

Competition Tribunal of South Africa

Hearing in the matter of

THE COMPETITION COMMISSION

and

DIS-CHEM PHARMACIES LTD

*Case No. CR008Apr20
(Complaint referral)*

held at

***DTI Building
Sunnyside***

on

6 May 2020

Panel: *Y Carrim
F Tregenna
I Valodia*

Case Manager: *A Day-Van Heerden*

*AMB Recordings and Transcriptions CC
P O Box 915-1519, Garsfontein East 0060
Tel: (012) 819 1013; Fax: (012) 349 8218*

Competition Commission and
Dis-Chem Pharmacies Ltd

CHAIRPERSON: Can you just put yourselves on record again, because this is a new recording?

MR MAJENGE: Thank you Chair. My name is Bakhe Majenge. I appear on behalf of the Commission together with my colleague,
5 Candice Slump. We are assisted by Mr James Hodge.

ADV LE ROUX: Morning Chair and members of the Tribunal. Michelle Le Roux, together with my learned friends Ms Avidon, Mr Quinn and Mr Phaladi instructed by ENS Africa for Dis-Chem.

CHAIRPERSON: Thank you. Just to confirm, the panel today is Prof
10 Fiona Tregenna, Prof Imraan Valodia and myself, Yasmin Carrim presiding. So, where we left off on Monday was we had been hearing from Mr Smith and we do have a few questions for him, Ms Le Roux, before we hand over to the Commission. I don't think the questions require us to go into confidential session at this point in time. If there
15 is to be a discussion around numbers, we can do that at the end together with the Commission's expert. We might want to arrange our numbers discussion in one sitting.

For now I think we will have some general questions, but I just wanted to place on record that we did receive the document, which we
20 will call the joint minute and the timeline from the parties yesterday and we might have a few questions on that, but for now let's just continue with Mr Smith and ask him to put his video on and his audio

Competition Commission and
Dis-Chem Pharmacies Ltd

and I will ask my panel members to field the questions they have for him and we will start with Prof Valodia.

ADV LE ROUX: Chair?

CHAIRPERSON: Yes?

5 ADV LE ROUX: Sorry Chair, just so that Mr Smith and I understand how the morning will run. We obviously have prepared the 15-minute wrap-up that you directed.

CHAIRPERSON: Yes.

10 ADV LE ROUX: Do you want to do questions before and then the 15-minute wrap up? Is that how you would like to proceed or would you like us to do the 15-minute wrap up and then address all questions as they come? We are in your hands.

15 CHAIRPERSON: Well, maybe do the 15-minute wrap-up, because that might ... you know, some of the questions might get addressed in that and then we'll canvass the questions with you.

ADV LE ROUX: Thank you Chair. So, then Mr Smith and I have divided the 15 minutes between ourselves. Mr Smith will start. We have made efforts to make sure this can happen in non-confidential session. So, I will hand over to Mr Smith and when he is done,
20 hopefully there are a few minutes left for me. Thank you Chair.

CHAIRPERSON: Thank you. Mr Smith?

*Competition Commission and
Dis-Chem Pharmacies Ltd*

MR SMITH: Thank you very much Chair and members of the Tribunal. I hope you can hear me. I won't need to go into confidential session. I just wanted to conclude with a couple of remarks. I suppose partly it's a recap, but mainly it's a conclusion of my comments that I
5 started on Monday.

Firstly, just to return to the importance of dominance as an economic matter in the consideration of excessive pricing enquiries, I just wanted to go back to this quote by Emile Paulus, which is at paragraph 49 of my report who says "*competition authorities should*
10 *not intervene in markets where it's likely that normal competitive forces over time will eliminate the possibilities of a dominant company to charge high prices*".

I know that's in the context of a general debate around excessive pricing in general times, but I then wanted to briefly go back to this
15 Motta article and there are one or two things just to highlight that I think speaks to the economic importance of dominance as an element of the economics of excessive pricing.

Just to go back to this, this is Motta's Daily Maverick article. He does raise the possible adverse effects of price regulation and he says
20 "*they may suppress price signals and thus eliminate or weaken the possibility of supply responses*". He says "*excessive pricing actions and antitrust are often criticised, because they interfere with the*

Competition Commission and
Dis-Chem Pharmacies Ltd

regular functioning of the market". He says *"that critique won't apply if supply is unlikely to respond in the short-run"*.

5 However, we see here that supply did indeed respond in a relatively few weeks and obviously it's for your consideration whether or not that is short-run within this context. Thirdly he says *"facemasks, protective garments and certain disinfectants can be produced easily and in most countries affected by the crises production has indeed increased substantially. Here price regulation would likely be counterproductive"*.

10 He ends his article by saying he hopes that pricing regulations won't be enforced too strictly, because when supply is responsive, a strict enforcement of price ceilings would kill any badly needed production increase. I think in South Africa the production increase, because there's only one local producer, hasn't arisen, but the supply
15 increase, the procurement increase was badly needed and has indeed come about.

I think that leads me on to just conclude on my point on the importance of a competitive benchmark. I think that is fundamentally important, primarily because competition is a process that this whole
20 forum is trying to protect and preserve and enhance. It is the fundamental goal of this Act and I think again this competition benchmark of what would competitive firms do is important, because

Competition Commission and
Dis-Chem Pharmacies Ltd

it distinguishes abuse of dominance situation from normal competition on the merits and it provides firms with a clear and foreseeable basis on which to set their prices.

I then want to very briefly conclude on the literature that I took you to briefly on Monday, which was Amartya Sen, the 1998 Nobel Prize winner in economics. What he is writing about is primarily a discussion of depravations of what are probably some of the most essential goods on the plane, which is food. It studied some of the most infamous famines of the 20th century such as Bengal in 1943, Bangladesh in 1974, Ethiopia in 1973.

He looked at these and what his body of research, which has lasted the last 40 years, really did was it turned around the erstwhile thinking on what causes famines. Up until the late 1970s people thought famines are caused by food availability decline, just not enough food and actually he challenged that and said in many of these historical famines in aggregate there was enough food, but there was an entitlement failure. Individuals had their entitlements. Their abilities to trade for food collapsed. It's through loss of jobs, loss of their own agricultural output and they couldn't trade for what was actually fairly readily available food.

I just point this out to you, because he also studies supply side responses that exacerbated the effects of some of these famines, such

Competition Commission and
Dis-Chem Pharmacies Ltd

as trade restrictions and other supply side responses and actually argues quite forcefully that it's demand side interventions such as grants that would have been a better policy response. Let the supply side largely get the goods where they need to be and intervene on the demand side
5 to give people more purchasing power.

I leave it to you, because I think it's relevant to the consideration of whether or not there might be adverse unintended consequences arising from supply side instruments in this context of disasters.

I then want to briefly talk of market definition. I think we
10 covered most of this on Monday, but one clarificatory comment. On the product market, as I answered Prof Tregenna, we don't have more market share information than is in Mr Govender's affidavit, paragraph 10, and indeed, we've heard that there have been supply responses. More people supply masks. More people retail masks. There has been
15 entry.

I don't know the scale or the set or suite of competitors there, but on the geographic market I wanted to clarify. The maps that I took you to, those were not a random selection of 10 stores. Those were the top 10 Dis-Chem stores by sales of masks. They account for around 6%
20 of Dis-Chem stores. However, they have achieved about 15% of its sales of masks, but I will leave that exercise there.

Competition Commission and
Dis-Chem Pharmacies Ltd

Finally on the qualitative side I wanted to talk about this historical and replacement costs issue that we discussed and I think Prof Valodia and others discussed theory and practice. On the practice I did want to come back to this Easter Monday issue in the timeline. I think you know that on Easter Monday, without going into specific points, there are really two tranches of replacement masks that were ordered, imports that were ordered by Dis-Chem.

There was a higher cost tranche and a lower cost tranche and the higher cost tranche primarily had arrived by the 13th of April. The lower cost tranche had planned delivery dates for about a week later and yet on the 11th of April Dis-Chem chose to cut its price to below the higher cost of procurement and above the lower cost of procurement, thereby factoring in its replacement costs of orders that had not yet been fulfilled or arrived.

I think that is consistent with them factoring in replacement costs. I make that as an economic observation. Obviously I can't talk to the facts of their decision making.

Secondly on this historical versus replacement costs issue, I think it is important to consider what would happen in a competitive equilibrium, not only what one firm might or might not factually do. So, I think that's my observations on the qualitative side and I had six

Competition Commission and
Dis-Chem Pharmacies Ltd

very quick points on the empirics just to summarise, although I won't go into confidential session on this.

First I wanted to say a huge thank you to Competition Commission's economists. I don't know individually who they are, but
5 I think this is obviously how it should always be, but there's hardly any disagreement on any of the empirical facts and I think that's fantastic in a very short space of time with large complex datasets. If anyone has quibbles I'm very happy to address them, but I think personally that's a great point.

10 Then onto the six points. Firstly, I think Dis-Chem certainly didn't arrive in the lockdown with any bid stock position that it could then take advantage of. It had hardly any stock that it had historically procured, in particular from the lockdown on 27th of March when geographic markets might have been narrower. It had sold almost all
15 of its historically procured stock by that stage.

Secondly, I think it's clear that margins are a fragile measure of conduct, as seen in the margins in November, December, January, February, March and April. As you know, the margins in January are about half of what they were in November or December, but Dis-Chem
20 didn't change any prices in January. In February the margins recover as Dis-Chem raises prices twice, but not yet to the level of November and December. In March the margins are substantially higher and yet

Competition Commission and
Dis-Chem Pharmacies Ltd

in April, despite setting prices far higher than they historically had been, Dis-Chem's margin is far lower than in March or in any of the preceding months.

The third empirical point I think it's very difficult to get stock. So, I think that was my slides 24 and 25 and it was difficult for a sustained period. Delivery times were longer. The orders were much larger and the completion or the proportion of orders that were actually delivered was far lower. Even in February delivery times are double what they had been in November.

The fourth point is a huge supply response was required and did materialise and will continue to be required likely as this crisis persists.

The fifth point is that margins were substantially higher in March. They were lower in April than they had been in the preceding months and I think that's agreed and I say again thanks, because I think the empirical points are largely agreed between the Commission and Dis-Chem.

The sixth point, in February and March these replacement costs and competitors' prices were higher than they had been and I want to go back to a question of Prof Valodia of what would have ... and I think of it in the context of what would a competitive firm in Dis-Chem have done on the 15th of March when the national disaster was declared

Competition Commission and
Dis-Chem Pharmacies Ltd

or on the 19th of March when the regulations, I understand, were promulgated.

The first point is they almost had exhausted their historically procured stocks. They needed to restock. Secondly or thirdly, about six
5 weeks ago they had had a quote, which is similar to their current prices on 19 March. That is a quote for restocking. Fourthly two weeks, for almost two weeks they had been sitting under an overhang of quotes that were many multiples higher than their current price, let along their current and historical costs of procurement. Fifthly, six days later Dis-
10 Chem would put through an order at roughly 40 times its historical procurement costs and finally about two weeks earlier it had seen competitive prices higher than its current price.

So, it's in that context that I see what would a competitively rational firm have done, knowing that in six days' time it will put
15 through this order and roughly ten days, twelve days' time it will have to raise prices many multiples. I don't think it's reasonable that a competitively rational firm would, on that 19th of March, drop prices for that small number of days and then having to increase them by even higher multiples, but I will leave that with you as my economic
20 observations and I will hand over to Adv Le Roux. Thank you.

