



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: COVCR114Sep20

In the matter between:

COMPETITION COMMISSION OF SOUTH AFRICA

Applicant

And

BLUECOLLAR OCCUPATIONAL HEALTH (PTY) LTD

First Respondent

ATELTICO INVESTMENTS (PTY) LTD

Second Respondent

Panel:	M Mazwai (Presiding Member) A Wessels (Tribunal Member) A Ndoni (Tribunal Member)
Heard on:	1, 2, 3, 25 March and 29 April 2021
Further submissions	7 May 2021
Order and Reasons Issued on:	3 April 2023

REASONS FOR DECISION AND ORDER

INTRODUCTION

- [1] On 3 September 2020, the Competition Commission (“Commission”) referred a complaint to the Competition Tribunal (“Tribunal”) against BlueCollar Occupational Health (Pty) Ltd (“BlueCollar”) and Ateltico Investments (Pty) Ltd (“Ateltico”) in terms of section 50(1) of the Competition Act No 89 of 1998 (“Competition Act”).
- [2] The Commission alleges that BlueCollar contravened section 8(1)(a) of the Competition Act, read with regulation 4 of the Consumer and Customer Protection and National Disaster Management Regulations and Directions¹ (“Consumer Protection Regulations”), in that BlueCollar engaged in excessive pricing conduct, during the period 21 March 2020 to 15 April 2020, in respect of hand sanitiser which it supplied to the South African Police Service (“SAPS”).²
- [3] The Commission also alleges that BlueCollar and Ateltico formed a partnership for the acquisition or procurement and supply of hand sanitiser to SAPS and agreed to share the alleged excessive profit that they made as a result of the excessive pricing based on a 60/40 split. The Commission therefore seeks a finding of excessive pricing by the BlueCollar and Ateltico partnership and an administrative penalty against both BlueCollar and Ateltico for a contravention of section 8(1)(a) of the Competition Act.³
- [4] In the Competition Appeal Court (“CAC”) matter of *Babelegi*⁴ Davis JP stated that “*context matters*”, and in the context of the Covid-19 pandemic, “*the context is a market where market conditions have been altered by the*

¹ Government Notice No. 350 of Government Gazette No. 43116, 19 March 2020.

² These are the relevant dates set out in the Notice of Motion. However, the Founding Affidavit refers to 20 March 2020 (as opposed to 21 March 2020) to 15 April 2020. Nothing meaningful turns on this discrepancy.

³ Supporting Affidavit to the Complaint Referral, para 3, read with paras 66, 67, 69, 70 and 71. Also Replying Affidavit, paras 42, read with 237 to 239, 252 to 254 and 261.

⁴ *Babelegi Workwear and Industrial Supplies CC v Competition Commission of South Africa* (186/CAC/JUN20) [2020] ZACAC 7; 2021 (6) SA 446 (CAC) (18 November 2020) (“*Babelegi Appeal*”).

unprecedented pandemic".⁵ The Commission's legal counsel described the context of this matter as follows:

"This matter before the Tribunal today concerns the exploitation by the Respondents of the urgent and dire need of the South African Police Services to procure hand sanitizer to protect its members and the public from the spread of the COVID-19 virus in the midst of the ongoing pandemic. The conduct arises shortly after the state of national disaster was declared on the 15th of March 2020. And at that stage everyone was scurrying to obtain PPE products. The police or SAPS paid ... R3 086,96, excluding VAT, per 25 litres of hand sanitizer, whereas the cost per unit was only R1 405,28. At the time the conduct started at 20 March 2020, the police had no hand sanitizer stock in store. It was at that stage desperately trying to build up stock. It had to urgently secure whatever stock was available from a supplier at the price that it offered."⁶

[5] It is common cause that hand sanitiser is listed in the annexures to the Consumer Protection Regulations as an essential item and that regulation 4 of the Consumer Protection Regulations which deals with excessive pricing during the National State of Disaster applies to the conduct that is the subject matter of this referral.⁷

[6] The Commission seeks *inter alia* the following relief:

- "3. Declaring that the First Respondent's pricing conduct for hand sanitiser in 25Lt containers during the period 21 March 2020 to 15 April 2020 has contravened the provisions of section 8(1)(a) of the Competition Act, read with Regulation 4 of the Consumer Protection Regulations;
4. Interdicting and restraining the First Respondent from engaging in any further conduct in contravention of section 8(1)(a) of the Competition Act;

⁵ *Babelegi Appeal*, para 55.

⁶ Transcript, p.7, line 10 to p.8, line 2.

⁷ *Common Cause Facts And Facts In Dispute Identified By The Applicant*, paras 22 and 27 citing paras 31 and 38 of the Founding Affidavit, read with paras 47 and 58 of BlueCollar's Answering Affidavit.

