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CASE NOTE

Safeguarding South African Consumers' Socio-Economic Rights During COVID-19: *Competition Commission v Babelegi Workwear and Industrial Supplies*

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Abstract
This article explores the responses of the South African competition authorities to the impact of the COVID-19 pandemic on the socio-economic rights of consumers in relation to the price gouging of essential and medical supplies. After discussing the constitutional and legislative context of socio-economic rights and excessive pricing, it examines the first case in which the competition authorities were called upon to decide on the excessive pricing of medical supplies during COVID-19. The article finds that, while the competition authorities were swift to interpret the Competition Act widely and act against suppliers charging excessive prices, there remains a gap in South Africa's legislative framework as there is no specific legislation regulating price gouging during states of pandemic or disaster. The article identifies the need for legislative development and concludes by offering recommendations for addressing future incidents of price gouging.

Keywords: COVID-19; socio-economic rights; competition law; excessive pricing; price gouging; South African Constitution

Introduction

Price gouging occurs when suppliers of goods or services raise prices to unfair levels owing to a sudden surge in demand. This is usually occasioned by natural disasters or global health emergencies, such as the COVID-19 pandemic. In a disaster or health emergency, demand for luxury goods and services dwindles; to offset the loss, retailers usually raise the prices of essential items to stay in business.[1] When COVID-19 emerged, some suppliers increased their prices for goods and services to unconscionable levels in line with the definition of price gouging. While some countries have legislation regulating price gouging, South Africa does not. In the USA, for instance, most states prohibit price gouging and, in certain situations, make it a criminal offence.[2] In light of the health

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1 "Supply and demand or price gouging? An ongoing debate" (1 April 2020) *Harvard Business School Online*, available at: <https://online.hbs.edu/blog/post/supply-and-demand-or-price-gouging-an-ongoing-debate> (last accessed 22 November 2023).

2 H Morton "Price gouging state statutes" (10 March 2022) *National Conference of State Legislatures*, available at: <https://www.ncsl.org/research/financial-services-and-commerce/price-gouging-state-statutes.aspx#:~:text=In%20most%20states%2C%20price%20gouging,penalties%20for%20price%20gouging%20violations> (last accessed 22 November 2023).

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and economic challenges consumers faced due to overinflated prices, South Africa relied on two pieces of legislation for respite: the Disaster Management Act 57 of 2002 (DMA) and the Competition Act 89 of 1998 (CA). Before delving into the role played by these laws in promoting socio-economic rights during a natural disaster, it is apposite to explain their constitutional foundation. The preamble to the DMA provides that its primary purpose is to provide an integrated and coordinated disaster management policy that focuses on preventing or reducing the risk of disasters, mitigating the severity of disasters, emergency preparedness and effective responses to disasters. Essentially, the DMA empowers the executive to implement policies to safeguard individuals' constitutional rights while monitoring and reducing the negative impacts of a natural disaster. The CA is not concerned with natural disasters; its primary concern is to regulate competition to promote the economy's efficiency, adaptability and development. However, the CA is meant to provide consumers with competitive prices, advance the social and economic welfare of all South Africans and promote equal access to and participation in the economy. These aims are grounded in the realization of constitutional rights, including equality and access to affordable socio-economic rights such as housing, healthcare, food, water and education. The enforcement of these two laws is relevant during a natural disaster such as COVID-19 because they enable the government to implement disaster policies while allowing ordinary South Africans to enjoy the most basic human rights, such as the right to access health facilities and fair prices on essential commodities.

Constitutional and legislative context

Some scholars have hailed the South African Constitution (the Constitution)[3] as providing "the most sophisticated and comprehensive system for the protection of socio-economic rights of all of the constitutions in the world".[4] Socio-economic rights are entitlements to material conditions for human welfare, including rights to food, water, health, shelter, education and a safe environment.[5] Socio-economic rights guaranteed by the Constitution include rights to a safe and healthy environment,[6] property,[7] housing,[8] healthcare, food, water and social security.[9] They also extend to children's rights to shelter, nutrition, social services, healthcare and education.[10] These rights are justiciable, meaning they may be enforced through the courts where they have been infringed.[11] In a disaster or emergency, various constitutional rights, including socio-economic rights, often come under threat due to multiple factors, including the disruption of social and economic activities.