CHAIRPERSON: Thank you. Mr Smith, we do have questions for you, but let's hear from you Ms Le Roux.

Competition Commission and
Dis-Chem Pharmacies Ltd

ADV LE ROUX: Thank you Chair and again good morning to you and members of the Tribunal. Chair, I have three issues that I need to cover in the minutes available to me. The first is what changes for Dis-Chem on the 19th of March with the publication and coming into immediately
5 effect of Regulation 4? Second, why this case is the wrong case and a bad example and a poor test case, but if Dis-Chem succeeds in the Tribunal, the Tribunal should not be concerned about under-enforcement and finally just to do a very brief summary of our submissions on the case and on the test.

10 So, the first question is what changes, if anything? The first thing that changes is that there's an obligation imposed on Dis-Chem as a retailer in terms of Regulation 6 that market participants are called on to ensure equitable distribution and adequate stocks of essential goods. Market participants, suppliers and retailers are asked to introduce
15 measures that may include limiting the numbers of items that a single customer may purchase and in Mr Govender's answering affidavit, page 86, paragraph 46, Annexure RG18, you will see that Dis-Chem that day sends an e-mail out to stores telling them to limit purchases of masks to six per customer and that notices need to be displayed in the
20 stores.

In short they comply with the only obligation that arises from the regulations on the day. No obligation arises for Dis-Chem to reduce its

Competition Commission and
Dis-Chem Pharmacies Ltd

price. We say this, because Regulation 4 firstly covers dominant firms and Dis-Chem has not been shown to be a dominant firm and dominant firms charging excessive prices.

5 So, the language of Regulation 4 expressly and specifically targets a material price increase that occurs after the 15th of March. The change in the language from 4(1) about charging an excessive price to 4(2), namely looking for a material price increase after the national disaster period commences on the 15th is the Minister telling the Commission what conduct to look for going forward. It means that
10 because there is no price increase in the 15 to 31 March period, Regulation 4 cannot apply. It also doesn't apply, because Dis-Chem is not dominant.

The regulation also doesn't say what Dis-Chem should reduce its price to, because obviously the provisions for any maximum prices
15 under Regulation 5.3, under the Consumer Protection Act, have not been invoked by the Minister. Indeed, the only indication from government to date on the papers before you on pricing is that it will today pay R511.00 for a box of 50 masks. Dis-Chem is here before you having never charged more than 170 something for the same box.

20 So, what to make of Dis-Chem maintaining its price after the 16th and until March when the Commission's case ends? You will recall of course that the next move made by Dis-Chem is outside of the period

Competition Commission and
Dis-Chem Pharmacies Ltd

of the Commission's case. It's on the 2nd of April when Dis-Chem no longer sells the masks in the three SKUs that are the subject of this referral. It introduces a new SKU for single masks, R22.00 above the cost and at a single digit margin, because it is so barely above these
5 new higher costs that it is ordering at. You see the price drop 11 April, again on 22 April. Why? Because the stock arrives, as Mr Smith has explained.

It is also important to answer the question what is Dis-Chem on the 19th of March? It's not a dominant firm, not even temporarily, not
10 even locally. Regulation 4 regulates pricing of dominant firms. It cannot apply to Dis-Chem. Mr Smith has explained what Ms Parsons for Dis-Chem was doing when she is sitting there in early March, knowing what has happened before and where she needs to go.

I need to make another point about the obligations on Dis-Chem
15 not required by the law when the regulation comes into force and that is that if it had dropped at that time, it may well have become loss-making and in addition to all of the reputational harm and frustration that would have come from customers who would have had to see prices go up, then come down for two weeks, then go back up again,
20 Dis-Chem instead chooses to maintain the price, introduce its new SKU and thereafter have regular price increases, but in the period, the critical point, there is no material price increase. Regulation 4 cannot apply.

Competition Commission and
Dis-Chem Pharmacies Ltd

So, then the second issue I need to just very briefly address, any concerns the Tribunal may have about under-enforcement, if the Commission's case is rejected, or to put it another way, why is this a bad test case that will set a bad example? The regulations come into
5 effect immediately. So, the Tribunal need not worry about that outcome, seeing firms, dominant firms that you do in fact want to catch under Regulation 4 falling through the cracks. They had no opportunity to hike their prices before the 19th of March or the 15th of March, because the regulation comes into effect immediately.

10 Of course, we've taken points under Section 78 how that is not proper, but we leave those aside for now. In any event, all of this conduct would be caught by Regulation 8 and it could be used as an aggravating factor under Section 59, if you were to be determining an administrative penalty on that other firm.

15 Such an approach is true both for the text of the Act and the text of Regulation 4. It also would be true to the purposes of the Act and the purposes of the law.

So Chair, if I can then now, as I so enjoy, very quickly give you on a slide where we are. This is slide 28 from Mr Smith's presentation.
20 We've made it confidential. So, you will see that, as I go through it, you will see that the actual data that Mr Smith shared with you in

Competition Commission and
Dis-Chem Pharmacies Ltd

confidential session, you will recall what that looked like when I reference those on the figure.

So, briefly what you've got here is the time series at the bottom and the relevant dates...

5 CHAIRPERSON: Sorry Ms Le Roux, please can you all mute your audio? Only Ms Le Roux should be on and myself. Thank you.

ADV LE ROUX: Thank you Chair. What we have done is this is ... we've just selected one of the price series so that it's just clean on a slide, this is the 5-piece that was obviously a popular item. This is then
10 what happens outside of the Commission period with the new SKU.

Chair, again the Commission's case is 15 March to 31 March, this period here on the time series. So, very quickly nine points. Number one ... sorry, I have to get back to the PowerPoint slide. Number one, you know what the historic order costs were at. You know
15 how they spike up. You know how they drop down when supply is restored. You know that Dis-Chem, in early February, had already received information about those replacement cost increases. You also know that earlier on it knew what higher competitive pricing would look like. We knew that even higher replacement cost quotes had been
20 received in early March for delivery at various points running through to late April. We know that competitive pricing soars above Dis-Chem prices when it's dropping prices already.

Competition Commission and
Dis-Chem Pharmacies Ltd

The Commission needs to establish a case at any point on this timeframe and obviously the Commission's case has moved around quite a lot. We've had many incarnations, but at any point on this slide it needs to prove a case under Section 8, dominance in a defined market, detriment to consumer, an excessive price, because it's established a competitive benchmark lower than Dis-Chem's prices with reference to the relevant Section 8(3). The fact is it has not established any one of those.

Finally, if it wanted to rely on Regulation 4 here, it needed a material price increase in the period 15 to 31 March. There is no price increase. It cannot be a Regulation 4 case. It can only be a Section 8 case.

So Chair, for all of those reasons, Dis-Chem submits that the Commission has failed to make out a case and seeks the dismissal of the complaint referral. Thank you Chair, those are our submissions. Obviously both Mr Smith and I are available for any questions.

CHAIRPERSON: Thank you Ms Le Roux. Let me hand over to Prof Valodia who will have some questions for Mr Smith and then we will take it in turn after that.

PROF VALODIA: Hi Mr Smith, good morning.

MR SMITH: Hello Prof Valodia.

Competition Commission and
Dis-Chem Pharmacies Ltd

PROF VALODIA: I have a few questions for you on the economics of how we should understand the case. It might be helpful just for the purposes of the exchange for you to refer to figure 5 in your report.

MR SMITH: Thank you. I have it.

5 PROF VALODIA: Have you got it?

MR SMITH: Yes.

PROF VALODIA: So, the essence of the question that I think we have to think though around the economics of this case is what is the sense that one should make about the change in the differences between those
10 two lines? So, it's about one sees the costs staying more or less the same on the moving average basis and in the period prices go up. I don't think there's any dispute about that picture.

The essence of the question is what does one make of the economics of what was happening in that time? So, in your expert
15 report you make a number of points around how the Tribunal should interpret questions of excessive price within that period and you caution us really to not jump to any conclusions.

So, my first question is what in your view changes in the economics of what one should think about in that period by the fact that
20 we have a pandemic? Does anything change? Does nothing change? If it's the former, what is it that you think changes?

Competition Commission and
Dis-Chem Pharmacies Ltd

MR SMITH: Yes, thank you very much. So, I will make a couple of comments and hopefully address your queries comprehensively, but if not, please do come back. So, the first point is I think there are no material disputes on any of the facts that you are pointing to at the moment and indeed there are hardly any facts that I think are material, which is, as I say, fantastic.

The second point is that a simple summary measure across each month using margins as a measure of conduct I think is fragile, as I mentioned a moment ago. You can't even see it on this graph, but that margin in January is roughly half what it was in December and in November. In February, although you see it going up, the volume weighted average margin is actually lower than it is in November and December. In March, yes, it is quite obvious from the figure and I will tell you summary, it is higher and then in April, although the figures are moving around, it is lower than it was in November, December, February or March.

So, firstly I think the second point is those margins are fragile. The third point is to say what is going on economically here? I think the key question is, is this an abuse of substantial market power that you might call dominance in a way that merits intervention or are these normal efficient signals that stimulate supply responses and part of normal competition on the merits, which we know is a practical

Competition Commission and
Dis-Chem Pharmacies Ltd

normal? It's not a textbook normal. It's a practical normal. There are frictions in any commerce. They might be relatively small and this is where I think the economic guidance is that one should be cautious not to step in too quickly.

5 The Paulus quote I used a few moments ago talks about long-run responses. So, it talks about don't intervene if normal competitive forces over time and at the end only intervene ... and this is a guy who worked for Digicom for many decades who was an enforcer and an enthusiastic one, it should only be limited to markets characterised by
10 very high and long-lasting barriers to entry.

So, the overwhelming economic consensus seems to be let the market sort itself out, if it is going to even over the long-term. Now, the next point what changes through Covid land and I think three things do change. I won't rank them in importance, but hopefully logically.
15 Firstly, demand does change. So, you know in January demand goes up. In February demand goes up. In April demand certainly goes up. Even competitive firms will take that demand increase as a combination of price rise and volume increase.

Secondly, costs go up. As I mentioned this morning, even in
20 February delivery times are double what they were in November. We know that from early February there is a quote for replacement that is multiples higher. I mean, that's around ten times the costs that Dis-

Competition Commission and
Dis-Chem Pharmacies Ltd

Chem had historically charged and then in the period of March, from about the 6th to the 26th of March, there are about 20 quotes. I'm rounding so that we don't need to go into confidential, but those quotes are anything up to 40 times the historical procurement costs.

5 So, the first change is demand has gone up. Competitive firms take that as a combination of price rise and volume increase. Second, replacement costs have gone up. I've explained why I think that in normal competition those replacement costs may more quickly or more slowly feed into prices. I think for competitive firms for smaller stocks
10 they will feed in relatively quickly.

 Then of course the third is the overall sensitivity towards the time in which markets take to recover and adjust may change and that's certainly a policy decision for you. I think it is sometimes more difficult for markets to adjust quickly in a time of national disaster, because
15 transport and other logistics are disrupted. The normal mechanisms through which prices act as efficient signals of supply are disruptive, but then of course the public and yourselves as policymakers may have a lower tolerance.