5. Directing that the First and Second Respondents are jointly and severally liable to pay an administrative penalty, in terms of section 58(1)(a)(iii), equal to 10% (ten percent) of its annual turnover in the Republic and their exports from the Republic during its preceding financial year, the first paying absolving the other;
6. Granting such further order, as the Tribunal determines appropriate, to remedy the Respondent's conduct in contravention of section 8(1)(a) of the Competition Act;
7. Granting such further and/or alternative relief as the Tribunal may deem appropriate.”⁸

[7] In its Notice of Motion, the Commission also seeks leave for the complaint referral to be dealt with by the Tribunal on an urgent basis in terms of the Tribunal Rules for Covid-19 Excessive Pricing Complaint Referrals⁹ (“Covid Rules”) which regulate complaint referrals for alleged contraventions of section 8(1)(a). We deal with the issue of urgency below.

[8] The Commission's Notice of Motion does not specifically seek an order declaring Ateltico's conduct to be in contravention of section 8(1)(a) of the Competition Act. However, upon consideration of the pleadings, there is no doubt that the Commission seeks a finding against Ateltico for contravening section 8(1)(a) of the Competition Act.¹⁰ The Commission specifically states in the affidavit filed in support of the complaint referral¹¹ that:

- “3. This affidavit is filed in support of the complaints against the First Respondent and Second Respondent (“the Respondents”), more fully

⁸ Notice of Motion, pp. 2 and 3.

⁹ *Competition Tribunal Rules for Covid-19 Excessive Pricing Complaint Referrals* Government Notice 448 of Government Gazette No. 3205, 3 April 2020, read in conjunction with the *Competition Tribunal's Directive for Covid-19 Excessive Pricing Complaint Referrals* issued on 6 April 2020.

¹⁰ Supporting Affidavit to the Complaint Referral, para 3, read with paras 66, 67, 69, 70 and 71. Also Replying Affidavit, paras 42, 237 to 239, 252 to 254 and 261.

¹¹ Supporting Affidavit to the Complaint Referral, paras 3 and 71.

described below, in terms of section 50(2)(a) of the Act, for the contravention of section 8(1)(a) of the Act.”

and

“71. The economic analysis indicates that the Respondents have contravened s8(1)(a) of the Act. The Respondents’ conduct demonstrates that they had market power in the relevant market for 25L hand sanitiser and they abused that market power by charging a price that is higher than the competitive price, where the difference was not reasonable.”

[9] During the hearing, the Commission was consistent in its allegation that both BlueCollar and Ateltico engaged in excessive pricing conduct in contravention of section 8(1)(a) of the Competition Act.¹²

[10] In terms of section 52(2)(b) of the Competition Act, the Tribunal has inquisitorial powers and in terms of sections 54(e) and (f) may accept oral submissions and any other information from any participant. The Tribunal may also condone any technical irregularities arising in the proceedings in terms of section 55(2) of the Competition Act. In our view, Ateltico was aware from the Commission’s founding and replying affidavits of the case that it was called to answer. Further, it was directed that the Tribunal would only make a determination on the issue of Ateltico’s role in supplying hand sanitiser to SAPS (i.e., whether it was merely a funder) along with all evidence canvassed during the hearing.¹³ In light of this directive, Ateltico was provided an opportunity to file a supplementary affidavit but chose not to.

[11] It was also clear during the hearing that Ateltico knew that it was facing a section 8(1)(a) contravention.¹⁴

¹² Transcript, particularly p.8, line 6 to p.9, line 21.

¹³ Prehearing directive, 12 November 2020.

¹⁴ Transcript, p.22, line 15 to p.25, line 7.

- [12] Given the above, we are of the view that Ateltico was aware of the case it had to meet and we condone any technical irregularity in the Notice of Motion.
- [13] Our approach was therefore to consider whether BlueCollar (acting on behalf of and/or within the ambit of its partnership with Ateltico) contravened section 8(1)(a) of the Competition Act, and consequently, whether to hold BlueCollar and Ateltico jointly and severally liable for contravening the provisions of section 8(1)(a) of the Competition Act. It is clear that the Commission seeks to hold BlueCollar and Ateltico jointly and severally liable for payment of the administrative penalty, which would be the consequence of a finding of a contravention against both parties.
- [14] We find that BlueCollar (acting on behalf of and/or within the ambit of its partnership with Ateltico) contravened section 8(1)(a) of the Competition Act, during the complaint period.
- [15] We further find BlueCollar and Ateltico to be jointly and severally liable for payment of the administrative penalty since BlueCollar supplied the hand sanitiser at issue to SAPS through its partnership with Ateltico and Ateltico benefitted from the excessive pricing conduct.
- [16] We impose an administrative penalty of R 3 550 000 for which BlueCollar and Ateltico are jointly and severally liable, the one paying the other to be absolved.
- [17] Our reasons for this decision follow.