In the event of a natural disaster or health emergency, the DMA outlines the legal procedures to be followed to ensure a timely, coordinated and effective response to the disaster situation. The DMA defines "disaster" as:

> "[A] progressive or sudden, widespread or localized, natural or human-caused occurrence which causes or threatens to cause death, injury or disease, damage to property, infrastructure or the environment; or significant disruption of the life of a community and is of a magnitude

3 Constitution of the Republic of South Africa 108 of 1996.

4 C Heyns and D Brand "Introduction to socio-economic rights in the South African Constitution" (1998) 2 *Law Democracy and Development* 153 at 153.

5 D Brand "Introduction to socio-economic rights in the South African Constitution" in D Brand and C Heyns (eds) *Socio-Economic Rights in South Africa* (2005, PULP) 1 at 3.

6 The Constitution, sec 24.

7 Id, sec 25.

8 Id, sec 26.

9 Id, sec 27.

10 Id, secs 28 and 29.

11 Brand "Introduction to socio-economic rights", above at note 5 at 17.

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that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources".[12]

The threat to health and the disruption to life posed by COVID-19 fell squarely within the definition of a disaster as contemplated in the DMA. The DMA was therefore applicable to the COVID-19 pandemic and, through its provisions, COVID-19 was declared a national disaster on 15 March 2020. The DMA's purpose is to provide for an integrated disaster management policy focusing on reducing the risk of disasters, mitigating their severity, ensuring emergency preparedness, declaring a national state of disaster and disaster management reaction, including recruiting and training volunteers.[13] However, the DMA contains no price regulation provisions. As a result of the lack of provisions for price regulation, the DMA proved inadequate to deal with price gouging and consumers faced a real threat to their socio-economic well-being. Given the disaster and the ongoing exploitation of consumers due to the COVID-19 pandemic, an alternative remedy to price gouging was required. That remedy was found in the CA. The former competition commissioner noted that, when COVID-19 struck and abuse of pricing of COVID-19-related goods became apparent, the Competition Commission (the Commission) advocated for regulations and the adaptation of competition rules to facilitate a swift response to price gouging. The response included the application of existing competition laws on illegal activities, such as excessive pricing, and implementing policies that shortened the timelines for adjudicating cases.[14]

One of the fundamental aims of the CA is to provide consumers with competitive prices and product choices.[15] This purpose was never more pertinent than during the COVID-19 pandemic, which threatened public health and citizens' socio-economic well-being. The CA sets out to achieve competitive prices and product choices for consumers by prohibiting abuse of dominance and the charging of excessive prices.[16] Under the CA, an excessive price bears no reasonable relation to the economic value of the goods or service.[17] It is prudent to note that there is a distinct difference between price gouging and excessive pricing. Price gouging refers to charging exorbitant prices for a product, service or commodity after a shock to either the demand or supply of a particular product or service due to a natural disaster or state of emergency. Price gouging, therefore, is an immediate short-term reaction to and exploitation of the supply and demand imbalance owing to a disaster. However, excessive pricing is a form of predatory pricing by a dominant firm over an extended period. At the onset of the pandemic, the authors questioned whether South Africa had the legislative framework to cope with the price gouging that was exponentially flaring during those times of crisis.[18]

They proposed that, because South Africa had no price gouging provisions, the Consumer Protection Act[19] or the CA could be used as a stopgap mechanism to combat price gouging. The latter suggestion was vindicated on 1 June 2020, when the Competition Tribunal (the Tribunal)[20] handed down a judgment[21] confirming that Babelegi Workwear and Industrial Supplies CC (Babelegi) had taken advantage of the COVID-19 global pandemic by inflating the

12 DMA, sec 1.

13 Id, long title.

14 T Bonakele "The South African competition agency response to COVID19" (2022) 10 *Journal of Antitrust Enforcement* 241 at 242.

15 CA, sec 2(a).

16 Id, sec 8(1)(a).

17 Id, sec 1.

18 S Tavuyanago and K Mpofu "COVID-19 and the possible price gouging effect: Does South Africa have the legislative framework to cope?" (1 April 2020) *De Rebus*, available at: <https://www.derebus.org.za/covid-19-and-the-possible-price-gouging-effect-does-south-africa-have-the-legislative-framework-to-cope/> (last accessed 22 November 2023).

19 Act 68 of 2008.

20 For detailed information on the competition authorities, see the CA, chap 4.

21 *Competition Commission v Babelegi Workwear and Industrial Supplies* CC CR003Apr20 (*CC v Babelegi*).

