COMPETITION TRIBUNAL OF SOUTH AFRICA

In the consolidated exceptions between:[1]

DRS DU BUISSON, KRAMER, SWART, BOUWER INC T/A AMPATH	1st Applicant
DRS DIETRICH VOIGT, MIA AND PARTNERS T/A PATHCARE	2nd Applicant
DR MAUFF AC AND PARTNERS T/A LANCET LABORATORIES	3rd Applicant

And

THE HEALTH FUNDERS ASSOCIATION NPC	1st Respondent
THE MEDICAL SCHEMES LISTED IN ANNEXURE "A"	2nd – 37th Respondent

In *re* the Complaint referral between:[2]

THE HEALTH FUNDERS ASSOCIATION NPC	1st Applicant
THE MEDICAL SCHEMES LISTED IN ANNEXURE "A"	2nd – 37th Applicants

[1] Case Nos: CRP102OCT23/EXC87DEC23; CRP102OCT23/EXC143DEC23; CRP102OCT23/EXC177FEB24
[2] CRP102OCT23

And

DRS DU BUISSON, KRAMER, SWART, BOUWER INC T/A AMPATH	1st Respondent
DRS DIETRICH VOIGT, MIA AND PARTNERS T/A PATHCARE	2nd Respondent
DR MAUFF AC AND PARTNERS T/A LANCET LABORATORIES	3rd Respondent
THE COMPETITION COMMISSION	4th Respondent

Panel	:	G Budlender (Presiding Member)
	:	M Mazwai (Tribunal Member)
	:	I Valodia (Tribunal Member)
Heard on	:	27 November 2024
Order issued on	:	19 February 2025
Reasons issued on	:	19 February 2025

ORDER AND REASONS FOR DECISION

INTRODUCTION

[1] This matter concerns three exceptions. They arise from a self-referral by the Health Funders Association NPC (HFA) and 36 medical schemes listed in Annexure "A" of the notice of motion ("the medical schemes").[3] The respondents in the self-referred complaint are the excipients in these matters. They are Dr Du Buisson, Kramer, Swart, Bouwer Inc t/a Ampath ("Ampath"), Drs Dietrich Voigt, Mia and partners t/a Pathcare

[3] They are: Remedi Medical Aid Scheme, SA Breweries Medical Aid Society, Discovery Health Medical Scheme, Anglo Medical Scheme, TFG Medical Aid Scheme, Malcom Medical Aid Scheme, Bankmed, LA Health Medical Scheme, Multichoice Medical Aid Scheme, Tsogo Sun Group Medical Scheme, Momentum Medical Scheme, Glencore Medical Scheme, Massmart Health Plan, Profmed, De Beers Benefit Society, Sasolmed, Bonitas Medical Fund, Parmed Medical Aid Scheme, AECI Medical Aid Society, Barloworld Medical Scheme, MBMED Medical Aid Fund, Fedhealth Medical Scheme, Medshield Medical Scheme, SABC Medical Scheme, SAPS Medical Scheme, SA Municipal union National Medical Scheme, Retail Medical Scheme, Engen Medical Benefit Fund, Netcare Medical Scheme, Lonmin Medical Scheme, BMW Medical Aid Society, Wooltru Healthcare Fund, Transmed Medical Fund.

("Pathcare"), and Dr Mauff AC and Partners t/a Lancet Laboratories ("Lancet") – collectively "the Pathologists".

[2] The HFA and the medical schemes ("the Complainants") submitted a complaint to the Competition Commission ("Commission") in terms of section 49B(2)(b) of the Competition Act 89 of 1998 ("the Act"). Following investigation, the Commission issued a notice of non-referral, and the Complainants then made a self-referral in terms of section 51(1) of the Act. The self-referral relates to an allegedly excessive price charged by the Pathologists for PCR tests for the period March 2020 to December 2021.

[3] The Complainants initially sought orders:

3.1 declaring that the Pathologists had each contravened section 8(1)(a) of the Act for the period March 2020 to December 2021, and had contravened section 4(1)(b) of the Act;

3.2 that the Pathologists are each liable to pay an administrative penalty equal to 10% of their respective annual turnover;

[4] The Complainants abandoned the prayers for orders that the Pathologists have contravened section 4(1)(b) of the Act, and for orders for payment of an administrative penalty. There was no opposition to those amendments, which we granted.

[5] Ampath filed an answering affidavit and noted an exception. Pathcare and Lancet both noted exceptions, but did not file answers. The exceptions deal with similar matters, and were heard together.

[6] We decided to dismiss the exception applications, except for the exception in relation to section 8(3) factors: "*comparator firms charging lower prices than the pathologists*".

[7] These are the reasons for our decision.

THE FACTUAL BACKGROUND

COVID- 19

[8] The first cases of COVID-19 were identified in Wuhan, China in December 2019. By mid-January 2020, COVID-19 had started to spread beyond the borders of China. On 30 January 2020, the World Health Organisation ("WHO") declared the COVID-19 outbreak a Public Health Emergency of International Concern.

[9] During January and early February 2020, it was reported that COVID-19 had broken out in Europe. By then, several countries had imposed restrictions on travel, and eventually imposed export bans on essential medical and protective supplies. South Africa reported its first case of COVID-19 on 5 March 2020.

[10] On 11 March 2020, the WHO declared COVID-19 a pandemic for which there is no cure. On 15 March 2020, the South African government declared a National State of Disaster. That was followed, on 23 March 2020, by the announcement by the President that South Africa would be placed under a nationwide lockdown.

[11] The lockdown took effect at 23:59 on 26 March 2020 and was to remain in place, initially, for 21 days. That 21-day period was just the beginning; lockdowns (or some other form of COVID-related restrictions) remained in place for approximately two years. The consequences of the pandemic and the government measures to deal with it were far-reaching. The normal functioning of markets was seriously disrupted. Of relevance to this matter, there were sudden spikes in demand for a range of goods, including personal protective equipment and medical supplies.

[12] Appreciating the risks of the imbalance between supply and demand, and the unequal bargaining power created by it, on 19 March 2020 Government issued the Consumer

and Customer Protection and National Disaster Management Regulations and Directions. The COVID Regulations were aimed specifically at firms seeking to exploit the pandemic conditions for economic gain.

[13] A key element in the fight against the spread of the virus was the detection of who was infected. The single most accurate and reliable available form of testing was the polymerase chain reaction test (often called the PCR test).

[14] The reliability and accuracy of PCR testing, and the general sense of panic surrounding COVID-19 and its rampant spread, resulted in a rapid surge of demand for PCR testing. There was a shortage of supply to meet this demand.

The Complaint by the Council for Medical Schemes

[15] On 8 October 2021, the Council for Medical Schemes ("CMS") filed a complaint with the Commission under section 49B(2)(b) of the Act, alleging that certain laboratories (including the Pathologists) were engaging in excessive pricing in the market for the supply of PCR tests.

[16] The complaint was premised on the Pathologists having charged a price of R850 (including VAT) per PCR test for the period March 2020 to December 2021.

[17] The Commission investigated the complaint. It concluded, on a *prima facie* basis, that the Pathologists were indeed guilty of excessive pricing in contravention of section 8(1)(a) of the Act.

