is the price difference unreasonable?

[111] The next leg of the test, for purposes of an assessment of whether the firm in question has charged an excessive price in contravention of section 8(1)(a) of the Act, is a determination of whether the price difference between the price charged and the competitive price is unreasonable.

[112] The reasonableness of a price is assessed with regard to the factors listed in section 8(3) of the Act, most notably including the costs associated with the provision of the goods.

---

[34] Tsutsumani made the speculative submission that its higher price was accepted by SAPS as a result of quality differences in the surgical masks. There was, however, no evidence to this effect. To the contrary, all indications are that a 3-ply surgical mask is standard in its specifications.
[35] See CAC *Babelegi* at para 58.
[36] See CAC *Babelegi* at para 59.

[113] As the CAC found in *Babelegi*, under the reasonable test the respondent must provide a justification for its prices. In this regard, the CAC stated: *"Section 8(3) covers both the s 8(2) enquiry and the case that a defendant firm must produce to show that, notwithstanding the prima facie finding, the price it charged is reasonable"*. Both the determination of whether the price is excessive and the question of reasonableness are determined, *inter alia*, by the factors set out in section 8(3)."[37]

[114] It is common cause that the relevant economic test for determining whether a price is excessive in the context of the Covid-19 pandemic, as contemplated in Regulation 4 of the Consumer Protection Regulations, is whether the price charged has any corresponding cost justification from the supplier up the value chain.

[115] A justification for Tsutsumani charging a price exceeding what a firm would have charged in the counterfactual world of normal sufficiently effective competition, would be an increase in suppliers' costs, or justifiable/ reasonable increases in the costs of supplying the masks to SAPS.

[116] It is common cause that Tsutsumani procured its stock from three entities, at a cost of between R17.00 and R17.50 (VAT inclusive).

[117] The price charged by Tsutsumani (R32.50 VAT inclusive) for the supply of 500 000 masks to SAPS is not justifiable on the basis of suppliers' costs, which was an average cost of R17.35 per mask.

[118] In a letter to the Commission prior to the Commission referring this complaint to the Tribunal, Tsutsumani provided the following financial information regarding the sale of the masks to SAPS, alleging certain costs that it incurred:

Table 1: Financial information regarding the sale of the masks to SAPS

[37] See CAC *Babelegi* at para 59.

Item	Amount
Sales	R16 250 000
Cost of Sales	(R8 728 500)
Gross Profit	R7 521 500
5% Admin and Handling Fee	R376 075
Interest on R5m loan	R1 000 000
Net profit/(loss)	R6 145 425
Tax Payable – 28%	(R1 720 719)
Net Profit/(loss after tax)	R4 4 24 706

[119] It sought to justify the price at which it sold the masks to SAPS by reference to:

119.1 its internal overhead costs (being the 5% admin and handling fee amounting to R376 075);

119.2 alleged finance costs of R1 000 000.00 in "interest", on a loan of R5 000 000.00 which it allegedly sought in order to secure the masks; and

119.3 company tax calculated at 28% on its profit earned before tax.

[120] In its answering affidavit, Tsutsumani claimed that its price has a corresponding cost justification, not only from the supplier in the value chain, but also its business. In addition to the factors mentioned above (overhead costs, including admin and handling costs; finance costs and company tax), Tsutsumani sought to justify its pricing with reference to the following additional factors:

120.1 It requires a minimum amount of R1 550 979.00 monthly, for operating expenses;

120.2 It has incurred costs of R 168 185.00 in respect of retrenched staff as a result of the pandemic, for which it was not fully refunded by the Unemployment Insurance Fund (UIF).[38]

120.3 An existing tax liability of R208 640 632.04.

[121] We turn to consider each of these alleged cost justifications.

Costs alleged by Tsutsumani relating to conduct

[122] Tsutsumani contends that its input costs for the masks sold to SAPS included transport, handling, loading and administrative fees related directly to the supply of masks. It states that while these costs cannot be easily quantified, they account for 5% "*jointly which would equate to R 376 075.00*"[39]. However, Tsutsumani failed to substantiate these input costs.