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prices of face masks from ZAR 50.60 per box as of 9 December 2019 to ZAR 550.00 per box as of 26 March 2020.[22]

Babelegi was found to have contravened section 8(1)(a) of the CA, which prohibits charging excessive prices. The Tribunal's decision is fundamental to South African jurisprudence for three reasons. First, it marked the first case to address firms' conduct to maximize profits during a state of disaster by overcharging consumers. Secondly, it confirmed the critical role of the public interest consideration in competition law, where the CA was used to protect South Africans' socio-economic rights. Lastly, it highlighted the need for better preparedness in protecting consumers from unwarranted price increases during states of disaster by providing greater certainty regarding the regulation of price gouging. This article notes that, while the competition authorities were swift to act, the question remains whether the CA is the most suitable tool for safeguarding socio-economic rights by regulating commodity pricing during states of disaster or if legislative intervention is needed to ensure preparedness in the future.

Competition Commission v Babelegi Workwear and Industrial Supplies

Facts of the case

Around 9 April 2020, the Commission referred a complaint to the Tribunal against Babelegi, alleging that it had contravened section 8(1)(a) of the CA.[23] The allegations related to the charging of exorbitant prices for FFP1 face masks, the demand for which had risen due to the advent of COVID-19. Since the alleged conduct occurred during a global pandemic, the case raised a legal issue of public interest.[24] The public interest related to the rights of consumers to have their socio-economic rights protected as provided by the Constitution, particularly rights to food, clean water, and access to health services and supplies.[25]

During the period between 31 January 2020 and 15 March 2020, Babelegi drastically increased the price of the FFP1 face masks, prompting intervention by the competition authorities. The prices increased by 888 per cent between 9 December 2019 and 5 March 2020, the first and last days of the complaint period.[26] This increase was effected despite Babelegi's costs of procuring the masks remaining the same until 19 March 2020.[27] The Commission argued that Babelegi had excessively increased the price of its face masks in contravention of section 8(1)(a) of the CA.

22 H Ratshisusu and L Mncube "Addressing excessive pricing concerns in time of the COVID-19 pandemic: A view from South Africa" (2020) 8 *Journal of Antitrust Enforcement* 256 at 258.

23 *CC v Babelegi*, para 1.

24 Id, para 26.

25 The Constitution, sec 27. It is important to note that the Tribunal's reference to "public interest" in this case referred to the general protection of individuals' rights, advancement of justice and improvements for the good of the general public. This is a wider interpretation of "public interest", bearing in mind the purpose and tenets of the Constitution. *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another* [2021] ZACC 35 considered a merger that would affect access to healthcare (a socio-economic right under sec 27 of the Constitution). Although there were no public interest issues raised in terms of the CA, the Constitutional Court still interpreted the decisions of the Tribunal and the Competition Appeal Court in light of the provisions of secs 7 and 39(2) of the Constitution, the goals of the CA and what would be in the "best interest of the public" (paras 8, 53 and 71). This wide interpretation should not be confused with "public interest" in the context of mergers. Under the CA, sec 12A, when considering a proposed merger, the Commission or Tribunal must consider what impact the proposed merger would have on competition, as well as whether the merger can be justified or prohibited based on a closed list of public interest considerations. For a more detailed discussion of public interest in mergers, see S Tavuyanago "Public interest considerations and their impact on merger regulation in South Africa" (2015) 15/7 *Global Journal of Human-Social Science: E Economics* 26.

26 *CC v Babelegi*, para 115.

27 Id, para 117.

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Issues for determination and Tribunal's decision

Contravention of the CA

Section 8 of the CA prohibits a dominant firm from charging an excessive price to the detriment of consumers or customers.[28] Under this section, three preconditions must be met. First, the firm against which a complaint is levelled must be dominant. Secondly, the firm must have charged an excessive price. Lastly, the price must have been to the detriment of consumers or customers. The Tribunal acknowledged and addressed these essential elements separately in its judgment.[29]

Establishing dominance

The Tribunal noted that section 8 of the CA only applies where the dominance requirements in sections 6 and 7 are met. In *CC v Babelegi*, the relevant test for dominance was under section 7(c) of the CA,[30] which relates to determining the dominance of a firm that has less than 35 per cent of the market share but has market power. Market power refers to the power of a firm to control prices, exclude competition or behave to an appreciable extent independently of its competitors, customers or suppliers.[31] The Commission alleged that, while Babelegi did not have the requisite market share under section 7(a) and (b) to establish dominance, the circumstances of COVID-19 had conferred market power upon Babelegi, which had allowed it to exploit customers and consumers.[32] The commissioner also argued that Babelegi's dominance could not be assessed as though the economy were operating normally, due to the exceptional circumstances.[33]

The Tribunal noted that determining whether Babelegi was dominant through the exercise of market power had to be done within the context of COVID-19, which created extraordinary circumstances by generating a surge in demand for products such as masks, thereby disrupting normal local and international supply.[34] It was noted that customers could not defer consumption of items such as masks in the context of a health crisis such as COVID-19. As a result, firms could exercise market power due to the disruption to normal market conditions.[35] The Tribunal found that, in the context of COVID-19, Babelegi had market power as it acted independently of its competitors, consumers and suppliers by drastically and progressively increasing the price of its face masks, thus satisfying the dominance requirement.