URGENCY

- [18] The Commission brought the complaint on an urgent basis on 3 September 2020 and required BlueCollar and Ateltico to respond within five days of service of the complaint referral. Both BlueCollar and Ateltico filed their answering affidavits on 11 September 2020.

- [19] BlueCollar and Ateltico contested urgency on *inter alia* the basis that COVID-19 cases were “over the peak” and the rapid escalation of COVID-19 cases referred to by the Commission ended some time before the referral was launched. It was argued that the period of five days which BlueCollar and Ateltico were given to respond to the Commission’s allegations went against the principles of *audi alteram partem*. It was also argued that the alleged urgency was unjustified and self-created, having reference to the time period between SAPS lodging the complaint on 5 May 2020, correspondence between the Commission and BlueCollar in May 2020 and the Commission instituting the complaint referral on 3 September 2020.
- [20] To address their concerns, the Tribunal granted BlueCollar and Ateltico an opportunity to file further supporting affidavits and reports. BlueCollar ultimately filed its supplementary answering affidavit on 12 October 2020 and Ateltico chose not to file any further affidavit.
- [21] As stated above, at a pre-hearing held on 12 November 2020, Ateltico indicated that it wished to raise a point *in limine* regarding whether the complaint referral against it was valid given its role as a “funder”. Ateltico therefore denied that it was involved in the alleged conduct. The dispute on whether Ateltico’s role was merely that of a “funder” or whether it was in a partnership with BlueCollar for the supply of hand sanitisers to SAPS, could only be determined by the Tribunal after a consideration of the evidence led during the hearing on the merits of the complaint. The Presiding Member therefore directed that the point *in limine* would be heard with the merits of the complaint.
- [22] A timetable regulating the provision of factual and expert witness statements, the preparation of a document reflecting those facts which were common cause and those in dispute, as well as the filing of heads was directed. Ateltico reserved its rights to call a witness but never did. It participated throughout the hearing, including by cross-examining the Commission and BlueCollar’s witnesses.

[23] The following factual witnesses were called:

23.1 As the Commission's factual witness, Mr Stevans Mahlangu, a Senior Administration Clerk from SAPS; and

23.2 BlueCollar called Ms Sibongile Mahlangu ("Ms Mahlangu"), BlueCollar's Managing Director, as its factual witness.

[24] The following expert witnesses were called:

24.1 Mr Jason Aproskie testified on behalf of the Commission as an economic expert ("Commission's economic expert");

24.2 BlueCollar called Ms Mollen Mukuze, a Chartered Accountant and registered auditor of Brendmo Inc., as BlueCollar's financial expert ("BlueCollar's financial expert"); and

24.3 Dr Ryan David Hawthorne, testified on behalf of BlueCollar as its economic expert ("BlueCollar's economic expert").

[25] At the hearing, the Commission submitted that urgency was no longer an issue given the timetable and dates set for the hearing. BlueCollar and Ateltico contended that this indicates that there was no urgency in the first place and that they were prejudiced by the short time given to file affidavits and gather evidence. Given that BlueCollar and Ateltico were afforded a further opportunity to file supplementary affidavits, and they had months to prepare before the hearing, we are satisfied that any potential prejudice to them was overcome. Since the matter was then not heard on an urgent basis, it is therefore not necessary for us to decide on the matter of urgency. We note further that since the conduct had already ceased, urgency was no longer an issue.

BACKGROUND

BlueCollar

- [26] BlueCollar is involved in the provision of occupational health services to customers including SAPS. The occupational health services offered by BlueCollar include performing medical screening of customers' employees or staff as required in terms of the Occupational Health and Safety Act.¹⁵
- [27] During the complaint period BlueCollar, for the first time, supplied hand sanitiser to SAPS. It did so as a so-called reseller. In other words, it bought the hand sanitiser from third parties and supplied it to SAPS (without adding any value to the hand sanitiser product).
- [28] BlueCollar is registered on National Treasury's Central Supplier Database ("CSD"). Government departments are limited to the CSD when securing suppliers for emergency procurement. BlueCollar is also an existing service provider for SAPS and is listed on their approved suppliers' database.

Ateltico

- [29] Ateltico specialises in the provision of investment solutions to customers. According to Ateltico it provided funding to BlueCollar for the procurement of hand sanitiser to be supplied to SAPS that is the subject of this complaint.
- [30] According to the Commission, Ateltico "came together" in a partnership with BlueCollar to supply hand sanitiser to SAPS and to share the profit derived from the alleged excessive price charged for the supply of the hand sanitiser to SAPS.

¹⁵ Act No 85 of 1993.