[123] During the hearing we requested the parties to provide calculations on Tsutsumani's mark-ups and margins taking into account various cost items which were in dispute between the parties. They provided various scenarios on an agreed basis i.e., that the figures / calculations contained in these scenarios are correct, the dispute being whether the costs should be included or excluded in the analysis of whether the price charged by Tsutsumani is excessive.

[124] The most appropriate scenario (out of a total of six) for purposes of our assessment of Tsutsumani's pricing is the following for the reasons explained below (assuming certain costs in favour of Tsutsumani namely a 5% admin and handing fee, interest paid for one month on a loan and certain UIF costs):

[38] Tsutsumani's salary expense line item reduced substantially in May 2020 from April 2020, indicating that Tsutsumani did retrench staff and did not pay their salaries in May 2020. However, there is no plausible causal link between these retrenchments and the SAPS contract for the supply of masks. In fact, the salary paid to the sole shareholder increased in May 2020, when compared to the April 2020 figure.

[39] Answering Affidavit p28 at para 4.71.3.

Table 2: Scenario B (1): Inclusion of 5% admin and handling expense, 1 month interest, claimed UIF shortfall

Label	Item	Value	GP	Mark-up
A	Revenue	16 250 000		
B	Cost	8 728 500		
C=A-B	Gross Profit	7 521 500	46,3%	86,2%
D	5% admin and handling fee	376 075	44,0%	81,9%
E	Interest (1 month)	83 333	43,5%	80,9%
F	UIF (par 4.13.8.4)	84 185		
G=C-D-E-F	Net Profit	6 977 907	42,9%	79,9%
H=B+D+E+F	Total cost	9 272 093		
I	Price at 15% GP	10 908 345		
J=I-H	Profit at 15%	1 636 252		
K=G-J	Tsutsumani's excess profit	5 341 655		

[125] The Commission submitted that the 5% admin and handling fee should not be taken into account since it was not substantiated by Tsutsumani. Furthermore, for a trading business this cost is already included in overhead costs.

[126] Nevertheless, we included the amount of R376 075 representing 5% admin and handling fee in the calculations as a best-case scenario for Tsutsumani.

[127] On Tsutsumani's overhead costs associated with the supply of masks, amounting to R376 075.00, even if one included these costs in favour of Tsutsumani its mark-up would be 81.9% and its margin would be 44%[40].

[40] Record p192 at para141.

[128] We have also as a best-case scenario for Tsutsumani included the interest on a loan for one month, in the amount of R83 333.33 in our calculations (as explained below).

[129] We have also as a best-case scenario for Tsutsumani included certain UIF costs (amounting to R84 185) in the calculations albeit they were unsubstantiated by Tsutsumani.

Operating expenses

[130] The evidence in respect of monthly operating expenses referred to by Tsutsumani indicates that these were incurred in respect of its waste management and other lines of business.[41] These expenses were incurred prior to and following April 2020, the month of the contract with SAPS for masks. Tsutsumani's management accounts reflect not only operating expenses, but also revenue associated with Tsutsumani's primary business. We do not agree that operating expenses unrelated to the SAPS sales are justified and have therefore not included them in the calculations.

Interest on loan

[131] Tsutsumani claims it incurred financing costs in the form of "interest" on the loan it made to purchase the masks. This interest according to Tsutsumani amounts to R1 million. We note that the loan agreement in question is between the sole member of Tsutsumani, Mr Nonyane, and Tsutsumani.

[132] We do not consider the alleged amount of R1 million to be a reasonable cost for purposes of our assessment of the costs of the masks sold to SAPS. This is because in May 2020 the finance costs reduced to only R39 000. Invoices were raised by Tsutsumani on 6 April 2020 for R9 847 500 (303 000 masks) and on 13 April 2020 (197 000 masks). These invoices were processed by SAPS on 13 and 27 April 2020, respectively. Therefore, in these circumstances, the loan obtained from Mr Nonyane could have been repaid

[41] Record p168 at para 74.

within a month, raising an interest charge of, at most, R83 333.33 and not the R1 000 000.00 as claimed by Tsutsumani.