 So, that's why on Monday I emphasised this point that yes, the
20 economics is that it's likely inefficient to intervene too quickly, but what is too quickly and what is the long-run? In the context of a Sasol or a Mittal it may be, well, we will intervene if we are confident they

Competition Commission and
Dis-Chem Pharmacies Ltd

have had that market power, that dominance for 10 years or so. I'm not suggesting 10 years is the appropriate frame within a national disaster, but if supply is going to respond in a matter of a week, six weeks, a couple of months, I think that is a very short-term supply response, which is likely a part of normal competition on the merits, albeit with some weeks of frictions as the supply chain gears itself up to these two very big changes, massive increase in demand and many multiples increase in costs.

PROF VALODIA: So, let me put two propositions. I mean, I think those are all matters that refer to what might have changed in the market, but here is two propositions and I would like to hear your responses. The first proposition is that the kind of standard benchmark that one would put to whether or not a firm is dominant or not, that that might have changed; that the dynamics in that market have changes so substantially, even though it's a short period of time that any assessments that one would make about governance might well have changed.

We could have the debate in theory, but here is one way to think about it. So, perhaps we should be asking ourselves the question what would happen if a consumer, during that period, and knowing the full context of the Covid land, if a consumer walk into Dis-Chem before Covid land, they might have thought about what the price of a mask

Competition Commission and
Dis-Chem Pharmacies Ltd

was elsewhere. They might have kind of delayed a purchase. They might have bought different quantities. They might have made all sorts of consumer choices about whether or not they buy a mask.

When we shift from that world to the world of Covid land, would
5 that consumer change her or his behaviour in that (1) they might be substantially less concerned about what that price is? They might also be substantially concerned about whether someone else has stock or not. They might be a lot less concerned about the prices somewhere else. In fact, the things might have changed so much that they would
10 simply buy that mask at whatever kind of price is asked from the retailer. Would the world have changed so much that we should perhaps make a different assessment about what is a dominant firm or not from the view of a consumer?

MR SMITH: From the view of a consumer, so firstly on the benchmark
15 for dominance and the view of the consumer, in terms of the benchmark for dominance, and here I mean the economic concept of dominance and where it may be justified to intervene on the supply side, I think the ideas are the same, but I think they are context dependent and I think the reason the idea should be the same is there is still I think huge
20 risk or huge potential for unintended adverse consequences. If people on the supply side, suppliers, other importers, other retailers knew that there would be so much scrutiny of a day or a week or a few weeks,

Competition Commission and
Dis-Chem Pharmacies Ltd

misalignment of prices and historical procurement costs, that will substantially dampen, I mean, I read all the Motta quotes this morning, that would substantially damper this massively needed supply response and it's a supply response in a risky context, in a context when you can
5 order several million masks at 40 times historical procurement costs and none arrive and yet you need to take a punt that yes, I will order there. I will get in touch with many more suppliers and have longer wait times and still put up that money at 30, 40 times my historical procurement cost and hope that I can get that stock.

10 So, I think the benchmark of what dominance means, the principles are the same, but I accept that context matters here and I think what is dominance in a shorter term, I think this is not as short-term like hurricane Katrina, which sadly will probably last for many months, but I think what is an appropriate supplier response, what are
15 acceptable market frictions may well change and I certainly leave that to you.

In terms of consumer preferences, again I can't talk factually for exactly ... when we say Covid land, it's quite a general term. So, if we think January, I can only speak personally and I'm not a medical expert
20 to say what people were thinking in January. I personally had no concept that Covid would come to South Africa in January and I would need a mask to go to work. I mean, I flew to Cape Town in February

Competition Commission and
Dis-Chem Pharmacies Ltd

as usual. I went to a recruitment event in early March and no one even looked at me. I knew of Covid overseas, but I think the 3rd of March I was in Cape Town for a recruitment event. So, I flew, not being hyper worried about what I was touching.

5 I think in January when we saw that huge spike, was that Covid land? I mean, when I talk of Covid land and I understand the Commission talks about narrowing geographic markets and consumer preferences, that is an integral, if you like, a build-up of all of these cumulative recommendations that sometimes went in different
10 directions, do buy masks, no don't buy masks, leave them for nurses.

I can't speak factually to all that, but by the time we get to the 15th of March, yes, there is a different concept and only by the time of the 27th people substantially lose some ability to shop around. Yes, then I accept that consumers' preferences, their abilities to choose, their
15 price sensitivity might well change in that context.

However, I still think the caution on the supply side, the principles still are valid and are going to be hugely important to South Africa getting supplies in the right places at the right times over the next, unfortunately it will probably be many months.

20 ADV LE ROUX: Chair, if I could just add some of the legal context to that question from Prof Valodia. As I understand it, it is saying has the competitive benchmark changed for consumers in this period? Chair,

Competition Commission and
Dis-Chem Pharmacies Ltd

through you, to Prof Valodia's question, the elements of Section 8, the case that the Commission has to do here, three elements to start with in Section 8(1)(a), a dominant firm charging an excessive price to the detriment of consumers and customers. Then in terms of the intro to
5 8(3) that it has to be higher than a competitive benchmark.

So, legally what changes for the consumer when they walk into Dis-Chem and see the price has gone up is we've got evidence of where the competitors were and they are above Dis-Chem. So, if I can put it this way, Dis-Chem is the cheapest higher price that you've got on the
10 record before you.

So, detriment to consumers is then not a superfluous requirement that the Commission can just dismiss and say it's axiomatic. It would have to demonstrate why paying the cheapest higher price is actually to your detriment, especially if the Tribunal is persuaded with this
15 hyper local, you know, I don't even walk down the mall to the Clicks or the pharmacy just across the road from the mall. I'm only in the aisles of Dis-Chem.

So, we would say that from a legal approach what changes from the perspective of the consumer, if anything does, has been met here,
20 because you've still got no showing of detriment to consumers, because we know that the competitive pricing is higher than Dis-Chem's.

Competition Commission and
Dis-Chem Pharmacies Ltd

PROF VALODIA: Okay, thank you Adv Le Roux. I mean, the second proposition on precisely this response that Adv Le Roux has raised, might it be that the competitor ... so, we've got the wedge between the costs and the price and the question is what is the benchmark that you
5 would evaluate the price increase against to come to a view about whether it's an excessive price or not?

One could look at all sorts of things and normally one would look at the price of a close competitor and say, yes, this price is higher or lower than a close competitor. It might be that the fact that we've
10 moved into a kind of disaster situation change what question you should ask about the relative price.

So, to make it specific to this case, might the reference price no longer be the closest competitor, because what Covid land has done is to take that competitor outside a narrower market that you would think
15 about. In a situation like that, and I agree with you that it is all about the context we are in, but might the reference price from a competitiveness perspective have switched from the price of a closest competitor to the price before you increased your price? What would your response be?

20 MR SMITH: Sorry, if I can make a couple of economic points just on that, unless you would like to go first.

ADV LE ROUX: No, no, you go first and then I will...

Competition Commission and
Dis-Chem Pharmacies Ltd

MR SMITH: So, thank you Prof Valodia. I think it's an interesting question and I think, yes, the competitive benchmark may change if the relevant constraints on this firm change. I think the competitive benchmark is still the full context of prices, costs, outside options and
5 constraints on both pricing and cost that exist. I think in a non-emergency context that's a very long-term notion. So, yes, in the longer term there is going to be this entry/exit, covering of all these costs included in capital costs.

I think those principles again still apply here, but the policy
10 tolerance may be smaller. I again caution that over-enforcement will squash that badly needed supply response. It will squash those efforts to go and procure stock at literally 30, 40 times what had been historically the case.

When you talk of competitor prices, I think again just to think
15 what Covid land might be. I think competitor prices, we know that Dis-Chem did consider its competitor's price in early March. So, I think that's not quite the Covid land that we are thinking about when there is Covid land and you only go to your absolute nearest store and you are very price insensitive perhaps to buy a mask, because you know it's an
20 essential item and then you look at the conduct in that context.

Now, what is interesting for me just empirically and I will leave the interpretation to you, is from that 15th or from the 18th of March

Competition Commission and
Dis-Chem Pharmacies Ltd

very few masks are actually sold by Dis-Chem until the end of the month and no prices are changed. So, even if it did anticipate and even if there were evidence and I don't know what evidence there are, is that consumer preferences changed. Consumer price sensitivity changed.

5 Geographic markets narrowed on the 27th. There is no exploitation of any of those three factors at about the times when I understand they might have changed.

I can't tell you factually when they would have changed or you might have other indicators in mind, but at least at the beginning of

10 March Dis-Chem's relevant consideration was its competitor's price that it saw and that was higher. Towards the end of March, if these other factors around consumer preferences did change, there wasn't any response.

I think then going into April, again how you get from March 19th

15 to the 1st of April, it is a policy question. Is that the normal friction of how markets work reasonably competitively? I think when we look into April, margins are small. I mean, they are not small ... you know, it is not as though Dis-Chem says well, prices have gone up 40 fold ... sorry, costs have gone up 40 fold, I'm going to put up prices 100 fold,

20 because I know geographic markets are narrower and people will pay whatever I say. That doesn't occur. Actually their percentage margins go down.

Competition Commission and
Dis-Chem Pharmacies Ltd

So, I think where this is going is percentage margins, I think I said it this morning, they are a fragile indicator of conduct, but if we do look at that conduct and what were competitive realities in the last part of March, Dis-Chem was not responding to any of these changes, if they did occur in that period.

I think the competitive benchmark and the principles apply the same, but the context may narrow the tolerance for those responses. I think the question is, is this normal frictions of how reasonably a competitive market works.

10 ADV LE ROUX: Chair, five brief points on whether the language of the Act would accommodate the contraction to the market being sort of ... the comparator being Dis-Chem's pre and post disaster pricing, if I'm understanding the question correctly. So, five quick points. The first, Chair, would be Dis-Chem has that information. It would be ignoring relevant market signals and how would it possibly set its price?

It's not clear now in terms of the predictability of regulation and of course, this assumes Dis-Chem is dominant, which of course we say it isn't. But how would this dominant firm now start thinking about itself? It is seeing its spiking replacement costs. It is seeing what's happening on demand. It's having all of the unreliability of supply.

Competition Commission and
Dis-Chem Pharmacies Ltd

How is that firm going to be guided? So, ignoring market signals from other competitors I think would be difficult and problematic for it.

Secondly, if it were to be this world of Dis-Chem competing against Dis-Chem, but just in Covid land and that somehow that becomes the competitive price in terms of the introductory portion of Section 8(3), then ... and you are saying, okay, so Dis-Chem's pre-disaster price is lower than Dis-Chem's post-disaster price. So, the Commission is through the first hurdle in 8(3), a price higher than a competitive price. It's problematic, but let's assume that.

10 It then has to say that the difference is unreasonable, because that's the obligation. That's the onus on Dis-Chem in 8(2). Now, with respect to reasonableness all of the same facts and evidence coming into play here, Dis-Chem would be saying to you even if it didn't reference competitive pricing, it would be saying I've got a huge spike
15 in demand. I'm running out of stock. The stock I had managed to scour the globe and find never arrives. It is getting quoted at incredibly high prices. I'm dealing with the difficulties of trying to respond. So, all of those factors would then be used to explain the reasonableness of Dis-Chem's Covid price.

20 The third point is obviously that the CAC in Sasol cautioned against trying to set very bright line thresholds, you know, this percentage, that percentage and stressed the fact dependency of every

Competition Commission and
Dis-Chem Pharmacies Ltd

decision that the authorities make. So, certainly any hard bright line threshold doesn't need to be set in this case. It can be fact-specific and look at what happened to Dis-Chem in the period and what happened when it was adjusting prices in response to the supply and demand
5 dislocation and disruption.