FACTUAL BACKGROUND

The Commission's investigation and referral

- [31] The Commission established that on 16 March 2020, SAPS identified an urgent need for, *inter alia*, hand sanitiser in the context of the pandemic.
- [32] On or around 20 March 2020, SAPS issued a Request for Quotation ("RFQ") to three suppliers listed on the CSD, including BlueCollar, for the supply of 81 000 25 litre ("L") containers of hand sanitiser. Given the urgency, the RFQ required a quotation by 11h00 on 21 March 2020 and an indication from the supplier if that quantity could be supplied, the price, as well as the period for delivery following placement of the order. BlueCollar was the only supplier to respond timeously to the RFQ.
- [33] According to BlueCollar, it immediately contacted Ateltico and negotiated terms whereby Ateltico would finance BlueCollar, in return for a 40% share of the profit derived from the supply of hand sanitiser to SAPS.¹⁶ This agreement was later recorded in a Memorandum of Agreement ("MOA") dated 31 March 2020.¹⁷
- [34] In its response to the RFQ, on or about 21 March 2020, BlueCollar advised SAPS that it was able to supply the quantity of bulk hand sanitiser required by SAPS. BlueCollar quoted SAPS for the supply of 81 000 containers of 25L hand sanitiser at a price of R3 550.00 per 25L container, amounting to a total of R287 550 000 (incl. VAT) for the 81 000 containers.
- [35] On 21 March 2020, SAPS revised the original order down to 10 000 containers of 25L of hand sanitiser.

¹⁶ First Respondent's Answering Affidavit, p113, para 18.

¹⁷ Bundle A, pp. 355 – 357.

- [36] On 21 March 2020, BlueCollar submitted a revised quotation of R35 500 000 (incl. VAT) for the 10 000 containers / units of 25L of hand sanitiser.
- [37] On 23 March 2020, due to SAPS's urgent need for hand sanitisers, BlueCollar delivered 10 units of 25L hand sanitiser to SAPS, instead of an agreed quantity of 200 units which was scheduled for delivery.
- [38] Following delivery of the hand sanitiser by BlueCollar, SAPS received further budget allocations which enabled it to procure more hand sanitiser. It then sent out RFQs for hand sanitiser as and when suppliers with stock were identified during March and April 2020 to secure whatever stock it could get, to ensure that it had enough stock for the following days and weeks of the pandemic.
- [39] On 5 May 2020, the Commission received a complaint from SAPS against several firms that responded to individual SAPS RFQs, including BlueCollar. SAPS alleged that the prices charged by certain companies were unreasonable and unfair. The Commission directed an email to BlueCollar on 20 May 2020, in relation to this complaint, querying its price and requesting it to provide cost justifications and information in respect thereof.
- [40] The Commission's investigation revealed that BlueCollar purchased 10 177 containers of 25L of hand sanitiser from several different suppliers at a total cost of R14 094 606 (excl. VAT).¹⁸ The variety of suppliers used by BlueCollar meant that any risks on the supply side were diversified and spread out amongst a number of suppliers.
- [41] Of the 10 177 containers of 25L of hand sanitiser, BlueCollar supplied 10 000 containers to SAPS. BlueCollar procured the 10 000 containers at a total cost of R13 849 471 (excl. VAT), which amounts to R1 384.95 (excl. VAT) per 25L container. BlueCollar supplied the 10 000 containers of hand sanitiser to

¹⁸ Founding Affidavit, para 39.7.

SAPS for a total amount of R30 869 565 (excl. VAT), which amounts to R3 086.95 (excl. VAT) per 25L container.¹⁹

- [42] The Commission alleged that BlueCollar generated a total profit of R17 020 095 (excl. VAT) from the sale of 10 000 containers of 25L of hand sanitisers to SAPS.²⁰
- [43] Based on the above figures, the Commission alleged that BlueCollar added a mark-up of 123% per 25L container of hand sanitiser and earned a gross margin of 55%.²¹ These percentages were subsequently calculated by the Commission's economic expert to be slightly lower at a mark-up of 120% and a gross margin of 54%.²² Nothing turns on this as the decrease in the calculated percentages is minor.
- [44] Given the above, in comparison to appropriate benchmarks, the Commission alleges that the price that BlueCollar charged SAPS is excessive and in contravention of section 8(1)(a) of the Competition Act, read with Regulation 4 of the Consumer Protection Regulations.
- [45] Furthermore, according to the Commission, BlueCollar supplied the hand sanitiser on behalf of, and/or within the ambit of the partnership set out in the MOA between BlueCollar and Ateltico. Having regard to the MOA, Ateltico benefitted from the excessive price charged to SAPS and was paid a 40% share of the profits from the sale of the hand sanitiser to SAPS. Consequently, the Commission alleges that BlueCollar and Ateltico may be held jointly and severally liable for the penalty.
- [46] The Commission referred the complaint to the Tribunal against BlueCollar (acting on behalf of or within the ambit of its partnership with Ateltico) for a

¹⁹ Founding Affidavit, paras 39.4 and 39.8.