[133] Furthermore, the applicable interest rate on the loan obtained from Mr Nonyane was 20% per annum, not for a single month.[42] In addition, the financial statements attached to the Answering Affidavit did not reflect any new financial costs of R1 million from March to April 2020. In fact, they reflected a substantial reduction in interest expenses following the sale of the masks to SAPS in May 2020. To the extent that a loan was advanced by Mr Nonyane to the company, it could easily have been repaid in full upon receipt of payment from SAPS.

[134] We have therefore as a best-case scenario for Tsutsumani included the interest on the loan for a period of one month, in the amount of R83 333.33 in our calculations of the costs.

Tax Liability

[135] We note that tax is not an expense that is to be included when assessing excessive pricing by comparing the price charged to appropriate benchmarks. It is the profit before tax that is relevant to the determination of this issue.

[136] Tsutsumani contends that it has a significant existing tax liability of R208 640 632.04 which should be reckoned in determining its costs for the masks it supplied to SAPS. However, it does not provide any confirmation of this liability, claiming that it is in negotiations with the South African Revenue Services (SARS) to resolve this and that it cannot be disclosed to the Tribunal. Even if this tax liability exists, this is not a cost associated with discharging the contract for the supply of masks to SAPS. It simply indicates that Tsutsumani historically did not pay its taxes owing to SARS. There was no evidence put up indicating that this represented an ongoing cost to the business, let alone

[42] Record p170 at para 77.

evidence that the tax debt had anything to do with the price at which Tsutsumani supplied masks to SAPS.

[137] We further note that on 05 April 2020, Tsutsumani was confirmed to be tax compliant.[43] Had Tsutsumani not been tax compliant at that time, SAPS would not have been able to conclude any transaction with Tsutsumani and the CSD Registration Report would have confirmed that it was tax non-compliant.

[138] Furthermore, as we have noted, Tsutsumani has a sole member, and its profits therefore would be retained by the sole member. It is extraordinary and is not reasonable to suggest that a firm should be allowed to charge an excessive price in order to repay its accumulated tax debt to government as Tsutsumani contended. Furthermore, as the Commission noted *"... those profits were earned in the past and would be held somewhere either by the member or as retained earnings by the business so they can be repaid from where they currently lie."*[44]

[139] Regarding company tax of 28%, this is not a cost taken into account in determining an excessive price. This is because the relevant calculation is the pre-tax profits made on the sale of the masks.

[140] In conclusion, we have in favour of Tsutsumani taken into account admin and handling costs of R376 075, although not substantiated; the loan interest amount to the extent relevant amounting to R83 333.33; and UIF amounting to R84 185 albeit this cost was not substantiated by Tsutsumani with any supporting documents.

[141] As indicated, the Commission submitted that for the distribution and trading of products, the main cost is the sourced cost and therefore margin levels of 10%-15% for PPE on top of the cost of sales are observed for such trading

[43] Annexure "K", a copy of the Central Supplier Database for Government's CSD Registration Report in relation to Tsutsumani. As is evident from page 3 found at Record p212.
[44] Transcript p48 at line 16 to p49 at line 8.

operations prior to the pandemic. Margins of 20% or below also appear in some consent agreements confirmed by this Tribunal.[45] Tsutsumani's margin for this contract of 42.9% after allowing certain costs in favour of Tsutsumani was not just marginally different to these levels, but rather more than double those levels. Furthermore, its mark-up after allowing certain costs in favour of Tsutsumani was 79,9%.

[142] We conclude that the prices charged by Tsutsumani were unjustified by the factors it indicates. Tsutsumani purchased masks at an average price of R17.35 and charged the SAPS R32.50 per mask. This is not accounted for by any cost increases in the value chain. Even allowing certain costs claimed by Tsutsumani as per the table in paragraph 124 above, Tsutsumani's mark-up of 79.9% and its margin of 42.9% are significantly above the benchmarks of a 10-15% margin that is applicable to resellers. It also far exceeds the 10% margin referred to in the Consumer Protection Regulations.

[143] We conclude that Tsutsumani provided a manifestly inadequate explanation to rebut the *prima facie* case as required of it in terms of section 8(2) of the Act.