[18] On 08 December 2021, the Commission wrote to the Pathologists and requested that they agree to reduce their prices to no more than R500 (inclusive of VAT), failing which the Commission would approach the Tribunal, on an urgent basis, for appropriate relief. The Pathologists agreed to the Commission's request, and consent agreements were concluded between the Commission and the Pathologists; and without an

admission of liability. Those consent agreements were duly confirmed by, and made orders of, the Tribunal.[4]

The complaint

[19] On 2 March 2023, the Complainants submitted a complaint to the Commission, under section 49B(2)(b) of the Act.

[20] According to the complaint:

20.1 the Pathologists contravened section 8(1)(a) of the Act by having engaged in excessive pricing in the market for the sale of PCR tests; and

20.2 the Pathologists contravened section 4(1)(b) by reaching an agreement, arrangement or understanding that they would not reduce their respective prices for PCR tests.

[21] On 6 September 2023, the Commission issued a notice of non-referral accompanied by a letter explaining its decision to non-refer. The Commission stated that the Complainants' complaint was similar in every material respect to the CMS complaint, that the CMS complaint had resulted in the consent agreements concluded with the Pathologists, and that the complaint between the Commission and the Pathologists had been settled.

The reason for the Complainants' self-referral

[22] On 05 October 2023, the Complainants self-referred this matter to the Tribunal.

[23] In the self-referral, the Complainants allege that between March 2020 and December 2021, the Pathologists contravened section 8 of the Act by charging an excessive price

[4] *CC v Lancet* Case No: COVCO141Dec21; *CC v Ampath* Case No: COVCO140Dec21; *CC v Pathcare* Case No: COVCO142Dec21

for the sale of polymerase chain reaction (PCR) tests, which are used to detect the COVID-19 virus.

[24] The Complainants allege that these unlawful prices caused the medical schemes to suffer harm, and that they intend to pursue damages claims against the Pathologists in the High Court. In order for them to bring such claim, they are required by section 65(6)(b) of the Act to file with the registrar of the High Court, a notice from the Tribunal or the Competition Appeal Court (CAC) "*certifying that the conduct constituting the basis for action has been found to be a prohibited practice in terms of the Act*."

[25] The Complainants thus brought this referral to obtain from the Tribunal a declaratory order that the Pathologists are guilty of a prohibited practice. If such a finding is made, the Complainants will use that finding in claims for damages in the High Court.

COMPLETED PROCEEDINGS

[26] As noted above, the Complainants made this self-referral in the wake of a non-referral by the Commission on the ground that a complaint concerning the same conduct and covering the same period had been resolved by the consent orders confirmed by the Tribunal in December 2021. None of the Pathologists admitted, in the Consent Agreements, that they had charged excessive prices for COVID-19 PCR tests in contravention of the Act.

[27] In its non-referral letter, the Commission stated that it was of the view that the "*full and final settlement"* clause in the consent agreements has the result that the Commission cannot pursue any further action against the Pathologists on the facts contained in the CMS complaint or a complaint relating to the same or similar conduct.

[28] We requested the parties to address us as on whether these applications by the Complainants are precluded by section 67 of the Act. Section 67(2) provides:

"*A complaint may not be referred to the Competition Tribunal against any firm that has been a respondent in completed proceedings before the Tribunal under the same or another section of this Act relating substantially to the same conduct*."

[29] Ampath had raised this issue in its answering affidavit as a point *in limine*. At the hearing, Ampath submitted that the purpose of section 67(2) of the Act is to protect firms against double jeopardy, and from harassment in the form of repeat referrals arising out of one and the same conduct. Ampath submitted that for proceedings to be completed, there must be an element of finality. According to Ampath, the inclusion of full and final settlement on the consent order brought finality to the CMS complaint, which covered the same conduct and the same time period as the complaint of the Complainants, by way of an order of the Tribunal.

[30] Counsel for Ampath drew attention to the judgment of the CAC in *Competition Commission v Beefcor Proprietary Limited and Another,*[5] where the Court held that "*the word 'completed' in its ordinary and natural meaning can be applied to proceedings which have come to an end in one way or another - whether following a trial on the merits, a consent order or an abandonment of the proceedings by way of withdrawal*."[6] [7]

[31] Counsel for Ampath submitted that this referral is not to be treated as a self-referral in substance, but rather as an application for a declaratory order as a precursor to a claim for damages. Counsel submitted that Complainants' rights are limited: while they

[5] [2003] ZACAC 5; [2003] 2 CPLR 272 (CAC)
[6] Ibid at para 53.
[7] On appeal to the Constitutional Court, the Court limited its finding to the nature and consequences of a withdrawal. *Competition Commission v Beefcor Proprietary Limited* and Another 2021 (4) SA 408 (CC).

cannot seek remedial relief, they can seek a declaratory order for the purposes of seeking damages in due course.

[32] Counsel for Pathcare referred to *Competition Commission v South African Airways v Nationwide and Comair (Comair),*[8] where the Tribunal reasoned that upon an admission of liability by the respondent, the proceedings before the Tribunal are completed.[9]

[33] Counsel for Lancet concurred with the submissions made by Ampath and Pathcare. In addition, it argued that the Tribunal in *Competition Commission South Africa v Sasol Chemical Industries Ltd, In re: Competition Commission South Africa v Sasol Chemical Industries Ltd and Others (SCI)*[10] considered whether a complainant's or any other person's rights had been extinguished in terms of section 67(2) by a settlement which contained no admission of liability. The Tribunal concluded that it did not consider a settlement agreement that contains no admission of liability as completed proceedings for section 67(2) of the Act.[11]

[34] Counsel for Lancet quoted from *Sutherland & Kemp,* as follows:[12]

"...to the extent that the respondent does not admit liability in the consent order:

(a) The Tribunal makes no finding or determination that the conduct complained of amounts to a contravention of the Act;

(b) A complainant may apply to the Tribunal for a declaration that the respondent's conduct constitutes a prohibited practice or a declaration that the whole or any part of an agreement is void, and it may seek damages against the respondent in a civil court (unless the consent order already contains an award of damages in

[8] *South African Airways v Nationwide and Comair* 83/CR/Oct04.
[9] Ibid at paras 59-60.
[10] 45/CR/May06, 31/CR/May05 [2010] ZACT 48; [2010] 2 CPLR 231 (CT) (20 July 2010).
[11] Ibid at paras 22 -31.
[12] Sutherland & Kemp, Competition Law of South Africa 11.6.4.

that complainant's favour, in which case it waives its right to seek civil damages)."[13]

[35] Having regard to the above, Lancet submitted that to the extent that liability is not admitted in the consent agreement, those proceedings are terminated, but not completed, and a complainant or another person can refer the complaint to the Commission, relating to substantially the same conduct, in order to be able to seek the further remedies against the respondent.

[36] The Complainants submitted the effect of section 49D (4) is that irrespective of any consent orders, the Tribunal is empowered to grant declaratory relief. Section 49D (4) provides that

"*A consent order does not preclude a complainant from applying for —*

(a) a declaration in terms of section 58(1)(a)(v) or (vi); or

(b) an award of civil damages in terms of section 65, unless the consent order includes an award of civil damages to the complainant."