²⁰ Founding Affidavit, para 39.8.

²¹ Founding Affidavit, para 39.7.

²² Commission's submission dated 7 May 2021.

contravention of section 8(1)(a) of the Competition Act, and against both BlueCollar and Ateltico for payment of the administrative penalty.

ISSUES FOR DETERMINATION

[47] This case required us to make the following determinations:

- 47.1 Whether BlueCollar can be regarded as a dominant firm in the supply of hand sanitiser to the SAPS and, in particular, whether it had market power, for purposes of section 7(c) of the Competition Act in the period covered by the complaint;
- 47.2 Whether the price that BlueCollar charged SAPS for the hand sanitiser was excessive, when considering appropriate benchmarks;
- 47.3 Whether BlueCollar contravened section 8(1)(a) of the Competition Act as alleged in the complaint;
- 47.4 The true relationship between BlueCollar and Ateltico and if BlueCollar acted on behalf of or within the ambit of its partnership with Ateltico;
- 47.5 Whether BlueCollar and/or Ateltico should be ordered to pay an administrative penalty;
- 47.6 If a contravention was found, the quantum of the administrative penalty to be levied on BlueCollar and/or Ateltico; and
- 47.7 Whether an interdict would be an appropriate remedy.

LEGISLATIVE FRAMEWORK

[48] Section 8(1)(a) of the Competition Act prohibits a dominant firm from charging an excessive price:

“It is prohibited for a dominant firm to-
charge an excessive price to the detriment of consumers or customers.”
(emphasis added)

[49] Sections 6 and 7 of the Competition Act set out the test for whether a firm is dominant or not. Section 6 empowers the Minister to determine a minimum turnover threshold (which is currently R5 million)²³ and section 7 of the Competition Act provides that a firm is dominant if:

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

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

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

[51] The central tenets of section 8(3) are that the price will be excessive if it is:
(i) higher than a competitive price; and (ii) the difference is unreasonable. Section 8(3) also sets out a non-exhaustive list of factors to be considered in the assessment of whether a price is higher than a competitive price and

²³ General Notice 253 in Government Gazette No. 22025, dated 1 February 2001, as amended by General Notice 562 in Government Gazette No. 22128, dated 9 March 2001.

whether that difference is reasonable, which notably includes “*any regulations made by the Minister...regarding the calculation and determination of an excessive price*” (section 8(3)(f)).

[52] Once there is a *prima facie* case of abuse of dominance because the dominant firm charged an excessive price, section 8(2) of the Competition Act shifts the onus of showing that the price was reasonable, on to the firm.

[53] While section 8(3) of the Competition Act applies to all products, the Minister of Trade, Industry and Competition (“the Minister”) published the Consumer Protection Regulations in direct response to the Covid-19 pandemic on 19 March 2020, in which specific product categories, including hand sanitiser, were identified as deserving special regulatory protection, given their critical value in fighting the spread of Covid-19.

[54] Regulation 4.1 of the Consumer Protection Regulations reiterates the wording of section 8(1)(a) of the Competition Act when it states that:

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

[55] Regulation 4.2 states that, 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” (emphasis added).

[56] In addition, as we noted in *Dis-Chem*,²⁴ where there has been a material price increase of the goods in question, regulation 4.2 creates a rebuttable presumption that “*indicates prima facie that the price is excessive or unfair*”.

RELEVANT MARKET

[57] In *Tsutsumani*, the Tribunal acknowledged how the context of the Covid-19 pandemic created the urgent, high demand by SAPS for protective equipment for its front-line workers. Similarly, in this case hand sanitiser became crucial in mitigating the spread of Covid-19 and this resulted in SAPS needing to urgently procure hand sanitiser on very short notice for its members who were at the forefront of enforcing the lockdown restrictions nationally and to protect the public from the spread of the corona virus.

[58] Accordingly, we conclude that the relevant market is the supply of hand sanitiser on an urgent basis to SAPS in the context of the pandemic. Neither BlueCollar nor Ateltico deny that this is the relevant market for purposes of this case. We see no reason to interrogate this further. The economic experts who gave evidence on behalf of the Commission and BlueCollar, guided by the Tribunal’s decision in *Babelegi*,²⁵ both agree that market delineation is not essential when one can determine market power by other means.²⁶

[59] We now turn to consider market power in the context of the Covid-19 pandemic and the market distortions at the time.

²⁴ Interpretive exercise was undertaken by the Tribunal in *Dis-Chem*, despite the fact that it was ultimately held that the Regulations did not apply to the facts of that case. See paras 41 - 53.

²⁵ *The Competition Commission v Babelegi Workwear and Industrial Supplies*, CT CR003Apr20, 1 June 2020, para 85 (“*Babelegi*”).