[144] Furthermore, Regulation 4.2 also creates a rebuttable presumption that "*indicates prima facie that the price is excessive or unfair*". Tsutsumani has not succeeded in challenging this rebuttable presumption and thus falls foul of Regulation 4 of the Consumer Protection Regulations.

[145] In summary, we find that the prices charged by Tsutsumani were significantly higher than a competitive price and that the price difference is unreasonable.

[146] We note that even if we were to accept the alleged "ancillary" costs[46] claimed by Tsutsumani (which we do not consider to be the correct approach),

[45] Commission's Heads of Argument p47 at para 109.
[46] It seems that Tsutsumani excludes the existing tax liability from this, according to its heads of argument.

Tsutsumani's mark-up, according to its heads of argument, would still be 56% and its margin would be 36%.[47] This in our view would still be excessive in the context of this case considering the appropriate benchmarks as discussed above.

CONSUMER DETRIMENT

[147] We now turn to the final requirement of section 8(1)(a) which is that the excessive price must have been charged to the "*detriment of consumers or customers*". As stated by the CAC in *Mittal*, this assessment involves a value judgement.

[148] Tsutsumani appears to contend that detriment cannot be felt where there is only one "*consumer and buyer*", i.e. SAPS. However, the CAC in *Mittal* clearly determined that an "*excessive price may be charged to a single customer*". Accordingly, detriment to a single customer or consumer constitutes sufficient grounds on which to find that Tsutsumani has charged an excessive price in breach of section 8(1)(a) of the Act.

[149] SAPS as a consumer of masks is the customer detrimentally effected by the excessive price charged. Moreover, SAPS in the complaint period had a public duty and had to ensure the safety of its own staff and the public that they served. It is the consumer, as are its employees who are to be provided with masks. Government entities, as well as private entities, are recognised as customers in terms of the Act.

[150] It is not difficult to see the detriment to the consumer - and indeed the public at large - in this instance. Tsutsumani took advantage of SAPS at a time when it urgently needed PPE supplies in order to fulfil its public functions, protecting citizens and keeping the peace. As the Commission noted, this had the effect of: "*increas(ing) the financial burden on government, and ultimately taxpayers, of dealing with the disaster, and (might) also (have left) frontline workers with*

[47] Tsutsumani's Heads of Argument at para 93.5.1.

inadequate protection if there (were) insufficient funds to acquire adequate supplies of essential goods given their price."

[151] This compounds the financial burden on an already severely constrained fiscus. An excessive price charged to government reduces the budget available to pay for, among other things, essential goods and services required by the general public. The reduction in financial resources of SAPS, due to excessive pricing, negatively impacts on its operations on the frontline during this crisis. This places not only the lives of members of SAPS at risk, but also negatively impacts upon the safety, health and wellbeing of members of the public.

[152] Tsutsumani further argued that any potential harm is mitigated by the fact that eighteen different suppliers responded to SAPS' RFQ and that it therefore had the ability to reject Tsutsumani's quotation. We have already found that the sheer number of masks required by SAPS and the urgency meant that no single supplier could supply the masks and that SAPS was a price taker that had to secure any masks that it could obtain on an urgent basis.

[153] Under the circumstances, we find that Tsutsumani engaged in excessive pricing to the detriment of customers or consumers.

REMEDIES

[154] In its Notice of Motion, the Commission sought the following relief against Tsutsumani:

154.1 an interdict and restraint preventing Tsutsumani from engaging in any further conduct in contravention of section 8(1)(a) of the Act;

154.2 the payment by Tsutsumani of an administrative penalty, in terms of section 58(1)(a)(iii) of the Act, equal to ten percent of Tsutsumani's annual turnover in the Republic and its exports from the Republic during its preceding financial year.

[155] We note that the Commission also sought interdictory relief in the *Babelegi* and *Dis-Chem* cases. As in those cases, it is common cause that the conduct which formed the subject of the complaint referral relates to conduct that is not ongoing. We accordingly see no reason to interdict and restrain Tsutsumani from engaging in any further conduct in contravention of section 8(1)(a) of the Act. In addition, section 59 of the Act provides for this in that any repeat conduct of this nature will attract a larger sanction.

[156] What, then, is an appropriate penalty for Tsutsumani?