Establishing excessive pricing

An economic test must be undertaken to determine whether a price charged to the consumer is excessive. The test entails determining whether the price charged is higher than a competitive price and whether such a difference is unreasonable, considering several factors listed in the CA.[36] The Tribunal had to determine whether Babelegi's markup or margin had increased materially, relative to what it previously charged or applied and, if so, whether that increase was justified by any cost increases from a supplier higher up the value chain.[37] If a prima facie case of excessive pricing were established, the onus would shift to Babelegi to demonstrate that the price increase was reasonable and justified.[38]

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28 CA, sec 8(1)(a).
29 *CC v Babelegi*, para 48.
30 Id, para 42.
31 CA, sec 1(1).
32 *CC v Babelegi*, para 53.
33 Bonakele "The South African competition agency", above at note 14 at 245.
34 *CC v Babelegi*, paras 67–69.
35 Id, para 75.
36 CA, sec 8(3).
37 *CC v Babelegi*, para 99.
38 J Oxenham, MJ Currie and C van der Merwe "COVID-19 price gouging cases in South Africa: Short-term market dynamics with long-term implications for excessive pricing cases" (2020) 11/9 *Journal of European Competition Law & Practice* 524 at 525.

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Babelegi's pre-crisis price for masks in December 2019 was accepted as the "competitive price" as it represented the comparison to the price(s) charged during the crisis.[39] The Tribunal ruled that, in the context of a crisis such as COVID-19, the test for exploitative pricing included an assessment of whether a corresponding increase in cost substantiated a material price increase.[40] Babelegi did not face any actual increase in its costs to procure the FFP1 face masks during the complaint period until 18 March 2020 and failed to tender any evidence of substantial price increases by any of its suppliers.[41] Comparing the pre-crisis price of ZAR 50.60 per box of face masks and the peak price of ZAR 550.00 as of 5 March 2020,[42] the Tribunal found that Babelegi failed to advance a rational and valid explanation for its successive and colossal price increases during the complaint period.[43] The Tribunal held that Babelegi's prices and markups during the complaint period bore no reasonable relation to the prices and markups before the complaint period and were excessive and unreasonable.[44]

Establishing consumer detriment

The Commission argued that the charging of increased prices during COVID-19 was detrimental to poor communities and small businesses, as such price increases could put necessities and products needed to cope with the challenges of the health crisis beyond the reach of the poor and / or impose high costs on small businesses.[45] Babelegi, on the other hand, maintained that there was no detriment as it did not sell enough masks to amount to a significant adverse effect on consumers or customers, as it only sold 496 boxes between 31 January 2020 and 5 March 2020.[46] The Tribunal noted that, due to excessive pricing being an exploitative type of abuse, it followed that, "if the prices complained of are held to be excessive, detriment to consumers will have resulted", since the excess profit earned must be at the expense of consumers or customers in the economy.[47] The Tribunal determined that Babelegi's price increases were not the result of some ingenuity or investment made by it, but rather an exploitation of economic circumstances amid the COVID-19 health crisis at the expense of consumers or customers.[48] In the context of the health crisis and because Babelegi was aware of the increased demand for face masks during the complaint period, it took advantage of customers and consumers by effecting price increases that were not in any way related to procurement costs.[49] Babelegi was found to have charged excessive prices to the detriment of consumers, meaning that the Tribunal had to focus on the second aspect of the issues up for determination and make a finding on the appropriate sanction for infringement.