²⁶ Transcript, p. 492, line 4 to p.493, line 5. See also Bundle B, page 111, Joint statement of experts dated 5 February 2021.

DOMINANCE

- [60] As stated above, the first jurisdictional pre-requisite for a finding that a firm has engaged in excessive pricing in contravention of the Competition Act is that the firm in question is dominant.
- [61] BlueCollar's annual turnover exceeds R5 million, which means that BlueCollar meets the first leg of the two-step test for dominance, set out in section 6 of the Competition Act.
- [62] For the purposes of this case, section 7(c) of the Competition Act is most relevant. Section 7(c) sets out the test for dominance applicable to those firms that have less than 35% of the market but have "market power". Market power is defined in section 1 of the Competition Act, as "*the power of a firm to control prices or to exclude competition, or to behave to an appreciable extent independently of its competitors, customers or suppliers.*"
- [63] The key question for the purposes of determining whether BlueCollar, although not dominant in terms of market share, had (temporary) market power in the context of the pandemic.

The Respondents' Arguments

BlueCollar

- [64] BlueCollar denies that the Commission has succeeded in proving that it enjoyed market power or dominance at the relevant time.
- [65] BlueCollar argues, firstly, that its supply to SAPS of hand sanitiser was a once-off occurrence and that it cannot be said to be a supplier and/or retailer of hand sanitiser, whether in bulk or at all. It argues that as it had not previously provided hand sanitiser to SAPS, or any other party with hand sanitiser, it was a new and "maverick" entrant into the market for the sale of hand sanitiser.

- [66] Secondly, BlueCollar argues that the CAC in *Babelegi* provided, in respect of temporary market power that: “...[where] other suppliers did not have masks available, ... applicant’s temporary market power would be obvious”. BlueCollar alleges that since the Commission failed to prove that other suppliers did not have hand sanitisers or were not available for SAPS to approach, it has not established market power.
- [67] BlueCollar further denies that it had market power, in that it was not the main supplier of hand sanitiser to SAPS. It only delivered approximately 10% of the entire units and battled to fulfil its own RFQ to SAPS. It alleges that the main supplier to SAPS (Mainstreet/Red Roses) charged far more than BlueCollar and had approximately 87%²⁷ of the total order of SAPS.
- [68] BlueCollar’s economic expert, testified that “SAPS has many, many, many, many alternatives...”²⁸ and could shop around widely. He stated that there were literally over 700 000 suppliers on the CSD at that time and assumes that SAPS could pick from any one of them. Even if SAPS could not find one supplier on the list, it could quickly (in his view) conduct a market analysis to identify possible alternative suppliers and then get the identified supplier to register on National Treasury’s CSD database.²⁹
- [69] BlueCollar’s economic expert further submitted that in assessing market power in a bidding market, one should look at a range of goods and a range of similar quotations in the same period. In this regard he pointed out that Mainstreet, who supplied eight times the volume supplied by BlueCollar had not been prosecuted, and yet its price was much higher than the price charged by BlueCollar.³⁰ On the other hand, BlueCollar was a maverick supplier of hand sanitiser which had never before, or never after the fact, supplied hand sanitiser. BlueCollar is owned by a black woman, trying to introduce competition in the market. BlueCollar’s economic expert argued that

²⁷ First Respondent’s Supplementary Answering Affidavit, para 7.24.

²⁸ Transcript, p.491.

²⁹ Transcript, p.501, line 11 to p.502, line 12.

³⁰ Transcript, pp.517 and 518.

encouraging maverick bidders like BlueCollar benefits customers since this has the effect of disrupting cartels.³¹

[70] In light of this, BlueCollar argued that it could not behave independently of its customer, suppliers, or competitors. BlueCollar could not act independently from its customer; as SAPS rejected deliveries, reduced quantities and sourced from other suppliers at higher rates and quantities. BlueCollar could not act independently from its suppliers, as it was wholly dependent on its suppliers to be able to supply SAPS and was competing for supply with other SAPS suppliers such as Mainstreet. BlueCollar argues that it could not act independently of its competitors given the substantial number of other suppliers SAPS could have asked for quotes and given the fact that Mainstreet supplied the bulk of SAPS order at a higher rate.

[71] BlueCollar also alleges that after deducting the costs it incurred to supply the hand sanitiser to SAPS, its nett profit margin was only 18%. BlueCollar alleges in addition, that it had to pay 40% of its profit to Ateltico and 10% of the profit to the agent who facilitated BlueCollar's loan agreement with Ateltico.

Ateltico

[72] Ateltico argues that BlueCollar is not dominant in the market for the supply of hand sanitiser and Ateltico is not active at all in this market, it can therefore not be seen to possess any market share in the relevant market.