The fourth point is to say that Section 8(3) repeatedly references comparative firms, competitive markets, other geographic markets, similar products in other markets, characteristics of markets, barriers to entry, contestability. All of that language in the factors under Section
10 8(3) that would be relevant here are all telling the authorities that when they bring a case, they need to look at that broader context. It can't just be Dis-Chem competing against itself in the pre and post-Covid market.

So, the final point is a market definition point. If it were to be
15 that you have no reference to competitors and you only look at Dis-Chem's conduct, and again, I've made all of the points about why it would still not be dominant, still be reasonable, etc, etc, and still no detriment to consumers if it's charging the cheapest higher price.

The final point would be on market definition. Your market
20 would then be the market for masks sold by Dis-Chem and then you are into price regulation. That's not competition regulation. The world can't shrink down to Dis-Chem before disaster and Dis-Chem in Covid

Competition Commission and
Dis-Chem Pharmacies Ltd

land, because then you will be price regulated and again, the regulations give the Minister the power to set a maximum price for a mask. He can exercise that power. The Tribunal doesn't need to fall into price regulation. It's competitive regulation that it is being asked
5 to perform. Chair, I hope that is of assistance to Prof Valodia.

PROF VALODIA: Just a final question from me. Mr Smith, it's on your referencing of Sen. I understand Amartya Sen to be saying something slightly different to what you are saying. So, while I kind of agree that his work is really interesting for understanding how we
10 should think about the world during an emergency and you sort of correctly bring out his work on entitlement.

I think the essence of what I gained from his work is that he is asking us to really think about how the market changes during an emergency and the fact that poor people don't have power in typical
15 market transactions, but when you are in an emergency, their power is even less than what it was before and the entitlement approach to economics tries to change that power balance.

So, he is not saying to us ignore the operations of the market. He is saying to us really think about how that market has changed and that
20 people don't get the products that they want because of the way market operators behave rather than factors outside of the market; that it is kind

Competition Commission and
Dis-Chem Pharmacies Ltd

of really understanding the market operations. I think that is the kind of important point about his work in terms of this case.

MR SMITH: Can I just comment briefly? I agree it's difficult to find perfect analogies for this. I mean, Prof Motta said this is not the first
5 time there's been excess demand in markets and competition agencies around the world have considered that many times before and he can't find good examples of excessive pricing regulation.

But if we come to Sen, I think what he is saying, if we imagine a hypothetical famine, which there is a cotton farmer and then there are
10 grain markets in which the cotton farmer must go and find some food, I think I very much agree with you. The entitlement failure is in the cotton market, for example. A harvest fails and that farmer suddenly finds his entitlements and the entitlements of his whole community destroyed.

15 I think the point he is making around some of these historical famines is that the supply side was more or less there. The food availability decline was not particularly acute in Bangladesh and in Bengal and even in Ethiopia in the 70s and he is saying there was food there and I think that is relevant. Yes, he is saying some market
20 collapsed, for example, the market for the cash farmer. He had no entitlements with which he or she could go and purchase food. So, there

Competition Commission and
Dis-Chem Pharmacies Ltd

is a challenge in those markets, but I think his intervention then supports the entitlement of that farmer.

We are in a new world where there is broadly enough food available. Prices may have changed, but that farmer's means of trade
5 have collapsed. You need to go and support those means of trade. So, that's what I thought was interesting. So, social grants, putting money in the hands of people who need to go and feed themselves or buy essential goods was a direct policy solution.

I think the other aspect, which you are right it's not a perfect
10 analogue, but I think he does talk about some unintended consequences of supply side interventions, in particular the restrictions on trade and I think Bangladesh is the example. Several states or regions within Bangladesh forbid trade between them and that actually prevented the normal supply side workings that would have moved food to different
15 areas.

So, I fully agree that he is addressing some challenges in these markets, but I thought of relevance to today's consideration is he does point out the potential for adverse consequences of a supply intervention, unintended consequences, not that government has ever
20 intended that, but then you are right, he is talking about...

[Talking simultaneously]

Competition Commission and
Dis-Chem Pharmacies Ltd

CHAIRPERSON: Thank you Mr Smith. I think we are going to not have a further debate about Sen. I just wanted to check. Prof Valodia, do you have any more questions for Mr Smith? Prof Tregenna, do you have any questions for Mr Smith? I think your microphone, your audio
5 is on mute.

PROF VALODIA: I think Prof Tregenna seems to be off the call. I don't see her on my participant list.

CHAIRPERSON: We might have dropped her.

PROF VALODIA: Her line might have dropped.

10 CHAIRPERSON: She is trying to get back on. Alright, in the meantime I just wanted to ... she is trying to get back on I think. Yes. She can hear me. She is not muted. So, we must just try and find her. Alistair is trying to sort it out. While we are dealing with that, can I just ask Ms Le Roux, the legal interpretation issue that you've raised now, can you
15 hear me? Are you still on the call?

ADV LE ROUX: Yes Chair.

CHAIRPERSON: What you are saying, and let me try to understand this correctly. You are saying the regulations don't apply for all the reasons that you've said and even if you were to consider a Section 8
20 analysis through the lens of a Covid 19 and a pandemic, i.e. that we might want to think about introducing a concept such as temporal dominance, because this is conveyed on a firm as a result of the

Competition Commission and
Dis-Chem Pharmacies Ltd

pandemic. Even if we were to do that analysis through the lense or the prism of a disaster, we would still have to take into account the factors under 8(3), which include for example (d), the length of time that prices have been charged at that level.

5 Now, I want to ask you about this issue. We've been focused on prices in the month of March and that's where the Commission has focused its case. At the same time we see the pattern of your prices in February and then we see it in April again. Dis-Chem clearly reduced its prices in April. The Commission says we should have no regard to
10 that, because those prices were reduced as a result of the Commission's enquiry, the Commission's investigation and subsequent referral. I haven't heard Dis-Chem providing a rationale for why their price was reduced.

ADV LE ROUX: Chair, let me start with that. It has, because the
15 answer is the replacement cost goods actually started arriving, and Mr Smith can probably help with some of the detail of that, but what we have is Dis-Chem getting quotes, not necessarily placing orders, but receiving quotes, January, February, March at higher prices with various delivery dates. Those orders don't arrive, even though it's
20 trying to procure them at the higher replacement cost.

It runs out of its old stock in the three SKUs that are the subject of the complaint referral. It then ... and that takes you through the

Competition Commission and
Dis-Chem Pharmacies Ltd

Commission's period. So, that gets you to 31 March. Then on 2 April it starts with the single SKU, only one mask in its system that it is selling and that is where the new stock starts coming into the stores and into the fray and then it's from that point that it is doing its reduction.

5 It is doing its reductions, because if you correlate it to the timeline of when stock actually starts arriving, it starts getting stock into its warehouses and distribution centres and into its stores. So, you've got the data and perhaps if we do do a confidential session, Mr Smith can give you the exact details, but this dwindling stock and
10 essentially stock outages and shortages that it has in stores, that all gets piece of mind, because finally stock starts arriving, albeit it at a higher price, and it has managed to secure some orders that are going to come in, in the weeks thereafter that will be at the lower replacement cost towards the end of April as that all starts arriving.

15 So, what is happening is as soon as it can, because it secured some stock, it's actually landed in South Africa, it immediately passes on cost savings and because of how it uses its MAC, that moving average price, you know, it can factor in the different pricing levels at which it is managing to replenish its supplies.

20 So, it does increase. It increases to below its competitors consciously. It has to price higher because of the higher replacement cost that it is in fact encountering. Its margin is completely collapsed

Competition Commission and
Dis-Chem Pharmacies Ltd

down to single digits effectively and then as soon as it can, with the comfort knowing that it actually has some masks in its stores, it reduces down to the price decreases that we see in April. So, that's the answer. We do see this. I will give Mr Smith an opportunity in case I have
5 missed something.

But then Chair, yes, 8(3) factors obviously include length of time and we would say that even in Covid land, you know, we are still in Covid land. So, if the Commission's case is 15 to 31 March, a 2-week period, you know, the length of time at which this happens, we say in
10 the context of everything before Covid land, January, February and you could take into account what you now know post the Commission's referred case and the fact that we know the pandemic is ongoing, even if you were looking at just this 2-week period, length of time is simply insufficient.

15 Because why does the legislature put length of time into Section 8(3)(d)? It puts it in for this persistence, durability, all of those requirements. It wants to get that texture to the market power that says you are behaving independently. You are impervious to pressure. There is no entry. No entrants is climbing over your very high barrier to entry
20 and coming to compete against you and force the price down. No entrant is climbing over the high barrier to entry to come and provide output if you are restricting output to try to create market power.

Competition Commission and
Dis-Chem Pharmacies Ltd

So, the length of time requirement in 8(3)(d) is all part of that debate about entry barriers, persistence, durability and even in Covid land the theoretical framework, that normative framework of regulating excessive pricing holds, because there's a 2-week period in which Dis-Chem is charging a particular price, but in that period its competitors, suppliers, entrants, both at retail level for masks that a consumer can buy as well as at supplier level, the competitive process is working. So, the length of time would certainly be a factor there.

Then yes, it's true, 8(3)(b)(iv) is obviously about historic pricing, but again that just requires you to think through what Dis-Chem has gone through as it has now found itself trading in Covid land. I'm not sure if Mr Smith had any economic or data points on that question.

CHAIRPERSON: No, that answers my question. Thank you very much. Let me ask Prof Tregenna, if she is back, because Mr Smith might want to deal with her questions first.

ADV LE ROUX: Thank you Chair.

PROF TREGENNA: Good morning Mr Smith. Can you hear me now?

MR SMITH: Yes, I can Prof Tregenna. You can hear me as well?

PROF TREGENNA: Yes, I can, thank you. So, I have a couple of questions, some of which relate somewhat to those asked by Prof Valodia, but let me go ahead and you can add as needed. So, firstly I

Competition Commission and
Dis-Chem Pharmacies Ltd

wanted to try and hear whether you can shed any light on what would have been a competitive price during the period in question. I didn't note that from your expert report. You've indicated that you didn't have the time or information and it would have been actually quite
5 difficult to estimate a competitive price, but are there any indications, which you are able to give us, as to what a competitive price could have been in a period-specific way?

MR SMITH: I think the key point is period-specific. I don't think there's such a thing as a competitive price for a day in this context of
10 excessive pricing considerations and where I think excessive pricing is a notion that requires a persistence deviation from what you would expect under competitive conditions.

I think pricing on a day is almost certainly going to be a normal friction and a normal part of efficient signals to increase supply, if
15 prices are unusually high or normal signals that tell people to stop losing so much money, if prices are unusually low.

So, I almost don't think there's such a thing as a competitive price that exists for one day, because that's not how markets ... that's not how you could conceive of practical competition on the merits. So,
20 reasonably effective competition on the merits.

Now, as I mentioned, if you are outside of this context and it is difficult, because there haven't really been enquiries into excessive

Competition Commission and
Dis-Chem Pharmacies Ltd

pricing of many multiproduct retailers, but there have been general enquiries into the competitiveness of supermarkets and other things like that. Then I think you would look at a whole basket of goods, probably not a single good, and see well, what is the normal
5 competitive price at which you would sell groceries, for example, or pharmacy supplies, but a whole suite of pharmacy supplies and are there ... what is the sort of profitability that one might expect that would compensate the normal risks undertaken and give adequate returns on capital to a supplier of pharmacy supplies?