[37] Section 58(1)(a)(v) — which is referred to in section 49D(4)(a) — provides that *" In addition to its other powers in terms of this Act, the Competition Tribunal may make an appropriate order in relation to a prohibited practice ... including declaring conduct of a firm to be a prohibited practice in terms of this Act, for purposes of section 65*."

[38] The Complainants further submitted that the phrase "*completed proceedings*" in section 67(2) does not immunise a respondent from all repeat referrals. Furthermore, the protection afforded by section 67(2) only applies where the Tribunal has decided the merits of the complaint, or the respondents have admitted liability.

[13] Sutherland & Kemp, Competition Law of South Africa 11.6.4.

[39] In *SAPPI Fine Paper (Pty) Ltd v Competition Commission*[14] the Court held that the purpose of section 67(2) is to protect firms against double jeopardy.[15] The Court further held that there are two primary jurisdictional facts or requirements to be satisfied for the operation of the section. These are (i) the complaint must relate to substantially the same conduct, and (ii) in respect of which a firm was a respondent in completed proceedings.[16]

[40] The consent orders do not purport to impose a penalty on the Pathologists, or require them to compensate for their past conduct. On the papers before us, the consent orders are forward-looking, relating to the future conduct of the Pathologists. We do not think enabling the Complainants to claim damages as compensation for past conduct gives rise to double jeopardy.

[41] The Complainants have a right, under section 34 of the Constitution, to access to courts in order to have their dispute with regard to a claim for damages determined. That right is constrained by the requirements of section 65(6)(b). In our view, the right is however not extinguished by a consent order which contains no admission of liability. This approach is consistent with the precedent to which we have referred above.

[42] We are therefore of the view that the consent orders concluded between the Commission and the Pathologists do not preclude the Complainants from applying for a declaratory order as a necessary element of the process of seeking to establish and enforce a claim for damages.

[43] The Complainants and the Pathologists were in agreement, at the hearing, that the determination of the merits of the complaint and whether a declaratory order should

[14] [2003] ZACAC 5; [2003] 2 CPLR 272 (CAC).
[15] Ibid at para 4.
[16] Ibid at para 42.

be made cannot be decided on the papers, and oral evidence will need to be led in that regard.[17]

[44] We now address the three exceptions.

OUR APPROACH TO EXCEPTIONS

[45] The Competition Tribunal Rules ("Tribunal Rules") do not expressly provide for exceptions. Rule 55(1)(b) provides that if a "*question arises as to the practice or procedure to be followed in cases not provided for*" by the Tribunal's Rules, the Tribunal may "*have regard*" to the Uniform Rules of the High Court.

[46] The Tribunal has previously heard and decided exceptions pursuant to its powers under Rule 55(1)(b). The Tribunal's approach to exceptions largely mirrors that of the High Court.

[47] In *Invensys PLC v Protea Automation Solutions (Pty) Ltd ("Invensys")*,[18] the Tribunal stated that there are three central considerations in its approach to exceptions:

47.1 Complaint proceedings in the Tribunal are *sui generis* and contain elements of both motion and trial proceedings of the High Court;[19]

47.2 The subject matter of the Tribunal's proceedings involves the intersection of law and economics, often requiring complex economic analysis of the facts to advance a theory of harm; and [20]

[17] Transcript lines 4-20,p4, Transcript lines 1-4, p5, and Transcript lines 5-18 p7.
[18] *Invensys PLC and 2 others v Protea Automation Solutions (Pty) Ltd* [1999-200] CPLR 299.
[19] Ibid at Para 14.
[20] Ibid at Para 15.

47.3 The Tribunal enjoys inquisitorial powers and is required to exercise these in its carrying out its functions, while ensuring the proceedings are conducted fairly and informally.[21]

[48] The Tribunal is guided by the principle of fairness, and the standard for referral set out in Rule 15 of the Tribunal's Rules.[22] In order for a referral to meet the requirements of Rule 15(2), it must particularise the material facts upon which the complaint is founded, and upon which the legal conclusions for which it contends are based. Fairness requires that a respondent must be able to understand the case being made out against it.[23] Fairness however is not a one-way street, and in particular does not oblige the Commission and private complainants to make more known of the case at pleadings stage than is required in the Tribunal Rules.[24]

[49] In *Competition Commission of South Africa v Bank of America Merrill Lynch International Designated Activity Company and Others*, the Tribunal held that: [25]

49.1 The test on exception is whether on all possible readings of the pleading no cause of action may be made out;

49.2 Exceptions must be judged on the interpretation of the pleadings most favourable to the plaintiffs;

49.3 The onus rests on the excipient;

49.4 A court must take all the allegations at face value. The allegations of fact must be accepted as true and correct;

[21] Ibid at Para 16.
[22] *Competition Commission et al v United South African Pharmacies et al* (*USAP*) [2003] ZACT 4 at p 2.
[23] *USAP* at p 2; *National Association of Pharmaceutical Wholesalers and Others v Glaxo Wellcome and Other*, Case No: 45/CRJul01 (, National Wholesalers') at p 18, para 55; *Rooibos Ltd v Competition Commission (Rooibos)*, Case No 129/CR/Dec08, para 6.
[24] National Wholesalers at p18, at para 55; *Rooibos Ltd v Competition Commission*, Case No 129/CR/Dec08, paras 7-8.
[25] CR212Feb17 [2023] ZACT 26 paras 52 - 53.

49.5 An over-technical approach must be avoided. The purpose of the exception is not to scrutinise pleadings for every possible flaw and imperfection; and

49.6 An exception that the pleadings are vague and embarrassing will be upheld only if it goes to the root of the plaintiffs' cause of action, and not to a particular paragraph or allegation;

[50] An exception is not about the granularity of the facts alleged.[26] The affidavit must contain sufficient '*concise statements*' of the grounds relied upon and *'material facts or point of law*' relied upon.[27] The usual remedy for exception applications brought on the basis of vague and embarrassing pleadings or a failure to disclose a cause of action is to grant the offending party an opportunity to amend its pleadings. In certain circumstances, such as when the exception concerns a pure point of law which might be determinative of the matter, dismissal of the case might be an appropriate remedy.

THE EXCEPTIONS

[51] The exceptions raised by the three Pathologists deal with similar issues. We have accordingly decided to group the grounds of exception.

[52] The grounds of exception can be categorised as follows:

52.1 Failure to define the relevant market;

52.2 Failure to plead the respective pathologists' market shares;

52.3 Failure to distinguish between market power and excessive pricing;

52.4 Failure to make it clear whether this is case of alleged collective dominance or individual dominance;

52.5 Failure properly to set out the complaint period;

52.6 No cause of action based on the COVID-19 Regulations;

[26] Ibid.
[27] Ibid.

52.7 Failure properly to plead facts demonstrating that the price is excessive;

52.8 Section 8(3) factors:

52.8.1 Unsustainable reliance on the findings in health market inquiry;

52.8.2 Vague reference to Comparator's firm's prices

52.8.3 Unclear reliance on the "lucky monopolist" theory; and

52.9 Failure properly to plead detriment

First ground of exception: market definition

Product market definition

[53] The Complainants in their referral submitted that the relevant product market is the market for the supply of SARS-CoV-2 PCR tests.