[73] Ateltico argues that the Commission misunderstood its role; and that Ateltico *"simply provided finance (and)...had no involvement in the procurement of the goods in question; the pricing of the sanitiser; or the delivery of the sanitiser"*.³²

[74] According to Ateltico, it was not in a partnership with BlueCollar. Ateltico alleges that the money that it lent to BlueCollar was repayable to Ateltico

³¹ BlueCollar's economic expert's report, p.5, para 3.

³² Second Respondent's Answering Affidavit, p.8, para 28.

irrespective of whether or not BlueCollar received payment from SAPS or BlueCollar made a profit, loss or broke even.

[75] Further, according to Ateltico, it was only introduced to BlueCollar a week after SAPS awarded the contract to BlueCollar. Ateltico alleges that it was not partners with BlueCollar at the time that the price was set for the hand sanitiser, since BlueCollar only approached it for funding after Blue Collar had determined the price.

[76] Ateltico also blames SAPS for putting out a RFQ for 81 000 containers of 25L of hand sanitiser and requiring a response by the following day. Ateltico alleges that SAPS did not do a due diligence and had it done so, it would have established that BlueCollar did not have any stock on its premises and was unable to supply the 81 000 containers, or even the 10 000 containers which the RFQ was subsequently revised to. SAPS accepted a quote from BlueCollar of R35 500 000 despite the fact that it was an entity with no track record in supplying hand sanitiser.

Our Assessment

[77] The CAC in *Babelegi* recognised that market forces may be disrupted during the pandemic causing an increase in demand and a shortage of supply of certain products necessary for the combatting or overcoming of the crisis, in this case, hand sanitiser. It held:

“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 ...”³³

[78] The evidence shows that BlueCollar supplied 10 000 containers of 25L of hand sanitiser to SAPS. BlueCollar purchased the hand sanitisers at an average cost of R 1 384.95 (excl. VAT) per 25L container. It charged SAPS an amount of R 3 086.95 (excl. VAT) per 25L container. This *prima facie* amounts to a mark-up of 123% per 25L container, and a gross margin of 55%. As indicated above, these percentages were ultimately calculated by the Commission’s economic expert to be slightly lower at a mark-up of 120% and a gross margin of 54%.³⁴

[79] As the Tribunal held in *Tsutsumani*, the fact that BlueCollar had not previously supplied hand sanitiser, as BlueCollar argued, does not hold as a defence to the complaint. This is because the supply of 10 000 containers of 25L hand sanitiser is a significant transaction in and of itself. Furthermore, it occurs during a crisis period when the market is distorted due to the high demand for hand sanitiser in South Africa and internationally. BlueCollar acknowledges that during the Covid-19 pandemic, hand sanitiser “*was near impossible to procure or it was only procurable at exorbitant prices together with long waiting periods.*”³⁵ Sourcing the hand sanitisers became very hard,³⁶ hand sanitisers were scarce and there was “*incredible high pricing by distributors.*”³⁷

[80] We find that in the context of the Covid pandemic, BlueCollar acquired temporary market power since it was able to procure stock (hand sanitiser in this case) during this crisis time characterised by market distortions. Further, the question of market power during a crisis is not limited to whether BlueCollar had stock available or not, as argued by BlueCollar’s economic expert. Rather, the question is which firm could supply. It is clear that when

³³ *Babelegi Appeal*, para 50.

³⁴ Commission’s submission dated 7 May 2021. Nothing turns on this as the decrease in the calculated percentages is minor.

³⁵ Witness statement of BlueCollar’s factual witness, Ms Mahlangu, para 3.6.

³⁶ *Supra*, para 3.10.

³⁷ *Supra*, para 3.9.

SAPS issued the RFQ, there was a finite amount of hand sanitiser available and therefore a critical question in determining dominance is which firm was able to procure hand sanitiser in a market where there was a finite supply and a high demand for stock at that time.

- [81] Further, as to BlueCollar’s argument that it could not be found to have market power in a bidding market and where there are allegedly many other suppliers, the CAC held in *Babelegi*, that “multiple firms can be found to be dominant during the crisis” and “more than one supplier can be in a dominant position in respect of its normal customers.”³⁸ Accordingly, alleging other suppliers and their prices does not assist BlueCollar in the context of the undisputed market distortions due to the crisis. Further, as the CAC held in *Babelegi*, “[n]otionally other suppliers could have exploited the same state of affairs.”³⁹
- [82] BlueCollar’s argument that Mainstreet supplied the bulk of the hand sanitiser to SAPS and that its prices were higher than BlueCollar’s prices (therefore BlueCollar’s prices cannot be excessive) does not assist BlueCollar either. As the CAC held in *Babelegi*: “The lucky monopolist might not be a single firm in the relevant market”.⁴⁰ This is because the same competitors are subject to the same market advantages that a disaster confers upon a lucky monopolist.⁴¹ This means that recourse to Mainstreet’s pricing, cannot assist BlueCollar, in the assessment of BlueCollar’s market power (nor, later in the enquiry, with reference to benchmarks). As mentioned earlier, SAPS complained to the Commission of the pricing of several suppliers to SAPS and not only BlueCollar.
- [83] We find that in the context of the crisis, and the urgent need by SAPS for hand sanitiser, BlueCollar became a “lucky monopolist”. The CAC held in *Babelegi* with reference to Jorge Ramos’ publication on dominance and market power:⁴²

³⁸ *Babelegi Appeal*, para 49.