10 It would be very difficult to say a pharmacy is typically required to have thousands of goods and the competitive price on any one of them is X or Y. I think the competitive price, what you would probably do, is try and find, and again this is for the non-regulated normal products on the shelf, which I think surgical masks fall under.

15 You would try and find, well, what is the general gross margin that in the longer term would compensate a firm for keeping a pharmacy and having all the other goods and stock and paraphernalia that involve a pharmacy business and that would be roughly the gross margin per unit of shelf space that you would expect, would be
20 anticipated to cover all those other activities and rent and security in the long-term.

Competition Commission and
Dis-Chem Pharmacies Ltd

I think that's how you would probably arrive at it and I think the rationale would be that if, and I don't think you can do this for an individual product, but if a whole class of product was mispriced, so margins were unfairly inflated such that they were earning way more
5 than was required for their unit of shelf space, other pharmacies or other retailers would increase their allocation of shelf space to that class of product and generally competition would move away from the returns or the higher than expected margins on that class.

But I think I suppose two points are relevant here. Firstly, I don't
10 think there's a competitive point for a day. There's not entry and exit in a day. So, you can't really find a competitive price over a very short time period. Secondly, in a multiproduct retailer I think you would probably get it to expected long-run margins per unit of shelf space, but that almost certainly need to apply to a wider category, because
15 that's where entry, exit and competition would over time squash those margins down to competitive levels.

PROF TREGENNA: Okay, so it's your view that it's actually impossible, even given enough time and data, to arrive at a competitive price for masks, even over an average period, let's say two weeks or a
20 month or whatever?

MR SMITH: This comes really to a policy question of what is the short-term and what is the long-term. I mean, I don't ... competition can

Competition Commission and
Dis-Chem Pharmacies Ltd

happen over the short-term, but a long-term competitive equilibrium simply can't be defined over a week or I don't think even a month, although I understand the context changes and within the context of a disaster you might want to approach that competitive equilibrium more
5 narrowly.

I think you can come up with an estimate of competitive margins per unit of shelf space, but that would almost be agnostic to the product that was stocked there and I think it will be artificial to say, well, actually for this one product that's a competitive price for exactly that
10 product, because you could deviate substantially for one product and competition might not squash that, but yes, you can come up with an estimate, but I think it is a longer term notion and I think again the policy question for you is what is long-term. I really think weeks and months, those are very normal frictions, even in a time of disaster, in
15 which supply responses happen to land at normal competition on the merits.

The final point is this is not a static period, as Prof Valodia indicated. Many things changed in this period and you would have had to respond to them.

20 PROF TREGENNA: Okay, thanks. Then linked to that, I wanted to probe a bit more the relationship with a competitor's price and I will do it in a non-confidential way and where relevant you might want to

Competition Commission and
Dis-Chem Pharmacies Ltd

... I'm not sure whether it will be you or Ms Le Roux who would respond. So, we've been referred to the price that a competitor was charging in the answering affidavit of Dis-Chem. It's referred to as early March. In the factual matrix it is referred to as the 2nd to the 9th of
5 March.

I'm just trying to benchmark the price of that competitor, which has been cited, for a 2-pack in relation to table 5 in Dis-Chem's answering affidavit. As I said, this may be a factual issue that Ms Le Roux might be better placed to answer. So, there's a Dis-Chem, there's
10 a range of Dis-Chem prices identified there for the 26th of March and then on the 2nd of March there's only for a 50-pack and then on the 7th of March for a 5-pack.

So, I guess my first question in relation to this is the price which has been cited of a competitor over the period 2nd to the 9th of March,
15 which is the relevant comparison, from table 5 and beyond that period of 2nd to 9th of March where we've been provided with that price of a competitor? Can you just directly link the competitor price with the Dis-Chem price in table 5?

ADV LE ROUX: Chair, through you to Prof Tregenna, and Mr Smith
20 will help me with some of the numbers here, but as I understand what's happening in table 5 is you've got the evidence of Ms Parsons explaining what she does. She looks at that competitive price. For a 2-

Competition Commission and
Dis-Chem Pharmacies Ltd

pack it's 10.99, so that's sort of R5.00 a mask. Then if you look at the price adjustments in table 5 from the 2nd to the 9th of March and if you look at what they are selling, you see how she comes in under that price.

5 So, at that pricing for a box of 50, it would have been in the range of 250 something for the box. Dis-Chem goes to 173 or 82 if you round it up and then for the 5-piece you see that Dis-Chem is actually going to just under the R20.00 mark.

10 So, as I understand Ms Parsons' evidence and explanation from Mr Govender and the information reflected in the table, that's the decision that is taken. So, it looks at that 10.99 and says, okay, so I'm testing the market here, right. The customer is paying 10.99 for two. If I multiply that for 50, that's nuts, R250.00, even though we have government saying you can pay 511, but you know, that's crazy. I don't think I want to do that. So, I'm going to set my 50s almost R100.00
15 below that and then similar exercises for the other pack sizes, 5s and then when those three products that are the subject of the complaint referral are no longer being the ones sold and you introduce the new SKU, you introduce it at the level with the wafer thin margin that just covers its cost and that's 2 April. I don't know if Mr Smith wants to
20 add.

MR SMITH: Ja, I have a tiny bit there. Sorry, you go first.

Competition Commission and
Dis-Chem Pharmacies Ltd

PROF TREGENNA: Ja, so I guess it still doesn't cover my difficulty, which is, I mean, presumably it's not a good comparison, a 2-pack and a 50-pack, because obviously a 50-pack would be cheaper. So, what I was trying to match from this table or anywhere else is a 2-pack of the competitor. Obviously there's an open question as to whether or not that's a competitive price, but the 2-pack of the competitor with perhaps a 1-pack or a 5-pack from Dis-Chem. So, I don't see that reflected in that period. So, I see a 5-pack on the 7th of March only. I don't see the prices here on the 1-piece.

10 MR SMITH: Can I try perhaps, sorry, just to add a tiny bit of empirics and then Adv Le Roux please carry on? So, firstly I understand your question, Prof Tregenna. I had understood that this is a period of substantial uncertainty. I mean, the call just six weeks earlier they set this record of hundreds of thousands of masks in one day. They are running out of supply and they are getting quotes that are substantial and excessive prices, let along historic costs. I mean, we are talking
15 tens of multiples of historic costs.

So, this is uncertainty and I think it is in that context that I had also understood they are thinking on a per-mask basis. I understand
20 your question, well a 50 should be cheaper per mask than a two, but I don't think that Dis-Chem has indicated that level of sophistication in this exercise. They see a 2-pack. They have, as you say, 5s, 10s, 50s.

Competition Commission and
Dis-Chem Pharmacies Ltd

The two empirical points that might assist is if you go to the confidential exhibit from Monday, slide 23, I won't point to the numbers, but if you imagine that competitor price, it will go just above, you can see the different series there and I want you to read that in the
5 context of slide 27, which is also confidential, but you will see the overwhelming majority of Dis-Chem sales throughout that period, 2 to 9 March, indeed the whole of March is the 1-pack size and that's the light green yellow line.

So, I think the most relevant comparator, the pack they were
10 really selling was the light green line and if you compare that on a per-mask basis, it's also a similar pack size. It's not the perfect comparator you like, but I suppose firstly understand it wasn't as sophisticated an exercise as you anticipate. Secondly, I think economically it was a point of great uncertainty and third just empirically I think we are really
15 talking about that light green line on either those graphs. Adv Le Roux? ADV LE ROUX: Thank you, and Chair through you to Prof Tregenna, just briefly three factual points. The first would be that obviously there's also the whole dynamic of Dis-Chem repackaging the 50s into the smaller pack sizes. That's what is going on as well in this period.
20 So, the pricing on the pack of 50s it's that product just getting broken down in-store and put into the smaller packs.

Competition Commission and
Dis-Chem Pharmacies Ltd

Secondly, it did obviously price lower per mask, even in those combo packs. That data is there. And then finally just to point to table 6 of the answering affidavit, which is the online pricing that we managed to put together for the answering affidavit. Obviously it is in
5 April, but the point to take away there is the comparators there are things like R1 500.00 for a box of 50 for multiple suppliers are at that level in April. This is when Dis-Chem has managed, through competing with other retailers to get some supply from suppliers, get them into stores and it is dropping its prices.

10 So, there is this dynamic and it's also clear at the end of the time period that Dis-Chem says you should have regard to, which is even now you've got competitors offering a box of 50 masks for R1 500.00.

So, you know, all of that, depending on which period you are looking at, would also be data that we have to show competitive
15 pricing. I'm not sure, we have not been able in the time, in the four days we had for the answering affidavit, we didn't have the time to do a historic online trawl to see what prices were doing 15 to 30 March, but if we see where they are at the end of April and they are still multiples higher than where Dis-Chem got to, we think that is a
20 relevant dataset as well.

PROF TREGENNA: Okay, I didn't note it in the table 6, which is obviously from the 24th of April where Dis-Chem's own prices were

Competition Commission and
Dis-Chem Pharmacies Ltd

very low as well, but ja, let me move to the next question, because I think we don't have a lot of time. So, I guess it's partly a flip of my question around the competitive price and you may also not be able to answer it directly, which is, can you give any indication as to what you
5 would regard hypothetically as either an excessive and/or unreasonable price, whether in terms of a threshold, a price threshold, a margin or criteria? What would have been an excessive or unreasonable price from Dis-Chem during the period in question? How would we recognise it?

10 MR SMITH: Yes, shall I start that first?

ADV LE ROUX: Sure.

MR SMITH: So, firstly the period in question, I'm guessing, is something like 15 or 19 March to 31 March. I have a challenge with that, because I should defer to you on the policy interpretation. I think
15 the economics is that it could only have been an excessive price if it falls unreasonably outside of the bounds of what you would expect reasonably effective competition to have achieved. I think reasonably effective competition does have frictions.

We know the Sasol/Mittal case we worry about persistent
20 dominance that might have been there for 10 years. I'm not proposing that test here. It is context-specific, but I think it's not economically reasonable to expect a reasonably effective competitive market to

Competition Commission and
Dis-Chem Pharmacies Ltd

adjust within two weeks, even in the context of a national disaster. I simply don't think that you could recognise an excessive price of this magnitude in that time period.

Now, I'm sure you can find counter examples that if someone
5 had increased prices a thousand fold, five times, every day for those 10 days and costs had done nothing and this was water or something, which had had no supply disruptions, I know for many people there have been supply disruptions, but you can hypothecate an example, but trying to move from the case we are looking at here, if you have no
10 price change and if you have these anticipated costs, I don't think that's a context in which you can find the price is excessive, because I think those normal frictions of practically effective markets would reasonably take longer than two weeks to play out.

So, to get back to you, if I find a counter example, say that Covid
15 lasts for 15 months. Let's just guess. We get a vaccine next March or so and it takes a while to roll out and we are under some form of lockdown until June 2021 and say that someone ... you know, we have had huge disruptions and no one really knew. There was massive uncertainty. No one knew what the cost of a mask would be or the
20 supply chain for a mask would be. All airlines shut and then they open up. Imagine we get to a new normal; that is everyone has to wear masks, it is a national disaster for the next 15 months and once we

Competition Commission and
Dis-Chem Pharmacies Ltd

actually know what a mask looks like, we are not going to wait 10 years for Sasol, but we reasonably expect a competitive market to sort out its supply chain within the next two to three months. SAA might never be flying, but at least Etihad or someone else, Emirates is going to be flying masks around and we can get that increased supply of masks that we need.