[54] Lancet argued that the Complainants have not properly defined the relevant market. Lancet argued that it appears that the product market contended for is the supply of the tests themselves and not the design and operation and administration of the tests, but that the self-referral is inconsistent in this regard. Lancet further argued that the Complainants identify features of PCR tests to delineate the alleged relevant product market from a demand perspective and distinguish it from Antibody tests. Lancet contended that none of the features concern the ancillary services related to the tests that are offered by pathologists such as Lancet.

[55] Lancet further argued that the utility of the SSNIP test ("the small but significant and non-transitory increase in price" test) is unclear. According to Lancet, the Complainants simply state the hypothetical questions that one would ask if the SSNIP test were to be applied to "the prices of PCR tests", without doing the analysis or stating what the outcome of the analysis would be and why. The Complainants do not say whether the SSNIP test would exclude the Antibody tests and how the SSNIP test applies at

different times during the complaint period, given the allegation that Antibody tests were only approved on 21 July 2021, nor what the other possible substitute products are to which the SSNIP test applies.

[56] The Complainants responded that on a balanced reading of the self-referral affidavit, it is clear that the case is concerned not with the sale of PCR test kits, but rather with PCR testing. The Complainants submit that this is made clear in several places in the self-referral affidavit. For instance, in paragraph 25.2 of the self-referral affidavit it is stated that the Pathologists' prices had remained unchanged in circumstances where their input costs (particularly in the form of PCR test kits) decreased between March 2020 and September 2021. It was thus clear that PCR test kits are one of the pathologists' input costs, i.e. one component of the testing service.

[57] The Complainants pointed out that paragraph 40 of the self-referral affidavit states that under pandemic conditions, "consumers are far more likely to choose a service provider nearer to their home or work." They contended that it is therefore clear that the relevant product market concerns the provision of services, as opposed to solely the sale of test kits.

[58] The Complainants further noted that the Tribunal press release which states that "*Lancet agrees … to reduce the price of COVID-19 PCR tests to no more than R500, inclusive of VAT*." They contended that Lancet's settlement agreement shows that it knows full well that the issue is the price charged for PCR testing, and not for the sale of PCR test kits.

[59] The Complainants pointed out that the cover letter to the self-referral affidavit stated that the referral concerns "*COVID-19 PCR testing prices*". This, they asserted, makes it clear that the focus is on the price charged for the testing service as opposed to the price charged for on-sale of test kits.

[60] A prerequisite for the dominance tests is defining the relevant market in which the firm alleged to be dominant operates. The purpose of market definition in abuse of dominance cases is to assess whether a firm is dominant for the purposes of section 7 of the Act. The question is whether the Complainants have properly defined the relevant market in its referral. On the papers before us, in our view cannot be any genuine misunderstanding in this regard. Ampath does not appear to have had any real difficulty in understanding the product market. Its heads of argument state *"But of course the market that has been defined is the market for PCR testing*".[28] Pathcare does not appear to have had any difficulty in understanding what the product market is. It does not raise this objection.

[61] In our view, applying the well-established tests for determining an exception, this ground of exception is not well-founded, and it is dismissed.

Geographic market definition:

[62] The Complainants submit that "[*'f]rom a geographic perspective, the market is a narrow one. That is because under pandemic conditions – including restrictions on movement and fears of being away from home - consumers are far more likely to choose a service provider nearer to their home or work. This means that the geographic market is local. This accords with the position advanced by Lancet in the Commission's healthcare inquiry, in which Lancet argued that it competes with other pathology practices in narrowly defined geographic markets*." [29]

[63] The Pathologists contended that the Complainants have failed properly to define the relevant geographic market. Lancet noted that the Complainants plead that from a geographic perspective, the market is a narrow one, and that the geographic market

[28] Ampath's HOA para 75 at p35 of the consolidated HOA bundle.
[29] Applicants' self-referral affidavit para 40 at p22 of the hearing bundle.

is local. They contended that this conclusion is premised on the bald allegation that under pandemic conditions, including restrictions on movement and fears of being away from home, consumers are far more likely to choose a service provider nearer to their home or work.

[64] Lancet pointed out that the Complainants, as medical schemes, have access to information as to where their members reside and work and from where their members obtained the COVID-19 tests that were paid for by the medical schemes. Yet none of this information appears to form the basis for the conclusion that the market is both "narrow" and "local," nor is it possible to ascertain what either term means.

[65] The Pathologists submit that the Complainants do not allege whether it is the radius around a service provider or the radius around a person's home or work that constitutes the alleged relevant "local" market. They further argued that it is not clear what is meant by the geographic markets being "narrow" or "local." They contended that local may be: (i) a portion of one of the nine provinces; (ii) a municipal area; (iii) a city; (iv) a town; (v) a suburb in a town or city; (vi) a particular area around a focal point e.g. a shopping centre or a hospital or a clinic or a laboratory or a testing station; (vii) some other area; or (viii) combinations of the above.

[66] We note that in *Competition Commission v Dis-Chem Pharmacies Limited (Dis-Chem)*[30], we held that in a crisis such as this, markets are narrowly defined because of the limitation of consumer movement.[31] This is of equal application to the present matter.

[67] After hearing the evidence, the Tribunal will decide whether the Complainants allegations can be sustained. At this stage, however, the Complainants have

[30] *Competition Commission of South Africa v Dis-Chem Pharmacies Ltd*, CR008Apr20
[31] Ibid at para 175.

sufficiently set out the material facts necessary for the Pathologists to answer to the allegations.

[68] In the light of the above, this ground of exception in unfounded, and it is dismissed.

Second ground of exception: Failure to plead the respective Pathologists' market shares

[69] Only a dominant firm can contravene section 8 of the Act. To be dominant, the firm in question must fit one or more of the definitions in section 7 of the Act, which stipulates that a firm is dominant if:

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

[70] Dominance can be established in two ways – through the firm's market share or by demonstrating that the firm has market power.

[71] Ampath stated in its heads of argument that assessing dominance is a combination of a consideration of a firm's market share and its market power. It asserted that *"… it is to be expected that the pleader at least alleges the market shares said to be enjoyed by the firm alleged to be dominant, even if reliance is placed on the presence of market power to establish dominance".*"[32] Similarly, Pathcare submits that *"[t]he identification*

[32] Ampath's HOA para 28 at p14 of the consolidated HOA bundle.

of market shares … is critical for an assessment of 'dominance', including the question of 'market power' …".[33]

[72] Lancet appears to have accepted that pleading market share is unnecessary where the pleaded case is one of market power, as it made no argument regarding market share.

[73] The Complainants submitted that these grounds of exception are unsustainable for several reasons.

[74] The plain wording of section 7 demonstrates that market share was not intended by the legislature to be a jurisdictional requirement of dominance. Dominance is established through evidence of high market share "or" market power. The Complainants submitted that the Pathologists cited no authority for the assertion that the allegation of market share is a jurisdictional requirement.