Sanction for contravening section 8(1)(a) of the Competition Act

The CA provides several sanctions, including injunctions, financial penalties and fines for firms or individuals who contravene it.[50] The Tribunal or the Competition Appeal Court (CAC) imposes these sanctions to correct transgressing firms and deter future would-be transgressors.[51] In *CC v Babelegi*, the Commission submitted that appropriate remedies would be an injunction and the

39 Ratshisusu and Mncube "Addressing excessive pricing concerns", above at note 22; *CC v Babelegi*, para 115.
40 *CC v Babelegi*, para 129.
41 Id, paras 132–33.
42 Id, para 118 (table 2).
43 Id, para 141.
44 Id, para 159.
45 Id, para 162.
46 Id, para 164.
47 Id, para 167.
48 Id, para 172.
49 Id, para 176.
50 L Kelly et al *Principles of Competition Law in South Africa* (2016, Oxford University Press) at 220.
51 M Neuhoff et al *A Practical Guide to the South African Competition Act* (2017, LexisNexis) at 438.

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imposition of an administrative penalty of not less than ZAR 113,000.[52] In arriving at this penalty, it argued that the USA's "treble damages" doctrine should be applied. The treble damages doctrine was established under section 4 of the Clayton Act[53] and provides that private plaintiffs with a cause of action for injuries suffered from antitrust violations may recover treble damages from the defendant.[54]

The Commission submitted that Babelegi's penalty should be no less than ZAR 113,451, representing three times the amount of Babelegi's calculated excess profit of ZAR 37,817.[55] The Tribunal noted that, in imposing a penalty, the amount should be proportional in severity to the degree of blameworthiness of the offending party, the nature of the offence and its effect on the economy.[56] The Tribunal accepted the amount of ZAR 30,416 as Babelegi's excess profit and held that, for the penalty to have the desired deterrent effect and to take into account all the considerations in terms of section 59(3) of the CA, it was appropriate that an amount 1.5 times the excess profit be added to Babelegi's improper gain. The penalty imposed on Babelegi thus amounted to ZAR 76,040, constituting ZAR 30,416 (improper gain) plus ZAR 45,624 (1.5 times ZAR 30,416), which it was ordered to pay within 15 business days of the order.[57]

Competition Appeal Court

Dissatisfied with the Tribunal's determination, Babelegi appealed against the decision to the CAC,[58] which upheld the Tribunal's decision. The CAC held that Babelegi's conduct reflected its market power and it had behaved in a manner consistent with that of a monopolist, demanding the highest possible price from consumers.[59] The court lamented that, in this instance, the exorbitant prices were levied during a crisis when the use of masks was deemed essential for protecting the health, safety and welfare of others and thus crucial for reducing the threat posed by COVID-19.[60] The court concurred with the Tribunal, noting that, because the high prices of such a necessity were unquestionably detrimental to all consumers, Babelegi had contravened section 8 of the CA.[61]

While the CAC concurred with the Tribunal regarding consumer detriment, it set aside the order relating to the administrative fine.[62] The court ruled that it was not appropriate to impose an administrative penalty because the breach committed by the appellant was a de minimis breach, in that the 1120 per cent markup on 5 March 2020 concerned only three boxes of masks.[63] Most importantly, the CAC held that there had been no legislation to regulate price-gauging when the complaint was filed.[64] Consequently, the court noted that justice would be best served

52 *CC v Babelegi*, para 179.

53 Clayton Act 15 USC § 15 (1982).

54 C Deffense "A farewell to arms: The implementation of a policy-based standing analysis in antitrust treble damage actions" (1984) 72/3 *California Law Review* 437 at 438.

55 *CC v Babelegi*, para 182.

56 Id, para 186.

57 Id, para 189.

58 *Babelegi Workwear and Industrial Supplies CC v Competition Commission of South Africa* [2020] 2 CPLR 470 (CAC) (18 November 2020) (*Babelegi v CC*).

59 Id, paras 51, 53 and 57. See also J Oxenham, M-J Currie and J Eveleigh "'Buyer power' in emerging markets: Economic or consumer protection driven" at 8–10, available at: <https://static1.squarespace.com/static/52246331e4b0a46e5f1b8ce5/t/6343e348b1e88a6180c38dc9/1665393481072/Oxenham+et+al_%E2%80%9CBuyer+Power%E2%80%9D+in+Emerging+Markets.pdf> (last accessed 22 November 2023).

60 *Babelegi v CC*, para 67.

61 Ibid.

62 Id, para 82.

63 Id, para 78.

64 Id, para 79.

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by a decision not to impose a penalty on Babelegi, a small company whose actions during the complaint period had already resulted in its incurring substantial losses.[65]

Analysis

After examining *CC v Babelegi* and the Commission's intervention by referring a complaint to the Tribunal, this article now discusses the broad interpretation of public interest and the use of the purpose of the CA to safeguard the socio-economic rights of consumers.