[157] In determining the appropriate amount of an administrative penalty, which may not exceed 10% of Tsutsumani's annual turnover in the Republic during its preceding financial year, the Tribunal is required to consider the factors in section 59(3) of the Act:

157.1 the nature, duration, gravity and extent of the contravention;

157.2 any loss or damage suffered as a result of the contravention;

157.3 the behaviour of Tsutsumani;

157.4 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;

157.5 the level of profit derived from the contravention;

157.6 the degree to which Tsutsumani has co-operated with the Commission and the Tribunal; and

157.7 whether the conduct has previously been found to be a contravention of the Act.

[158] On every factor listed above, bar the last one, there are no mitigating factors in favour of Tsutsumani. It sought to engage in profiteering at a time of a national health crisis, seeking to exploit government whose essential workers were working to protect the public and police the lockdown. Government, already under a fiscal burden of dealing with the crisis under reduced tax revenues, was forced to buy masks at excessive prices, and/or to purchase fewer masks than they otherwise would have done given such prices.

[159] Tsutsumani did not co-operate with the Commission, or the Tribunal. Neither Tsutsumani, nor its attorneys complied with the timelines and directives contained in the directives issued by the Tribunal. As a result, an urgent pre-hearing was convened some two weeks before the hearing to ensure that the hearing of this matter would proceed on the days set down since Tsutsumani was not complying with the timetable or responding to e-mails by the Commission and Tribunal.

[160] At the pre-hearing we confirmed a new timetable for the submission of documents, including the filing of heads. Tsutsumani did not comply with the deadline for the filing of heads and only filed them on the day of the hearing.

[161] In addition, Tsutsumani has failed to provide a satisfactory explanation for its excessive price during a crisis situation pointing to unsubstantiated and spurious costs. In the circumstances, the only conclusion to be drawn is that Tsutsumani's conduct reflected price-gouging through the exploitation of the market power it enjoyed as a result of the disruption in supply and demand for masks brought about by the coronavirus pandemic.

[162] The Commission estimates that, during the complaint period, Tsutsumani enjoyed an additional profit attained through its excessive pricing of at least R5 341 655.00. This is based on scenario B1 set out above, where the 5% admin and handling fee; one month interest and part of the UIF costs are included in the calculations in favour of Tsutsumani.

[163] In *Southern Pipeline Contractors,* the CAC confirmed that an administrative penalty should promote the important objective of deterrence, and that it "*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 principles were recently reconfirmed by the CAC in *Babelegi*.

[164] Tsutsumani's annual turnover in 2019 (i.e. for the financial year ending 28 February 2019) was R34 416 891.00. Tsutsumani has not provided its audited financial statements for the latest financial year ending 28 February 2020. Given section 59(2) of the Act, which limits the administrative penalty to 10% of the firm's annual turnover during its preceding financial year, the maximum fine based on Tsutsumani's 2019 turnover of R34 416 891.00. would be R3 441 689.10. This figure is significantly lower than the excess profit which Tsutsumani derived from the sale of the masks to SAPS, even if certain costs are included in favour of Tsutsumani. Furthermore, as indicated above, the aggravating factors in this matter far outweigh the mitigating factor of a first-time contravention of the Act by Tsutsumani. Under the circumstances, we find that this penalty, 10% of Tsutsumani's 2019 turnover, is warranted.

Order

We find that:

[1] Tsutsumani has contravened section 8(1)(a) of the Act, read with Regulation 4 of the Consumer Protection Regulations, during the period 5 April 2020 to 29 April 2020.

[2] Tsutsumani must pay an administrative penalty of R3 441 689.10 (three million four hundred and forty-one thousand six hundred and eighty-nine rands and ten cents) within 30 business days of the date of this order.

[3] There is no order as to costs.

Ms Mondo Mazwai

28 April 2022

Date

Mr Andreas Wessels and Ms Andiswa Ndoni concurring.

Tribunal Case Managers:	Busisiwe Masina, Peter Kumbirai and Lumkisa Jordaan
For the Applicant:	Candice Slump of the Commission.
For Tsutsumani:	Hanes Lerm instructed by Aphane Attorneys