[75] Pathcare relied on our decision in *FFS Refiners*[34] for its submission in this regard. There, we noted that dominance can be established by alleging that the respondent firm falls into any of the three categories set out in section 7, or if the Complainant is uncertain, by alleging more than one as alternatives. The respondent firm needs to know from the complaint what case it is to meet, whether any presumptions apply, and where the onus lies.

[76] In their self-referral affidavit, the Complainants pin their colours firmly to an allegation that the Pathologists had market power. They allege facts which, they assert, demonstrate that the Pathologists had market power.[35] They contend that these facts are evidence of the Pathologists' power to act to an appreciable extent independently of customers. The Complainants do not rely on any presumption arising from the

[33] Pathcare's HOA para 4.2 at p105 of the consolidated HOA bundle.
[34] FFS Refiners (Pty) Ltd v Eskom & Others Case no 64/CR/Sep02, decision of 21 February 2003.
[35] Complainants' self-referral affidavit pars 43-54 at pgs 23-54 of the hearing bundle.

provisions of section 7 of the Act, and the onus will therefore fall squarely on them. The Pathologists have been informed that this is the case they will have to meet.

[77] The Complainants also submitted that in a crisis it would be irrational to insist on market share being pleaded, because market share says nothing about market power in a crisis. They rely on the Tribunal's decision in *Competition Commission of South Africa v Babelegi Workwear and Industrial Supplies CC*,[36] where we found that *Babelegi* enjoyed market power even though it had a market share of less than 5%, and it was accordingly dominant.

[78] Our approach to the application of section 7(c) of the Act is set out in *Babelegi* and *Dis-Chem*.[37] In both of those cases, the market definition and market share analysis were not undertaken in establishing market power. In *Dis-Chem*, we accepted that market share and defining the relevant market are usually the tools used to assess a firm's market power. However, these are not the only tools available to a competition regulator.[38]

[79] In our view, the Complainants sufficiently set out the facts to allege market power as envisaged in section 7(c) of the Act for the Pathologists to understand the case they must meet. The hearing of evidence will enable a determination of whether the Complainants' allegations of dominance through market power can be sustained. We find that at this stage, the Complainants have sufficiently identified the case which the Pathologists have to meet.

[80] This ground of exception is therefore without foundation and is dismissed.

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[36] [2020] 1 CPLR 152 (CT)
[37] Case No: CR000pr20
[38] *Dis-Chem* at para 102.

Third ground of exception: Failure to distinguish between market power and excessive pricing

[81] The Pathologists contend that it is not permissible for the Complainants to rely on allegedly unreasonably high prices or margins as evidence of market power.

[82] Ampath submits that high prices or profits alone are not sufficient to show substantial market power. It further submitted that in making out a case for market power in a section 8(1)(a) case, more must be alleged than high prices.

[83] Lancet submitted that placing reliance on the same allegedly unreasonably high prices as evidence of market power and as evidence of excessive pricing is "circular." It contended that it is "logically inconsistent" for unreasonably high prices to serve as a fact that can be used for determining dominance.

[84] The Complainants relied on the Tribunal's decision in *Dis-Chem* and the CAC's decision in *Babelegi*.[39] The Tribunal stated in *Dis-Chem*: "… *the Commission adopts an inferential approach to the issue of market power and the same facts that serve to infer market power namely Dis-Chem's price increases are also relied upon to establish the excessiveness of the prices.*"[40] The Commission thus approached *Dis-Chem* in the same way as the Complainants do here, relying on unreasonably high prices as evidence of market power and as evidence of the existence of market power and its abuse.

[85] In *Babelegi*, the CAC noted at paragraph 30: "… *a fundamental part of appellant's case on appeal was based on the argument that the tribunal had failed to distinguish between market power and excessive pricing*…" [41] The Court found that the pandemic

[39] *Babelegi Workwear and Industrial Supplies CC v Competition Commission of South Africa* 2021 (6) SA 446
[40] *Dis-Chem* at para 102
[41] *Babelegi (CAC)* at para 30.

had altered market conditions to confer on the appellant market power that allowed it to act like a monopolist for six weeks, extracting the maximum price it was able to obtain from anxious customers. Though sourced in unprecedented market conditions, its ability to price in this manner was reflective of market power.[42]

[86] The Complainants contended that both the Tribunal and the CAC found nothing objectionable in unreasonably high prices or margins serving as evidence of two distinct questions, market power (for purposes of section 7) and *prima facie* excessive pricing (for purposes of section 8). The Complainants further contend that if a firm is shown to be able to charge utterly exorbitant prices, then it has market power and it is engaging in excessive pricing.

[87] This ground of exception is without merit, and is dismissed.

Fourth ground of exception: Failure to make it clear whether this is a case of collective dominance or individual dominance.

[88] The Pathologists contend that the allegation of dominance is impermissibly vague, as it is not clear whether the Complainants' case is one of collective dominance or one of individual dominance.

[89] Lancet notes that the Complainants conclude that, in light of the allegations they make, "*for the period March 2020 to December 2021 the pathologists each had market power in the market for the supply of PCR tests*."[43] It was submitted that notwithstanding the use of the word "each", the allegations leading up to this conclusion refer to "the

[42] At paras 51-56.
[43] Lancet's HOA para 41 at p67 of the consolidated HOA bundle (emphasis added); referring to para 54 of the Complainants' self-referral affidavit at p26 of the hearing bundle.

pathologists", and this (it was submitted) can only refer to the respondents collectively. It was submitted that collective dominance is not recognised by South African law.

[90] Counsel for the Complainants submitted that the case pleaded in the self-referral affidavit makes it plain that this is a case of individual dominance.[44] For instance, in paragraph 50 of the self-referral affidavit, the Complainants assert submit that "[*t]hat is a further basis on which each of the pathologists should be found to be dominant.*" And paragraph 54 of its self-referral affidavit explicitly alleges that each of the Pathologists had market power.

[91] The Complainants submitted that a foundational principle in exceptions is that the pleading must be afforded its most favourable reading. They submitted that read in its most favourable light, the case advanced in the referral is one of individual dominance.

[92] Relying on the CAC's finding in *Babelegi,* the Complainants contended that there is nothing objectionable in more than one firm being held to be simultaneously dominant.[45]

[93] We are required to determine whether the Complainants' pleadings comply with Tribunal Rule 15. In doing so, we must be guided by the principle of fairness that a respondent is entitled to understand the case against it and cannot *"be expected to answer to any pleading, regardless of its impoverishment of fact or legal averment*." [46] We are satisfied that the Complainants' self-referral is clear that the case pleaded is one of individual dominance and meets this standard.

[94] In our view this ground of exception is not well-founded. It is dismissed.

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[44] Transcript line 1-5,p166.
[45] CAC at para 49
[46] *Casalinga Investments CC t/a Waste Rite v The Competition Commission* (CR133Sep15/EXC152Oct15) ("Casalinga") at para 28. See also Invensys, supra at para 31.