We now roughly know what the cost of a mask is. If someone then is able to generate persistent excess returns, and I don't know exactly what it would be, so again I wanted to defer sufficiently to you on the policy question, but in the context of that 15-month disaster, if they had six or nine or twelve months of excess returns, you would say, well, actually that looks excessive.

Those are not efficient market signals that are going to increase supply. Supply already sorted itself out in a six-week, two-month, three-month period. Now we all know what the costs are. There aren't these massive uncertainties and risks. You are now exploiting whatever market power you might have. That's the persistence that you might seek within the context of a national disaster.

I'm not suggesting it might have to be the whole 15 months, but equally I think it reasonably has to be long enough that these efficient supply signals can work out and competition can work and try and

Competition Commission and
Dis-Chem Pharmacies Ltd

establish a new normal. I hope that answers it sufficiently, but if not, I'm happy to go further.

ADV LE ROUX: Chair, through you, from a legal perspective the first point is to say, obviously with respect Prof Tregenna, it's an unfair
5 question, because the Commission bears the onus to prove an excessive price. It's not for Dis-Chem to now put up some sort of threshold or some of requirement of what an excessive price could look like. That's an onus that the Commission bears and it's an onus that the Commission has not discharged.

10 So, the first point is just to note that it's not for Dis-Chem to prove a non-excessive price. It's for the Commission to prove an excessive price in terms of all of the elements of Section 8.

But secondly, what that means for this decision by the Tribunal, because I think again it's very clear that the Commission has brought
15 this as a test case, but if it has hundreds of other complaints waiting, it needs some guidance, but this is not the case in which the Tribunal should be tempted to try to set some sort of threshold with reference to the facts of this case.

I say that for this reason. The Commission should have brought
20 a very narrow case, a clear material price increase after the regulations come into effect, a clear product definition in a defined market and a proper analysis of dominance of a respondent in that context. That kind

Competition Commission and
Dis-Chem Pharmacies Ltd

of narrow case that actually hits the requirements of Section 8 would be a better case to say here is some clear guidance on why we say this is an excessive price here, but here we've got a broad case, ever changing, constantly changing what period it covers and so this is the
5 wrong case to try to set some sort of bright line or threshold here.

So, again it's for the Commission to prove an excessive price. Because of the framing of the regulation by the Minister, this case requires the Commission to do that in terms of all of the elements of Section 8. Again, I invite the Tribunal to provide some feedback to the
10 Minister through its decision to say if you want to get the price gougers and, you know, I express no view on someone who on the 24th of April is asking R1 500.00 for a box of 50 masks for that question, whether that's a price gouger.

But if the Minister wants to study your decision and say, okay,
15 let's disconnect price gouging from excessive pricing, it's an unworkable regulatory framework, let me issue an amended regulation that says price gouging is a material price increase after the period of the regulations, I set a threshold, I retain the test, maybe with a bit of information about what costs to look at. It could even say you can only
20 look at the cost of the actual stock sold. You know, you could craft a very clear strong regulation that wouldn't have all of these difficulties and complexities.

Competition Commission and
Dis-Chem Pharmacies Ltd

Certainly, if the Minister were to withdraw these regs and do something like that, it would be ... that probably would ensure better enforcement, but in this case the Commission bears the onus to prove an excessive price and it hasn't.

5 CHAIRPERSON: I'm sorry Mr Smith, but I'm going to just come in here. We are running out of time and I would urge you not to repeat arguments that have already been put up. I think Prof Tregenna's question was a question to Mr Smith as an independent economist and so let's not go into legal argument that has already been presented to
10 us and let's not, Ms Le Roux, use this platform to advise the Minister. I'm sure you can do that on your own as well. We need to now manage our time.

So, I just need to ask Prof Tregenna whether she has any more questions for Smith. They are focused on the economics and then we
15 will have to take a 5-minute adjournment so that we allow the Commission to come in and respond. Maybe we might, if we need it, we can do a 10-minute confidential session at the end, but for now let Prof Tregenna finish her questions. Ms Le Roux, please no more argument. You've made your arguments already, unless it's a factual
20 issue that you want to bring to our attention, which hasn't been brought to our attention previously. Then please come in.

Competition Commission and
Dis-Chem Pharmacies Ltd

PROF TREGENNA: Okay, I have several other questions, but I think let me just confine it to one, because I'm concerned about time and I'm not sure if either Mr Smith or Ms Le Roux could answer. It's about the right-offs and repackaging of masks associated with the change from
5 the 50-packs to the single packs.

So, it's a couple of questions. Let me just run through them altogether to save time of back and forth. So, firstly were there any write-off costs, other than the repackaging of costs? So, was there any loss of stock or anything or stock written off or was it simply a
10 repackaging?

Secondly, where was the repackaging done and by whom? So, was it in a store? Was it in warehouses or whatever? Thirdly, what were the labour costs associated with the repackaging? So, did temporary staff have to be brought on board to do the repackaging? Was it current
15 staff who did the repackaging? How were labour costs associated with the repackaging and actually calculated?

MR SMITH: Can I very quickly go on that? I think Adv Le Roux has perhaps a better grasp of the detailed facts here, which I can add to what is in Mr Govender's statement. Very quickly, just all of these
20 comments are economics. So, when I say what an excessive price might be, I mean in economic terms what's an excessive price that might

Competition Commission and
Dis-Chem Pharmacies Ltd

better balance these type 1 and type 1 areas, nothing about legal requirements.

So, write-offs and repackaging, yes, we understand there were some write-offs. The data here are not perfect. So, stockholdings data,
5 I think the transactional data are quite solid. I think the order and receipt data are quite solid, although the dates of receipt are sometimes somewhat in doubt, but I mean, we have the dates on which the orders were supposed to be delivered.

Exactly what stock is at what store or at the central distribution
10 warehouse, those data are not as reliable. We don't have a good idea of that. However, we do have an understanding that there were substantial stock losses and that's both for internal staff use and simply because they fell off the back of a truck or were scattered into the bush.

So, we don't have a precise estimate of that and it is quite
15 difficult to estimate, but that's another source of loss of sock. We understand it's substantial, but it's not going to change these numbers hugely.

On the other write-offs there are accounting adjustments, which you will see particularly in the first spreadsheet that was provided,
20 which really should be a reallocation from 50s to 5s or 10s. So, 50s stock in stock out, they don't match up, because you moved mainly the 50s, you didn't sell them. They should be write-offs, moved to another

Competition Commission and
Dis-Chem Pharmacies Ltd

column, but that's an accounting adjustment and again, I don't think it changes any of the margins that we've talked about today by a huge amount.

The repackaging, I understand much of this was done in-store.
5 Some was done in the central distribution centre and I think the labour costs, I understand that the central distribution centre does from time-to-time take on temporary labour costs and that's where the estimate came from, but I understand that the store, during this period, there probably wasn't much incremental labour. They were diverted from
10 other tasks. So, there is a cost and a cost estimate.

Some of that may be incremental, but I have to leave it to Adv Le Roux as to how much factually was incremental as opposed to re-
diversion from other tasks, but I understand the central distribution
centre does from time-to-time take on temporary staff and that's where
15 the cost came from.

ADV LE ROUX: Chair, through you, just conscious of timing, Prof Tregenna, if I can just refer you to paragraphs 45 and 69 of the answering affidavit. That's where the information that was available in the time available is set out in the answering affidavit.

20 CHAIRPERSON: Thank you. Prof Tregenna?

PROF TREGENNA: Can you just give me a moment? I'm just finding the place. I mean, I did see this, but I don't think it answers the

Competition Commission and
Dis-Chem Pharmacies Ltd

questions that I asked. So, for example, in terms of the write-offs, you mentioned that there were some boxes that fell off the back of a truck or some masks that would be redirected for use by Dis-Chem staff. Is the suggestion that where Dis-Chem essentially purchased masks from
5 itself for use by its own staff, that those costs should somehow be built into the price that was charged to consumers who were buying masks?

In terms of the repackaging costs, I think the kind of clarity which I was looking for was not that from time-to-time Dis-Chem may bring on more temporary staff in its warehouses. In this specifically
10 case were there actually net new labour costs associated with it? Did they have to hire 30 temporary staff at the warehouse to do the repackaging and this was the cost or was it just existing staff, current staff whose tasks were redirected and the associated labour costs were somehow imputed in terms of the hours and their wage rate or
15 whatever?

MR SMITH: Yes, so very quickly just on the write-offs...

CHAIRPERSON: I'm going to come in there, sorry about this, but the question was asked and you haven't been able to answer it, because you don't have the detailed information and Ms Le Roux has pointed
20 us to Mr Govender's affidavit where he also is not able to give us the details.

Competition Commission and
Dis-Chem Pharmacies Ltd

What I want to suggest we do is we leave this, because you haven't been able to give us that information, but we do know that the Commission has done an estimate of what those costs would be. My understanding is that you've taken no issue with the Commission's estimate for that, for the repackaging costs, including labour and packaging materials.

If we accept that, then we at least have an estimate that has been included in the calculation of the margins. Prof Tregenna, I don't know if that helps you, because I don't think that we can get the detail here now, because it hasn't been provided and I don't think Mr Smith is in a position or Ms Le Roux to give us that information.

MR SMITH: I merely wanted to clarify that the margins we've been talking about today exclude those calculations. So yes, I can't give you an update on those calculations of exactly where they are, but when you talk about gross margins, it's procurement costs. It doesn't incorporate additional cost of stock used by staff or repackaging costs, etc. All the margins we talked about exclude that whole discussion, but Chair, you are correct. Otherwise we can't add to that.

PROF TREGENNA: We can leave it there in that case. I was sceptical of the Commission's calculations on this, which is why I'm probing it further, but it looks like we won't get the information today.

Competition Commission and
Dis-Chem Pharmacies Ltd

MR SMITH: We simply haven't had time or more data to do a perfect calculation. We can quibble, but we can't give you a more precise number.

CHAIRPERSON: Prof Tregenna, do you have any further questions
5 for Mr Smith?

PROF TREGENNA: I did have, but I can leave them because of time.

CHAIRPERSON: Well, we can maybe pick them up in the confidential
session at the end. I just need us to manage our time here. It is 10:33.
Before I allow us to take a 5-minute adjournment and then give time to
10 the Commission, I just wanted to say something about the joint minute
that was handed out last night.

The one thing that I found difficult is sometimes a reference to
the unit, the per unit price and I think Ms Le Roux you have now started
calling that SKU, which is SKU, the stock keeping unit and the prices
15 per unit, but we don't get a sense of whether that is a per-mask price or
what type of unit is it? Is it a 2-pack? Is it a 5-piece? We need some
clarity around that and some consistency from both you and the
Commission.

It might be that at the end, after the Commission has done its
20 address, we can give you some guidance on what we want to see in that
spreadsheet that we are going to ask you to do. So, can we now take a

Competition Commission and
Dis-Chem Pharmacies Ltd

5-minute adjournment and then I will hand over to the Commission.
We will just take a quick comfort break. Thank you.

ADV LE ROUX: Thank you Chair.