Excessive pricing during a disaster and the detriment to consumers

Extreme external shocks to an economic system due to war, public health emergency or natural disaster can cause surges in demand for various commodities and services and disruptions in supply, frequently resulting in dramatic price increases.[66] This was the case during the global COVID-19 pandemic when consumers witnessed a spike in the prices of essential commodities.[67] There are two main reasons for price increases during a crisis. First, the crisis period may substantially increase transaction costs, including search costs, for buyers of retail products and services, thereby reducing the number of substitutes that typically restrain market power from vesting in one firm.[68]

Secondly, health concerns may restrict consumers' propensity to visit alternative stores in pursuit of alternative products.[69] The crisis period may drastically modify customers' valuations of product attributes for some products, lowering or limiting the number of substitutes that would typically reduce the market power of firms selling those products.[70] For instance, during COVID-19, hand sanitizers with a reduced alcohol level were significantly less interchangeable with other soaps or sanitizers.[71] Furthermore, the pandemic inevitably raised demand for goods such as face masks, where the production rate before 2020 was insufficient to meet the demand imposed by COVID-19.[72] Consequently, the incidence of COVID-19 significantly aggravated the supply-demand imbalance.[73]

Fundamentally, it appears that the fluctuation of prices during a disaster is inevitable and legislation must protect consumers by prohibiting excessive pricing to their detriment. As noted by the OECD, consumer detriment can take many forms: it can be structural (ie, affecting all consumers) or personal, apparent to consumers or hidden, and financial or non-financial; consumer detriment may be apparent to consumers immediately, take time to emerge or remain hidden.[74] Considering that, at the onset of COVID-19, consumers were coerced into paying more for essential food items and health supplies, this amounted to structural and apparent financial detriment due to the excessive pricing. The interference of the competition authorities was therefore justified to prevent

65 Id, para 80.

66 WH Boshoff "The competition economics of excessive pricing and its relation to the COVID-19 disaster period" (5 May 2020) *Stellenbosch University Centre for Competition Law and Economics* 1 at 1; X Chen "Research on the causes and effects of Chinese mask price fluctuation during COVID-19" (2022) 654 *Advances in Economics, Business and Management Research* 406 at 407.

67 A Van Assche and L Sarianna "From the editor: COVID-19 and international business policy" (2020) 3/3 *Journal of International Business Policy* 273 at 274–5.

68 Boshoff "The competition economics", above at note 66 at 2.

69 Ibid.

70 Ibid.

71 Ibid.

72 Chen "Research on the causes and effects", above at note 66 at 408.

73 Ibid.

74 "OECD recommendation on consumer policy decision making" (March 2014, OECD Committee on Consumer Policy), available at: <https://www.oecd.org/sti/consumer/Toolkit-recommendation-booklet.pdf> (last accessed 22 November 2023).

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further abuse of dominance and promote the welfare of consumers. According to Ratshisusu and Mncube, the excessive pricing and markups earned by suppliers presented a case of extreme consumer exploitation during a pandemic, and the competition authorities had no option but to intervene.[75]

Competition law as a tool to safeguard socio-economic rights

The state must respect, protect, promote and fulfil the rights in the Bill of Rights, including socio-economic rights.[76] Section 27(2) of the Constitution imposes a duty on the state either to take affirmative action to realize socio-economic rights or to refrain from actions that could impede their full implementation.[77] Affirmative action takes the form of promulgating legislation that oversees the gradual realization of socio-economic rights.[78] There are numerous pieces of legislation enacted to give effect to socio-economic rights, including the Consumer Protection Act and the CA.

The CA became a seminal piece of legislation during COVID-19 because it aims "to create employment and advance the social and economic welfare of South Africans".[79] Thus, section 2 establishes the welfare of South Africans as one of the guiding principles for interpreting and applying all provisions in the act. Furthermore, the CA requires competition authorities to improve South Africans' participation in the economy as well as promote the socio-economic well-being of all citizens. Therefore, the Commission's intervention regarding price gouging was not only timeous but necessary to protect the rights enshrined in section 27 of the Constitution. The following remarks by the Tribunal underline the necessity of the intervention: "competition authorities are, at times of crisis and in instances of exploitative price abuse, duty-bound to act".[80] Had the authorities not intervened, the proliferation of excessive pricing would have put essential commodities and access to health and food supplies out of the reach of poor individuals, pushing them further down the ladder of economic freedom and enjoyment of constitutionally protected rights. This view is also bolstered by First, who applauds the competition authorities' concern for justice and their use of antitrust to protect the vulnerable and do away with injustice as they sought to sanction the reprehensible exploitation of consumers amid a crisis, when customers were at their most vulnerable and their choices very limited.[81]