Fifth ground of exception: Failure properly to set out the complaint period

[95] The Complainants in their self-referral affidavit stated that the complaint period is March 2020 to December 2021. This period appears to have been drawn directly from the Commission's finding, as reflected in the Pathcare consent order. that:

> "*The Commission's investigation also revealed that the pathology groups have been earning significant profits since March 2020, especially in the current financial year to date*." [47]

[96] Ampath contended that when it comes to the period for which the "*conduct that forms the basis of this referral persisted*", there is an absence of material facts pleaded.[48] Similarly, Lancet contended that the complaint period is vaguely pleaded, because it not disclose at what point either at the start of or during this complaint period the Pathologists' input costs decreased, and sales volumes increased.

[97] We are not persuaded by the Pathologists' submissions that the complaint period is unclear. The Complainants have set out in the notice of motion, and in their self-referral affidavit, that the complaint period is March 2020 to December 2021. This is consistent with the CMS complaint and the consent agreements concluded with the Commission. Whether the facts justify reliance on this period, or part of it, will have to be determined at the trial.

[98] In our view this ground of exception is not well-founded. It is dismissed.

[47] Pathcare Consent agreement Para 4.3 at p63 of the hearing bundle.
[48] Lancet's HOA para 74 at p35 of the consolidated HOA bundle

Sixth ground of exception: No cause of action based on the COVID-19 Regulations

[99] The Pathologists submitted that the Complainants cannot rely on the Consumer and Customer Protection and National Disaster Management Regulations and Directions (regulations).[49] The regulations are aimed at protecting consumers from *inter alia* excessive pricing during the COVID outbreak.

[100] Section 8(3) of the Act provides that:

> *"…Any person determining whether a price is an excessive price must determine if that price is higher than a competitive price and whether such difference is unreasonable, determined by taking into account all relevant factors, which may include—*
>
> *……..*
>
> *(f) any regulations made by the Minister, in terms of section 78 regarding the calculation and determination of an excessive price*." (emphasis added)

[101] The regulations were published (a) to promote concerted conduct to prevent an escalation of the national disaster and to alleviate, contain and minimise the effects of the national disaster; and (b) to protect consumers and customers from unconscionable, unfair, unreasonable, unjust, or improper commercial practices during the national disaster. The regulations apply to *inter alia* private medical services relating to the testing of the COVID-19 during the period of the national disaster, with effect from 19 March 2020. They were in force at the time of the alleged prohibited practice.

[102] The regulations seek to prevent dominant firms from so-called price gouging by charging high prices for essential goods and services where those prices do not bear

[49] Govt Notice R350 of 19 March 2020.

any relationship to the costs of providing those goods or services, or represent a substantial increase in average margin or mark-up for those goods or services. In *Competition Commission v Tsutsumani Business Enterprise CC*,[50] we held that: *"(t)he relevant economic test for determining whether a price is excessive in the context* of *the COVID-19 pandemic,* as *contemplated in Regulation 4* of *the Consumer Protection Regulations, is whether prices charged have any corresponding cost justification from the supplier up the value chain."*[51]

[103] The Complainants relied on regulation 4.2, which provided:

"In terms of section 8(3)(f) of the Competition Act during any period of the national disaster, a material price increase of a good or service contemplated in Annexure A which-

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

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

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

[104] The Pathologists submitted that the regulations target firms that increase prices with no underlying cost increase, whereas the complaint against the Pathologists is that they are said to have priced excessively because they failed to decrease prices when underlying costs decreased. They further contended that the regulations are in any

[50] COVCR113Sep20.
[51] Ibid at para 46.

event not applicable because the PCR test service did not exist pre-COVID, so there is not a pre-COVID price with which the post-COVID price can be compared. They submitted that the reliance in the self-referral affidavit on the regulations was impermissible.

[105] In response, the Complainants submitted that the Commission's investigations which led to the conclusion of the consent agreements found that "*failure to reduce prices in the context reductions in costs is the flip side of the COVID-19 Regulations as it results in the same effect, namely an increase in the margin earned for an essential product*".[52] Counsel contended in his oral submissions that the regulations must be given a purposive interpretation which applies their principle to the "flip side" situation which existed in relation to PCR tests, namely a reduction in input price not leading to a corresponding reduction in the price at which PCR tests were provided.

[106] It is not necessary to decide, at this stage, whether a purposive interpretation would have that result. In our view, it is arguable that the regulations may be relevant in one or both of the following respects:

106.1 First, it is arguable that through a purposive interpretation, they are applicable to a failure to <u>decrease</u> prices;

106.2 Second, it is arguable that the policy which underlies the regulations is a relevant factor in terms of section 8(3) of the Act in determining what is an "excessive" price.

[107] The self-referral affidavit clearly makes the second of the two arguments above.[53] In our opinion, having regard to the approach to interpreting pleadings in the context of

[52] Consent order between Pathcare and CC, para 2.5 at p60 of the hearing bundle.
[53] Self-referral affidavit paras 57-60 pgs 28-30 of the hearing bundle.

an exception, it also opens up the permissibility of the first (interpretive) argument. We find that the Complainants have sufficiently set out the material facts necessary to raise the interpretation of the regulations as an issue.

[108] In *Tsutsumani*, we found the regulations to be applicable even though Tsutsumani had not previously supplied masks. The reasons for that conclusion are set out fully in that case.

[109] It follows that this ground of exception is without foundation, and is dismissed.

Seventh ground of exception: Failure to plead facts demonstrating that the price is excessive

[110] The Pathologists except on the basis that the Complainants have failed properly to plead facts demonstrating the charging of an excessive price.

[111] The first fact alleged by the Complainants in this regard is that between March 2020 and December 2021 the Pathologists' input costs decreased significantly, but their selling prices remained unchanged. It is alleged that this resulted in each of the pathologists "*earning significant profits since March 2020, especially in the current financial year to date*."

[112] In response, the Pathologists contended that the Complainants have not provided any evidence of a significant decrease in input costs, and that there is therefore no basis for that allegation.

[113] The second fact alleged by the Complainants is that the Pathologists were each able to consistently maintain their prices at R850 in circumstances where R500 was found

to be a profitable selling price. They contended that this mark-up of 70% above what is already a profitable price is, on its face, exorbitant.

[114] The Pathologists asserted that the Complainants rely on the Tribunal's press release of 12 December 2021 and the consent agreement concluded between the Pathologists and the Commission, and the Commission's *prima facie* view that the Pathologists were capable of profitably selling PCR tests at R500. The Pathologists argue that the Complainants plead no facts to support the Commission's conclusion on which they seek to rely.

[115] Ampath argued that the Consent Order does not set out any facts on which the Commission relied on for its conclusions. Ampath argued that the Complainants offered no facts of their own, apart from the allegation that the R850 price was maintained from March 2020 to December 2021, but that fact is inconsistent with the press release, which records that Ampath had reduced its price to R710 in November 2021.

[116] Ampath also submitted that the price charged for the PCR test was set through the regulatory process of the Department of Health, and consistent with its Regulations.

[117] Pathcare argued that the consent order cannot be relied upon as *prima facie* evidence. Counsel submitted that the Complainants must provide evidence to establish that the Pathologists were capable of profitably selling PCR tests at R500. Counsel further contended that the Complainants cannot rely on the Tribunal's press release as this was issued before Pathcare's consent agreement was signed.