A d j o u r n m e n t

On resumption:

5
10
CHAIRPERSON: Well thank you everybody. Thank you for your indulgence and thank you for Mr Majenge and Ms Slump and Mr Hodge. I'm going to hand over to the Commission now to do your reply and the Commission will remember that it was seriously out of time on Monday. So, I'm going to be very firm with time and have granted you half an hour and we suggest that you try to stick to it, if not coming under that so that there is some more time for questions. Mr Majenge, over to you.

15
20
MR MAJENGE: Thank you very much Chair. We will try our best to stick to the time allocated to us and we are quite grateful for the opportunity. Chair, we will humbly submit that the submissions, which have just been made to you on behalf of Dis-Chem, can only hold if it is to be found that competition law and economics is not concerned with questions of equitable access to essential goods required to protect consumers within the context of a pandemic.

Competition Commission and
Dis-Chem Pharmacies Ltd

So, in terms of how we have structured our submissions, Chair, I will hand over to Mr Hodge who will address some of the pricing as well as some of the substantive issues that have arisen. Then after that we will then briefly address some of the legal issues, which have been raised. Thank you very much Chair. At this point I will request that Mr Hodge then proceeds with his address on the substantive issues.

CHAIRPERSON: Thank you. Thank you Mr Hodge.

MR HODGE: Thank you Chair. I will be as brief as I can. In the upfront argument we dealt with many of the points in the respondents Heads. So, I'm not going to repeat those. I think the way that the respondent has now argued the case has placed it now, I think, quite firmly in a particular fashion, which is first of all I think there is now common cause that price gouging is a species of excessive pricing; that we can look at market power within a disaster context and we can even look at a competitive price in the disaster context.

I think that is now accepted from Mr Smith and Ms Le Roux and that context specifics is important in making the assessment by the Tribunal under Section 8. What is really put up, I suppose, as the defence is that the Commission we are told ignores the period before and after with a particular focus on April, ignoring we are told price decreases and margin collapse in April and that the Tribunal needs to

Competition Commission and
Dis-Chem Pharmacies Ltd

have regard to the whole period if they are to make a judgement in this case.

We are told that it is inappropriate or risky to intervene in a dislocation for a short period of time and that's been the emphasis this morning. That is now what I would frame as the main defence put up by the respondents.

In terms of the disruption to the market, I think there's common cause now, massive disruption, a large spike in demand, people scrambling to get supply and that's not in dispute, but that is in fact why there is temporary market power and that's why market power borne out of the context exists.

There's a call to look at market share and, in fact, we were referred to as the best estimate in Mr Govender's report, which is actually paragraph 12, which is for February 2019 for broad category of products like the personal care segment. That isn't the market share and market share isn't important in this context. If you look at the Motta article and the whole idea about price gouging, he states that "*when demand is much higher than capacity, even small firms may be endowed with significant market power*".

The point is that Dis-Chem faced the disruption. They saw the spike in demand late January, early February. They knew that this would persist in the context of Covid. They knew that others may have

Competition Commission and
Dis-Chem Pharmacies Ltd

far less stock than themselves and whoever had stock, had some pricing power and they put up prices. So, even later when there's reference to Ms Parsons, that's subsequent to three price increase already from mid-February.

5 This I suppose is the point and I think Prof Valodia's question brings it out. When you are a consumer going into a shop and you see they have stock, you don't pause to say, well, let me shop around and come back another day. When things are in short supply, you know you grab that at that point and that's the point of panic buying and that's
10 the point at which retailers can exploit that position and which Dis-Chem has.

 If we look at now the reasons for that price increase from February through to March, about five successive price increases, in the whole of the argument there was silence on costs. It came up in
15 questioning, but there was no attempt to say that repackaging costs accounted for that difference. There is at paragraph 70 and the Chair rightly pointed out a calculation from the Commission. It hasn't been contested and there is no attempt to, in a sense, justify it.

 The focus of the argument has been almost entirely on the
20 context and this idea of expected replacement costs, but as again Prof Valodia pointed out, the critical question there is not the theory but the practice and the practice is the moving average cost. That's clear. Even

Competition Commission and
Dis-Chem Pharmacies Ltd

Mr Smith conceded that he can't take the practice point further. That is how they behaved.

So, we are then left with argument that in fact we must look at this other retail competitor. Before I deal with that, I do want to just point out that counsel has repeated asked you to compare the National Treasury price of 511 on the 24th of April to a price at the end of February or beginning of March. She has also said that we must compare it to the Take-a-Lot. Those are all 24 March prices or later. They have no bearing on competitive price or benchmarks...

10 *[Talking simultaneously]*

CHAIRPERSON: Sorry Mr Hodge, 24 April price.

MR HODGE: 24 April.

CHAIRPERSON: 24 April price. You said March. So, I just want to clarify.

15 MR HODGE: Oh sorry. So, counsel has said look at National Treasury. They say they will buy at 511 per pack and yet Dis-Chem has never charged more than 173, but that's the comparison of National Treasury today when we know that costs have gone up tenfold, if not more to a price back in March, early March, and those can't be compared.

20 I think this is where we made the point at the beginning of the hearing that there's a fair degree of obfuscation of the facts and I think the Tribunal obviously will have regard to what they are and the timing

Competition Commission and
Dis-Chem Pharmacies Ltd

of those, but to the point of a price of another retailer, I mean, in the context of a crisis we have had the debate this morning about what is the reliable measure what is not a reliable measure. If anything, not a reliable measure is a price that another retailer is selling at. We even
5 heard that on the 24th of April someone is selling these for R1 500.00. That is the point. Those who have stock have some pricing power and those who are desperate enough as consumers will be forced to pay that.

So, what is in fact more informative is margins and even, I think
10 Mr Smith conceded that in a retail context margins are what matter. It's what gross margins you make on things on the shelf. That is why, if you look at price gouging laws in the US where they don't have excessive pricing, but they've looked at this one because it's abhorrent, in fact, and at our Heads at 72.1.2 we quote from a California penal
15 code. Reference is made to the mark-up customarily applied by the seller for that good or service in the usual course of business immediately prior to the onset of the state of the emergency.

That is the point. Each product has a particular gross margin or mark-up range, which does set the benchmark, because that is taking
20 into account the stock flow, the shelf space and the overheads. So, that is more informative.

Competition Commission and
Dis-Chem Pharmacies Ltd

What I would also say about the price claimed about the competitor is (a) it is obviously a single point in time, but more importantly it follows the fact that Dis-Chem has already increased its price threefold in the weeks before. So, if everyone is watching
5 everyone else, how can we take much comfort that if the other competitor has increased in response, that that is now the competitive price?

That's why prices in a pandemic are difficult. It's public knowledge that the Commission, once the regulations were in place
10 and moving into the lockdown period, was receiving 100 complaints a day. We continue to receive complaints and the price gouging is not over. It's not as though the market has sorted itself out.

But that's where we come to the April period and normal margins, because this seems to be what the respondents have focused
15 on the most. So, when we got the storyline at the beginning, the emphasis has continually been on before the Commission even arrived at our door. So, we were told that they adjusted their price and margins before even hearing from the Commission; that on Easter Friday before the Commission letter arrived, on 11 April the decrease preceded any
20 contact from the competition authorities, before the Commission even showed up at the door and this has become the main focus of the defence on persistence. It's a couple of weeks. It's just March and the

Competition Commission and
Dis-Chem Pharmacies Ltd

market has corrected itself and that's why the Tribunal needs to be cautious and that's why in fact they shouldn't find against them.

Even at the end counsel said of the 22nd of April price decreased, which happened on the day of the referral, which Dis-Chem knew
5 about it, we were told that it is regrettable and untrue, the contention that the price decrease on 22 April is in response to what the Commission has done, it is simply untrue.

Now, this is all extremely misleading and that's why it needs to be corrected. So, in terms of your trial bundle, attached to the referral
10 at page 32 of the trial bundle is the reply to the Commission's letter of 14 April or e-mail of 14 April from Mr Govender.

CHAIRPERSON: Is it at page 35?

MR HODGE: Oh, is it 35? Sorry.

CHAIRPERSON: I'm asking you.

15 MR HODGE: 32 sorry, 32. It's Annexure B to the founding affidavit.

CHAIRPERSON: Carry on, Mr Hodge.

MR HODGE: So, in that reply from Mr Govender you will see the second paragraph he says "*see attached all information required on 3-ply masks. Please use the national consumer report attachment as the*
20 *main reference point*". And if one looks at the attachment, the last item there is labelled 'National Consumer Commission report 3-ply masks'. It also sits on the reference trial bundle, item 51, 'National Consumer

Competition Commission and
Dis-Chem Pharmacies Ltd

Commission report 3-ply masks’ and that was the working spreadsheet that was sent to the Commission in order to respond to the question.

The fact is, and it is a matter of public record, that the NCC did an initiation against Dis-Chem on the 25th of March, sent a letter to them on the 26th of March and I think the Commission has provided the Tribunal with that context. They were under investigation before the end of March.

It is also a matter of public record that the Minister consulted the heads of all the major retail chains before the regulations went into effect. The Commission has sent letters to them on 22 March reminding them of these regulations. We even sent further letters on the 26th of March to say we are getting complaints about your stores. Please bring your store manager into line and Dis-Chem was included.

So, the claim at this point that in fact the market corrected itself and that all these price decreases and margin collapses occurred before the Commission came knocking on the door are simply incorrect and untrue. The Commission had been knocking on the door and the National Consumer Commission since the end of March. So, at that point...

ADV LE ROUX: Chair, I’m afraid I must apologise to Mr Hodge, but I need to correct this now with an objection.

CHAIRPERSON: Alright.

Competition Commission and
Dis-Chem Pharmacies Ltd

ADV LE ROUX: Mr Hodge, in addition to still being an advocate and not an economist, is now introducing facts that are not before you.

CHAIRPERSON: Continue.

ADV LE ROUX: There is nothing in the record about letters to Dis-Chem from the National Consumer Commission, these meetings with
5 retailers. Sorry, we do have the letter from the National Consumer Commission, meetings with retailers, the Commission telling retailers what it is up to. I have to get this objection out clearly, because clearly this case is not going to end at the Tribunal, whatever its outcome.

10 I was very clearly saying that the Competition Commission had not knocked on Dis-Chem's door when it began dropping its prices in early April. That is factually true. The Commission has nothing before you to contradict that. The fact that the National Consumer Commission contacts my client on the 26th of March is before you. Mr
15 Govender responds with a spreadsheet and the invoices. Nothing further, I'm instructed, has happened with the National Consumer Commission complaint.

The Competition Commission, after Dis-Chem has dropped its prices on the 11th of April, sends its first e-mail. Mr Govender responds
20 with the e-mail you see as Annexure B to the founding affidavit and it references the same spreadsheet given to the National Consumer

Competition Commission and
Dis-Chem Pharmacies Ltd

Commission, save that it updates it to include April information showing a practically non-existent margin and the pricing.

So, the Commission certainly needs to do its job and we certainly have sympathy for the Commission, but that sympathy evaporates
5 when the Commission starts creating a new case in reply with quite frankly vigilante tactics here. The Commission is not here and nor is the Tribunal here to do the work of the National Consumer Commission. That body has been provided with information. I'm sure it's independently and without fear, favour or prejudice considering the
10 information that's been provided. Nothing further has happened.