Need for legislative development

This article has identified a lacuna in the regulation of price gouging in South Africa. While competition law was used to prosecute firms engaged in price gouging, the authors argue that the CA is not the most appropriate legislation to deal with price gouging. This view is supported by other authors who suggest that, in circumstances of national emergency, dedicated legislation to protect consumers should be preferred instead of using competition law.[82] This argument is further supported by the fact that the competition authorities used excessive pricing provisions in the CA to combat unwarranted price increases during the COVID-19 pandemic. However, there is a

75 Ratshisusu and Mncube "Addressing excessive pricing concerns", above at note 22 at 257.

76 The Constitution, sec 7(2), read with sec 27.

77 F Coomans "Reviewing implementation of social and economic rights: An assessment of the 'reasonableness' test as developed by the South African Constitutional Court" (2005) 65 *Heidelberg Journal of International Law* 167; K Klare "Legal culture and transformative constitutionalism" (1998) 14 *South African Journal on Human Rights* 146 at 150.

78 The Constitution, sec 26(2), read with sec 27(2).

79 CA, sec 2.

80 *CC v Babelegi*, para 104.

81 H First "Robbin' Hood" (September 2020) *CPI Antitrust Chronicle* (New York University Law and Economic Research Paper No 20-45) at 7, available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3724628> (last accessed 22 November 2023).

82 Oxenham, Currie and van der Merwe "COVID-19 price gouging cases", above at note 38 at 529.

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distinction between legislation prohibiting price gouging and excessive prices under traditional competition laws. On the one hand, legislation that regulates price gouging typically places a moratorium on price increases relating to essential goods and services.[83] Price gouging laws aim to protect consumers from potential exploitative behaviour and provide certainty regarding permissible price increases during states of disaster. On the other hand, laws that regulate competition and excessive pricing are designed to evaluate whether markets can rectify themselves to restore prices to competitive levels in the long term.

The USA provides a pertinent example of how price gouging and competition legislation can exist in parallel while aiming to achieve the same goal. The USA has antitrust legislation such as the Sherman Act, Federal Trade Commission Act and the Clayton Act,[84] as well as price gouging legislation, albeit sporadic and state-dependent. For example, the New York Consolidated Laws prohibit the sale of "goods and services vital and necessary for the health, safety and welfare of consumers or the general public" for amounts that represent an unconscionably excessive price;[85] California prohibits price gouging in states of emergency or local emergencies and limits increases to a maximum of 1.1 per cent;[86] Pennsylvania prohibits price gouging in disaster emergencies;[87] and the Michigan Compiled Laws make it an offence to charge "the consumer a price that is grossly in excess of the price at which similar property or services are sold",[88] with a penalty of up to USD 25,000 per violation.[89] What is noteworthy from this is that, apart from the USA having specific competition and price gouging legislation, its laws on price gouging are designed to prevent rather than react to complaints of price gouging.

This example is especially relevant to South Africa because the CA is more reactive than proactive. This implies that a complaint of excessive pricing must be filed to initiate an investigation. A determination must then be made before the accused firm is held accountable through enforcement procedures.[90] The authors opined in a previous contribution that the lack of specific legislation would lead to consumer detriment because, even though the CA could be used (and was used) to fight excessive pricing during COVID-19, by the time consumers were vindicated through the prosecution of firms such as Babelegi, the effects of the price increases would long have been felt by consumers.[91]

Furthermore, the CAC acknowledges that the offence committed by Babelegi is rightly described as price gouging and that South Africa does not have price gouging laws. Due to the lack of legislation regulating price gouging, the Tribunal was unjustified in imposing an administrative penalty on Babelegi, which points to the need for further legislative development. In that vein, the authors agree with the CAC's finding and add that, had a sanction been imposed against Babelegi, it would have amounted to a violation of the common law maxim *nullum poena sine lege* [no punishment without law].[92] This principle is an essential component of the rule of law. It ensures that individuals are not subject to arbitrary punishment and that one should only be held accountable for an act or omission clearly defined as illegal by national law at the time of the conduct.[93] While

83 Ibid.

84 See "The antitrust laws" (Federal Trade Commission), available at: <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws> (last accessed 22 November 2023).