[118] Lancet submitted that the Complainants do not plead a competitive price, and instead rely on statements which are not material facts contained in the consent agreement between Pathcare and the Commission. Lancet contended that it is unclear when, it is alleged, the R500 price became a profitable price. Furthermore, that it is unclear

whether it is alleged that the competitive price remained consistent during the complaint period or changed because of the changes in input costs and volumes (and if so, when it changed and how).

[119] The Complainants relied heavily on four cases in support of their submissions: *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another (Mittal*), [54] *Sasol Chemical Industries Limited v Competition Commission (SCI)*,[55] *Babelegi* and *Tsutsumani*. In SCI, the CAC found that a 20% mark-up may be permissible but anything above that would raise concerns.[56] In *Babelegi* and *Tsutsunami,* we found that where there is evidence of a firm substantially increasing its prices without any corresponding rise in costs, that constitutes *prima facie* evidence of excessive pricing.

[120] The Complainants contended that it is for the respondent firms to adduce evidence to the contrary if it is to avoid the case against it becoming conclusive.

[121] The conclusions reached by the Commission are not binding on us. They are provisional, and we do not know on what legal and factual bases they were arrived at. While they should not be ignored, they cannot be of more than persuasive value. However, the fact remains that the Pathologists agreed to reduce their price to R500. While it is hypothetically possible that they agreed to sell the tests below cost , that is on its face improbable. That probability arises from the agreed facts. It can be rebutted by evidence, but it is sufficient at exception stage. If the price of R500 per test was profitable, it is arguable that the earlier price of R850 (or R710) was excessive. We conclude that at this stage of the pleadings, the Complainants have sufficiently set out material facts necessary to demonstrate that the price is excessive. Whether that

[54] [2009] ZACAC 1
[55] (131/CAC/Jun14) [2015]
[56] *SCI* supra at para 175.

conclusion will be found to be justified on all of the facts, is for the Tribunal to decide after hearing the evidence.

[122] This ground of exception is therefore not justified, and it is dismissed.

Eighth ground of exception*:* Section 8(3) factors

[123] The Complainants pleaded a number of the section 8(3) factors, including that smaller firms were charging substantially less than the Pathologists, that markets of this nature are characterised by high barriers to entry, and that the pandemic conditions had conferred upon the Pathologists a position of unusual economic strength vis-a-vis their customers.

[124] Section 8(3) of the Act states:

"Any person determining whether a price is an excessive price must determine if that price is higher than a competitive price and whether such difference is unreasonable, determined by taking into account all relevant factors, which may include—

(a) the respondent's price-cost margin, internal rate of return, return of capital invested or profit history;

(b) the respondent's prices for the goods or services –

(i) in markets in which there are competing products;

(ii) to customers in other geographic markets;

(iii) (iii) for similar products in other markets and

(iv) (iv) historically;

(c) relevant comparator firm's prices and level of profits for the goods or services in a competitive market for those goods or services;

(d) the length of time the prices have been charged at that level;

(e) the structural characteristics of the relevant market, including the extent of the respondent's market share, the degree of contestability of the market, barriers to entry and past or current advantage that is not due to the respondent's own commercial efficiency or investment, such as direct or indirect state support for a firm or firms in the market, and

(f) *any regulations made by the Minster in terms of section 78 regarding the calculation and determination of an excessive price."*

Prices charged by comparator firms

[125] The Complainants contended that some smaller firms were charging much lower prices than the pathologists for the PCR test, in some instances as much as 70% lower. They argued that these smaller firms suffered a cost disadvantage compared with the Pathologists, because the smaller firms did not achieve the sales volumes necessary to achieve the same volume-related cost savings as the Pathologists.

[126] The Pathologists pointed out that the Complainants do not (i) identify these smaller firms or the prices that they charged; (ii) identify the period during what period they were charging lower prices; (iii) identify the "local" markets in which the smaller firms were charging the lower prices; (iv) indicate what the base cost was for these smaller firms; (v) indicate how the price of "as much as 70% lower" than that charged by the Pathologists was arrived at. The Pathologists submitted that such evidence, if it existed, should be provided, subject to a confidentiality regime if necessary.

[127] We agree with the Pathologists on this point. The assertion by the Complainants is purely conclusory, without any particularity as to any of the facts which are said to underlie the conclusion. There do not appear to be any probabilities that support the Complainants' allegation.

[128] At the hearing, the Complainants' counsel accepted that this information would have to be provided in due course, in order for the Complainants to be able to substantiate this claim. However, at this stage of the pleadings, the identities of the smaller firms could not be disclosed. There is no evidence before us that explains and justifies this position.

[129] The Pathologists cannot meet and answer the complaint on the basis of this conclusory and non-specific assertion.

[130] This ground of exception is therefore upheld. The Complainants are required to file a supplementary founding affidavit to particularise its case with regard to the smaller firms.

Reliance on the findings in the health market inquiry;

[131] The Complainants rely on the findings of the Health Market Inquiry report of September 2019 that the market for healthcare practitioners is characterised by high barriers to entry. They state that the report expressed concerns at several features which serve to benefit practitioners at the expense of patients and medical schemes. This has created an environment where practitioners can increase prices and avoid innovation without the threat of losing customers.

[132] The Complainants submit that the Commission's Health Market Inquiry report finds application in this case because the Pathologists did not face intense competition and were not fearful of losing customers, which is evidenced by their ability to maintain their prices over an extended period, despite a material decrease in their costs.

[133] The Pathologists contend that the Complainants have defined the market as the market for PCR testing, and seek here to rely on another market. The Pathologists

further contend that the market for the supply of PCR tests did not even exist in September 2019, and therefore could have not have been the subject of any finding in the Health Market Inquiry or in the Commission's Final Report.

[134] The Pathologists further argue that the Complainants seek to rely upon, a very general concern expressed by the Commission in the Inquiry regarding "a *number of features of the private healthcare market*", but not related specifically to pathologists. The Complainants do not explain how a general finding relating to participation in tenders is in any way relevant to an assessment of market power in the market that is relevant to this complaint referral.

[135] Section 8(3) of the Act requires an assessment of whether the price in question is higher than a competitive price and whether that difference is unreasonable, applying the factors set out in section 8(3). These factors include the structural characteristics of the relevant market. Paragraphs 67 to 68 of the Complaint sets out the basis for referring to the report of the health market inquiry. The contentions raised by the Complainants in this regard are somewhat speculative.

[136] It appears to us that this complaint is not a free-standing ground of exception. Rather, it is a complaint that certain of the evidence on which the Complainants rely in support of their complaint is irrelevant. That is a matter that can be determined at trial.

[137] Accordingly, to the extent necessary, this ground of exception is not upheld.

Unclear reliance on the "lucky monopolist" theory

[138] The Complainants assert that the Pathologists are in the position of a "lucky monopolist." They submit that the Pathologists offered PCR tests at a time when demand exceeded supply, and customers were unwilling or unable to exert downward pricing pressure on the pathologists. They contend that the Pathologists sought to

profit from a most vulnerable group during a global pandemic and that this should weigh against them.