Whatever the National Consumer Commission did is irrelevant to this case. The Commission needs to do its job, establish dominance, establish an excessive price, establish a competitive benchmark, show how Dis-Chem has contravened Section 8. So Chair, we object strongly
15 to what Mr Hodge is now doing, presumably wearing some hat other than an economist. Thank you Chair.

CHAIRPERSON: Thank you Ms Le Roux. Your objection is noted.

ADV LE ROUX: Thank you Chair.

CHAIRPERSON: Mr Hodge or Mr Majenge?

20 MR MAJENGE: Chair, I think we don't want to detain the Tribunal on this point, but the objection is really baseless, but we will deal with it once Mr Hodge has finished his presentation. Thank you Chair.

Competition Commission and
Dis-Chem Pharmacies Ltd

CHAIRPERSON: Well, Mr Hodge, let's go back to the e-mail of the Commission. The point you were making is that Dis-Chem is aware of an investigation, but let's stick to the facts regarding the Competition Commission's work.

5 MR HODGE: Well Chair, I will let Mr Majenge deal with the objection, but maybe to round off, the point is in April the behaviour is in the context of enforcement. It's in the context of even if one took the view that there is no other communication and we just look at the regulations, there's knowledge now that any price increase that must
10 happen towards the end of March, because costs have increased, there is a regulation in place and you must comply with it. It was very public, the Commission enforcement and the NCC.

So, to argue that the April period is a period of natural market correction outside any other influences would be incorrect.
15 Enforcement happened and that's the point and that's the counterfactual.

CHAIRPERSON: Yes.

MR HODGE: So, it can't be used to limit the period and say that there's not a persistence. Things changed because of regulations and
20 enforcement. Maybe let me make a few last points on consumer detriment. Much has been made about the bulk buyers at the end of January and early February and it's even stretched to the extent that

Competition Commission and
Dis-Chem Pharmacies Ltd

says this is evidence of poor people who in fact weren't harmed and there's no detriment to consumer, but again there's a mismatch in timing.

All the evidence presented, and this is in the RBB report, you
5 have seen those graphs and the answering affidavit in paragraph 41 that this ended in the first week of February. The price increases went through from mid-February onwards on smaller packs and the evidence certainly in the point of sale is that almost 98% of the March sales were under R500.00 purchases. So, the argument that a few bulk buyers at
10 the end of January and February now means there's no consumer harm is simply incorrect.

There has been a debate about the sort of benefit of either being the lowest of the highest prices or in fact that supply matters more, but I think the point was well made by Prof Valodia that it is almost a loss
15 of entitlement through market forces that in fact if price is the rationing criteria, it is the poor who suffer. That is in the response in the Heads and part of the references provided to the Tribunal such as Snyder who debates exactly this point.

I think the point as well is that if there is a signal to a
20 manufacturer to make more investment and increase supply, that is one thing, but for a retailer who happens by circumstance to have some stock or have an existing supply chain and a brand and name and power

Competition Commission and
Dis-Chem Pharmacies Ltd

to secure some more stock during a crisis period, to allow them to double, triple prices and earn that in excess margins, is just adding extra margin through the chain for no ingenuity investment and it doesn't change the supplier response from a manufacturing level. If there are
5 shortages, retailers will want to provide that. That pressure will be pushed through to a manufacturer.

So, to the point Mr Majenge made right at the start, it's also the inequity and that is part of the philosophical debate around this. I think maybe just to round off, there is also, we've heard once more the call
10 to send a message to the Minister, but when there's an acceptance that price gouging is a species of excessive pricing, then I think it is not necessary to institute new laws that would take time and that will not act retrospectively.

We've always relied on the Tribunal to in fact provide that
15 guidance and there's no reason why it can't happen now. There shouldn't be an aversion to price regulation. As I think put out in the Heads, Mr Lewis as the first Chair had said in these sort of contexts and in fact less troublesome than in the context of a more enduring market power where it is more complex to make that assessment.

20 So, let me end there, Chair, and pass over to Mr Majenge.

CHAIRPERSON: Thank you Mr Hodge. Mr Majenge? I want to emphasise, Mr Majenge, this is a reply. So, let's remember that and not

Competition Commission and
Dis-Chem Pharmacies Ltd

do the argument you've already done at the beginning and in the course of the proceedings.

MR MAJENGE: That is correct, Chair. We will indeed be very brief. Chair, there is no answer to the point that we made about the applicability of the test that is referenced in paragraph 50 of the AMSA decision of the Competition Appeal Court. There is also no answer to the point that we made in relation to the Senwes decision of the Tribunal that if the character of price gouging coincides with the character of excessive pricing, then the Tribunal has grounds to intervene.

Chair, most of the submissions that you have heard, with the greatest of respect, from our learned colleagues, are decontextualized submissions and we will tell you why those submissions are decontextualized with reference to an article that is part of the bundle of authorities and this is the article by Jeremy Snyder. You will see this article, Chair, at page 568 of the bundle of authorities and it is titled "what is the matter with price gouging?"

In particular we would like to refer the Tribunal to page 572 of that article under the heading 'price gouging and respect for others'. I would just like to take that article, the second paragraph under that heading in the middle there where Snyder says that "*I believe that this characteristic of anti-gouging legislation offers an important insight*

Competition Commission and
Dis-Chem Pharmacies Ltd

regarding what is morally objectionable about price gouging, as not all types of price increases trigger the worry about gouging. It is not price increases themselves that motivate this concern. Rather, what I would like to argue, it is the price increases that undermine” and this

5 is where we would like to make the emphasis “that undermine equitable access to certain essential goods that motivate the worry about price gouging. Put another way, worries about price gouging are engaged when price increases cut off poor consumers from necessary goods” and then the article continues.

10 So, that is really at the heart of what we are advancing before the Tribunal and this ties in with the point that Mr Aproskie makes and this Chair you will see at page 46 of the pleadings bundle. At paragraph 33 Mr Aproskie again, consistently with the point that has been raised by Snyder in the article that we commend to the Tribunal, he makes the

15 same point and he says, and I will take that at the beginning of paragraph 33 “given these are essential and susceptible to price gouging, a high threshold may simply provide an umbrella for a material degree of exploitation, which is likely to put many of these essential items out of the reach of the poor. This is especially the case

20 in the context where a basket of essential goods is required, because the cumulative effect of consumers will be substantial if the high price or margin increase thresholds are lower than across these goods”.

Competition Commission and
Dis-Chem Pharmacies Ltd

So, that is the main point that we make, Chair, that price gouging within the context of a pandemic disconnects consumers from essential goods, which are necessary or required to protect their health within the context of a pandemic. That is why we find it quite curious that our
5 learned colleagues could argue with the audacity in which they have argued this matter to say that there is no detriment to consumers in this matter when clearly we have demonstrated that the higher price disconnects consumers from access or equitable access to these essential goods.

10 Then very briefly, Chair, on the attack which has been made to Mr Hodge, Chair, we are surprised that there is still persistence with this attack, despite our references to the law and the law is set out in Section 53 of the Act. We have made it clear that Mr Hodge is a participant in this matter and he falls within ... his submissions fall
15 within the purview of Section 53(1)(a)(i) of the Act.

So, he would have been entitled to all the rights, if this were a trial that are references in Section 53(1). So, we know that in these proceedings the evidence is on the papers. The economic evidence that the Commission is advancing to the Tribunal is on the papers and Mr
20 Hodge is not giving expert evidence, but he is participating as an expert. So, there is simply no basis to these repeated objections that have been made in relation to his participation.

Competition Commission and
Dis-Chem Pharmacies Ltd

The last point, Chair, on this question of competitive pricing, we know that the Act, and we have made this point in our Heads, we know that the Act does not define what a competitive price is, unlike the previous formulation in the repealed provision of Section 8A, which
5 had a specific definition of economic value.

The Act doesn't have in its current form a definition of what a competitive price is. So, it is open and the language of the Act permits that for the Tribunal to interpret what a competitive price is, both purposefully as well as contextually with reference to factors which are
10 relevant in determining this case and we have advanced in our Heads what those factors are.

Just one last point, Chair, we will respectfully submit that it would be tragic if a broadly formulated provision of excessive pricing in Section 8(1)(a) is interpreted in a manner that is blind to questions
15 of equitable access to essential goods, especially in the context of a pandemic that has the kinds of effects that have been referenced in the judgement, the recent judgement of the High Court in Mohamed Hassim, which we reference at paragraph 4 of our Heads.

Thank you very much, Chair. With those submissions, Chair, we
20 don't think the case that has been advanced by the Commission has been disturbed by the decontextualized submissions, which have been made on behalf of Dis-Chem. Thank you Chair.

Competition Commission and
Dis-Chem Pharmacies Ltd

CHAIRPERSON: Thank you very much, Mr Majenge. I would like to thank all of you. I think we have come to the end of our proceedings. However, we do have a number of questions for Mr Hodge and possibly for Mr Smith in relation to some of the confidential information. My suggestion is that I think what we will do as the panel is that we will send you some written questions and you can then make written replies to those.

We will give you some time to do that and then we will assess whether we need to have an engagement with you in a confidential session on those issues, but for now we have come to the end of our public proceedings and I would like to therefore close the proceedings. We unfortunately have another matter at 12. So, we do need to end off now.

So, I would like to thank all of you for your participation, especially under the circumstances. We appreciate the work that you have put in. We know that we have put you under a great deal of pressure to meet our timetable, but as you know, we are in the grip of a pandemic and these issues are of national importance and certainly of importance to the consumer. So, I would like to thank all of you for your participation and on this note wish you well. Have a good afternoon and we will make contact with you in writing henceforth.

ADV LE ROUX: Thank you Chair and members of the Tribunal.

Competition Commission and
Dis-Chem Pharmacies Ltd

MS SLUMP: Thank you very much.


CHAIRPERSON: Thank you, bye-bye.

A D J O U R N M E N T

Transcriber's Certificate

I, the undersigned, hereby declare that this document is a true and just transcription, in as far as it is audible, of the mechanically recorded proceedings in the matter of:

***Competition Tribunal of South Africa
Commission/Dis-Chem Pharmacies – 6 May 2020***

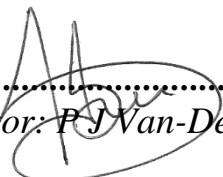

.....
Transcriptionist: A Van-Der-Ben

Date: 9 May 2020

Editor's Certificate

I, the undersigned, hereby declare that this document is a true reflection, in as far as it is audible, of the mechanically recorded proceedings in the matter of:

***Competition Tribunal of South Africa
Commission/Dis-Chem Pharmacies – 6 May 2020***


.....
Editor: P J Van-Der-Ben

Date: 11 May 2020

AMB Recordings and Transcriptions CC
P O Box 915-1519
Garsfontein East
0060

ANNEXURE F – PERSONNEL ASSIGNED TO A MATTER

Case name: Commission/Dis-Chem – 4 and 6 May 2020

Date record transcribed: 5 to 10 May 2020

Service provider names: AMB Recordings and Transcriptions CC

NAME OF PERSONNEL	ROLE OF PERSONNEL
P Van-Der-Ben	Stenographer
A Van-Der-Ben	Transcriptionist
P Van-Der-Ben	Editor

NOTE

The names of all personnel involved in the recording or transcribing of a matter irrespective of their role or the status of their employment (fulltime/part-time/subcontractor/consultant) must be detailed on the schedule.

Service provider's signature:



Date signed: 11 May 2020