85 New York General Business, chap 20, art 26, sec 396-R(2).

86 Californian Penal Code §396. See also "State price gouging laws: California" (The Food Industry Association), available at: <https://www.fmi.org/docs/default-source/gr-state/price-gouging-state-law-chart.pdf?sfvrsn=9058b75c_2> (last accessed 22 November 2023).

87 Price Gouging Act 133 of 2006, sec 4.

88 Michigan Consumer Protection Act 331 of 1976, sec 445.903(1)(z).

89 Tavuyanago and Mpofu "COVID-19 and the possible price", above at note 18 at 10.

90 See CA, chaps 5 and 6.

91 Tavuyanago and Mpofu "COVID-19 and the possible price", above at note 18 at 11.

92 *Babelegi v CC*, para 79.

93 J Burchell *Principles of Criminal Law* (3rd ed, 2005, Juta) at 99.

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the CAC is lauded for its application of the rule of law through its decision to rescind Babelegi's administrative penalty due to the lack of law regulating price gouging, the authors believe, however, that it was incumbent upon the court, as an organ of the state, to give a directive to Parliament to effect this legislative development and provide for the regulation of price gouging.

Conclusion

While *CC v Babelegi* dealt with the excessive pricing of face masks, the authors proffer that face masks be used as a proxy for all goods and services essential to the livelihood of consumers that could have been subject to excessive pricing and thus directly affect consumers' socio-economic well-being.[94] Although the CA was not promulgated to address states of disaster, natural or otherwise, the competition authorities must be commended for their proactiveness and broad interpretation of the CA and for using it as a stopgap mechanism to halt excessive pricing of essential commodities and, by so doing, safeguard the socio-economic rights of South Africans. *CC v Babelegi* sent a strong message that the authorities will not hesitate to intervene and prosecute any cases of excessive pricing, as the well-publicized outcome served as a deterrent to both Babelegi and other firms that were at risk of attracting higher penalties from the courts due to their larger size.[95]

Be that as it may, some criticism may be levelled against the government, especially the legislative branch, for not having introduced measures in the form of pandemic-specific legislation to regulate pricing during pandemics and other health and safety protocols to protect citizens' socio-economic rights during states of emergency. Due to a lack of specific legislation dealing with price gouging, different agencies scrambled to find recourse for consumers. To this end, Bonakele recounts that, to expedite recourse for consumers, complaints had to be classified as either consumer or competition complaints and be divided between the consumer protection agency[96] and the Commission.[97] While this collaborative initiative by both agencies may be commended, the authors argue that, had there been specific price gouging legislation in place, the path to recourse for consumers would have been more certain and the response swifter.

The US example provides valuable insight into how competition and price gouging legislation can not only co-exist but complement each other in efforts to curb excessive pricing in the short or long term. The authors suggest that legislative development is necessary to prepare the country for the next pandemic, disaster or state of emergency. Ideally, the legislature should consider the promulgation of specific price gouging legislation. Alternatively, the legislature may consider amending the CA and inserting a section to regulate price gouging. The development (a new act or new section in the CA) should also place a moratorium on price increases during states of disaster or emergencies. It must follow the style of section 4(1)(b) of the CA[98] in prohibiting price gouging per se and perhaps even making it a criminal offence as in other jurisdictions.[99]

COVID-19 was not the first, nor will it be the last pandemic or endemic disease to devastate the world; it would therefore be prudent to enact or amend existing legislation to make it more

94 See "COVID-19 in Africa: Regional socio-economic implications and policy priorities" (2020, OECD) at 8–9, available at: <https://read.oecd-ilibrary.org/view/?ref=132_132745-u5pt1rdb5x&title=COVID-19-in-Africa-Regional-socio-economic-implications-and-policy-priorities> (last accessed 22 November 2023), which explores the socio-economic impact of COVID-19 in detail, including the rise in food prices, pharmaceuticals and oil prices, which in turn affected the prices of basic goods and services.

95 Bonakele "The South African competition agency", above at note 14 at 245; see also First "Robbin' Hood", above at note 81 at 4, for the distinction between consumer and competition matters.

96 The National Consumer Commission.

97 Bonakele "The South African competition agency", above at note 14 at 243.

98 Prohibition of cartel conduct under the CA, chap 2, part A.

99 See Morton "Price gouging state statutes", above at note 2.

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disaster-specific and negate any potential adverse effects on constitutionally protected rights. The government's unpreparedness and experiences from the COVID-19 pandemic provide valuable lessons that open the avenue to more research and, hopefully, policy transformation.

Competing interests. None.

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