[139] The Pathologists contend that if the Complainants wish to rely on the "lucky monopolist" theory, they must plead facts to underpin the conclusion that the pathologists by "sheer luck" gained market power.

[140] Further, Pathcare relied on the CAC's decision in *Babelegi,* in which the following was held:

[50] … in a crisis situation, such as that induced by the COVID-19 pandemic, one needs to use a somewhat different conceptual framework from what ordinarily would be employed in an excessive pricing case

… Recall however that the test for dominance for a firm that has less than 35% share of the defined market is that it has market power; that is 'the power to control prices or to exclude competition or to behave in an appreciable extent independently of its competitors, customers, or suppliers'. Within the context of this case, this definition requires evaluation in terms of the cost, prices, and mark-ups prior to or during and after the complaint period …"

[141] Pathcare submits that the Complainants have not undertaken an analysis of the cost, prices and mark-ups of the PCR test of the kind that is required to substantiate a case of the "lucky monopolist".

[142] Pathcare further contends that the case of the "lucky monopolist", as contemplated by the CAC in *Babelegi* and the Tribunal in *Dis-Chem* and *Tsutsumani,* is concerned with a material price increase during a disaster, relative to what was charged pre-disaster, and whether that increase could ultimately be justified by any cost increases. PCR

tests for the detection of the COVID-19 virus were only introduced in South Africa after the commencement of the disaster, in around March 2020.

[143] When the Tribunal hears the evidence, it will decide whether the Complainants' allegations can be sustained. The Complainants have at this stage sufficiently set out the material facts necessary for the Pathologists be able to answer.

[144] This ground of exception is therefore not justified, and it is dismissed.

Ninth ground of exception: Failure properly to plead detriment

[145] In their self-referral, the Complainants contend that PCR tests were a vital tool in monitoring and reducing the spread of the virus. They contend that it is likely that as a result of the Pathologists charging an excessive price, fewer PCR tests were sold than would otherwise have been the case. According to the Complainants, the Pathologists' conduct in this regard contributed to the spread of the virus.

[146] The Complainants further contended that the allegedly excessive price charged by the Pathologists increased the cost of the claims made by scheme members, and reduced the schemes' reserves, which affected the members' required level of contribution.

[147] Ampath submits that there is no factual basis for the contention that its pricing was in fact detrimental to consumers or customers. It further submits that there is no factual basis for the allegation that fewer tests were conducted than there would otherwise have been. Ampath points out that the Complainants have not put up any facts that demonstrate an overall increase in members' claims or a reduction in reserves.

[148] Counsel for Lancet argued that the pleadings do not demonstrate actual detriment suffered by the schemes. It was further submitted that the Complainants' self-referral is vague as it fails to set out the following information:

148.1 The actual prices that were paid to Lancet, the other respondents and the "smaller firms" for the PCR tests and/or testing services;

148.2 The number of PCR tests and/or testing services that they paid for;

148.3 The total value that was paid for the PCR tests and/or testing services in respect of each of the respondents and the "smaller firms" over the relevant period; and

148.4 The actual effect that such payments had on the schemes' reserves and consequently on the level of contribution required.

[149] Counsel for Lancet further argued that the allegations pleaded do not distinguish between consumers or customers. On the pleaded facts, it is not apparent whether it is the Complainants or their members who are the customers and/or the consumers of the PCR tests. Given the nature of the Complainants (a non-profit company and medical schemes), it is not apparent how they were themselves consumers of PCR tests. Lancet further argued that it is also not apparent how the members of medical schemes were customers, where it is not alleged that they paid for the PCR tests. Nor is it positively alleged that the level of contributions from members in fact increased as a result of or linked to the cost of the PCR tests.

[150] In response, the Complainants contended that the charging of exorbitant prices for life-saving goods or services in the context of the pandemic is by its nature detrimental to consumer or customers. The Complainants relied on the CAC's decision in *Babelegi*. There, the Court held that when *Babelegi* charged excessive prices, at a time of crisis when the employment of a mask by every person in the country was seen as being essential to the protection of the health, safety and welfare of others and therefore as critical to the reduction of the danger posed by COVID-19, the high prices of such a necessity *"unquestionably acted to the detriment of consumers in the country"*.[57]

[57] *Babelegi* CAC at para 67.

[151] The Complainants submitted that the detriment was axiomatic on the facts of the case. We agree. It is difficult to see how the charging of an excessive price for a necessity could not be detrimental to those that received and paid for the services, whether directly or indirectly. Whether it can be shown that this also resulted in a reduction in the number of sales, contributing to the spread of the virus, remains to be seen.

[152] We consider that in paragraphs 75 to 79 of their self-referral affidavit the Complainants sufficiently set out the alleged facts on which they rely. The Tribunal will after the hearing of evidence decide whether the Complainants' allegations can be upheld. At this stage, the Complainants have sufficiently set out the material facts necessary for the pathologists to answer the allegations.

[153] This ground of exception is without foundation, and is dismissed.

[154] The Tribunal makes the following order:

ORDER

Having read the papers and heard the exception applications brought by Dr Du Buisson, Kramer, Swart, Bouwer Inc t/a Ampath ("Ampath"), Case No CRP102Oct23/EXC187Dec23, Drs Dietrich Voigt, Mia and partners t/a Pathcare ("Pathcare"), Case No: CRP102Oct23/EXC177Feb24, and Dr Mauff AC and Partners t/a Lancet Laboratories ("Lancet"), Case No: CRP102OCT23/EXC143DEC23, the Tribunal makes the following order:

[1] The exceptions are dismissed save for the exception relating to the comparator firms' prices.

[2] The Complainants must file a supplementary affidavit within 15 business days of the date of this order, stating the following:

2.1. The names of the comparator firms;
2.2. The prices charged by these comparator firms;
2.3. The markets in which these comparator firms allegedly charged the much lower price; and
2.4. The period in which these comparator firms charged the lower price.

[3] Lancet and Pathcare must file their answering affidavits within 20 business days of receipt of the Complainants' supplementary affidavit.

[4] Ampath must file its supplementary answering affidavit within 20 business days of receipt of the Complainants' supplementary affidavit.

[5] The Complainants may file a replying affidavit, if they so wish, within 10 business days of the answering affidavits.

[6] There is no costs order.

Signed by:GEOFF BUDLENDER
Signed at:2025-02-19 15:31:45 +02:00
Reason:Witnessing GEOFF BUDLENDE

GEOFF BUDLENDER

19 February 2025

Adv Geoff Budlender SC **Date**

Ms Mondo Mazwai and Prof. Imraan Valodia concurring.

Tribunal Case Managers:	Nomkhosi Mthethwa-Motsa and Theresho Galane.
For the Complainants:	Adv M Van Der Nest SC and Adv S Quinn instructed by ENS Africa Inc.
For Ampath:	Adv MJ Engelbrecht SC and Adv L Zikalala instructed by Herbert Smith Freehills Inc.
For Pathcare:	Adv A Gotz SC and Adv L Buchler instructed by Janine Nainkin Inc.
For Lancet	Adv M Le Roux SC, Adv C Avidon and Adv S Mbatha instructed by Webber Wentzel Inc.
For the Commission	Simphiwe Gumede and Maribe Malope.