³⁹ *Babelegi Appeal*, para 57

⁴⁰ *Babelegi Appeal*, para 49.

⁴¹ *Dis-Chem*, para 158.

⁴² *Babelegi*, para 48, with reference to Ramos J, *Firm Dominance in EU Competition Law: The Competitive Process and the Origins of Market Power* (2020) at Chapter 7.

“The lucky monopolist is not a dominant firm whose power comes from the state or from natural efficiencies, from unparalleled investment efforts or superior management ability nor as a result of anticompetitive conduct. Its dominant position comes from what Ramos refers to as luck, being events that fall outside of the knowledge of the economic actor or its ability to determine the timing thereof. They do not require the firm to incur any cost in order to secure its market position in that the relevant factors are exogenous to the cost functions of the firm but are significantly meaningful to propel a firm to a position of dominance among existing firms.”⁴³ (emphasis added)

- [84] In *Babelegi* the CAC observed that Babelegi had been able to “*price higher without any constraint imposed upon it by either its consumers or customers, not as a result of any new investment or commercial efficiency produced but simply because the onset of the pandemic created entirely different conditions for the market in which appellant was located*”.⁴⁴ Likewise, BlueCollar’s high prices as a reseller of hand sanitiser are not the result of any efficiency on the part of BlueCollar but a consequence of the changed market circumstances due to the pandemic.
- [85] We have found no persuasive evidence that BlueCollar faced any additional or extraordinary business risks in supplying SAPS with sanitiser. It was able to obtain stock of the product in respect of which there was unprecedented demand at a time when other suppliers did not have stock, and customers – in this case SAPS - had no option but to accept the prices sought by BlueCollar, which were unconstrained by other suppliers or by any exercise of demand-side market power by SAPS.
- [86] On the evidence before us, BlueCollar’s pricing is consistent with that of a lucky monopolist. Ms Mahlangu testified that BlueCollar priced in the shortage in demand and urgency to its standard pricing model (of 42% to 55% in

⁴³ *Babelegi*, para 48.

⁴⁴ *Babelegi Appeal*, p.20, para 58.

margins), despite the fact that it was simply a reseller / trader when supplying the sanitiser to SAPS. She stated:

“Okay, I just want to make you aware of the urgency of this quotation. So, we did not have much time. So, we knew that we needed to first establish where we go to get the product from. And having realised that it might be a difficult task to do so, because we couldn’t find on Google. We’re doing a lot of telephone calls to suppliers, we realised it’s just going to be a difficult task to do this and we priced according to realising that there was a lot of demand for it...So, we incorporated into our pricing over and above this model as well to say we will need to make provisions for transportation for the product.”⁴⁵
(emphasis added)

- [87] We are not at all persuaded by BlueCollar’s economic expert’s argument that BlueCollar behaved like a maverick disrupting the market through innovation and low prices. This is because BlueCollar did not intend to supply hand sanitiser beyond the SAPS contract, but rather behaved like a lucky monopolist during a period of crisis.
- [88] A typical maverick firm as understood in competition economics is a firm that is associated with charging low prices to enhance competition (and not excessive prices). Charging an excessive price during a pandemic, as we have found BlueCollar did, is not behaviour that can be associated with a maverick firm. Furthermore, according to BlueCollar itself, it only supplied the hand sanitiser as a once-off supply to SAPS. It is not currently in the business of supplying hand sanitiser to its customers and has no intention of entering the hand sanitiser market⁴⁶ and thus cannot be regarded as a maverick firm in the supply of hand sanitiser.
- [89] BlueCollar’s economic expert’s position that BlueCollar’s conduct would disrupt cartel conduct as an alleged benefit stands in contradiction to the adverse impact of excessive pricing / price gouging behaviour itself on

⁴⁵ Transcript, p.112, lines 4-15.

⁴⁶ First Respondent’s Answering Affidavit, p112, para 9 and p115, para 28.

customers / consumers, as is the case here. Both cartel conduct and excessive pricing aim to increase prices above the competitive level and not to enhance competition.

- [90] BlueCollar's economic expert also argued that supplier response is important in this case as high prices trigger entry – the 'supply side response'⁴⁷ – and thus consumers would benefit from higher pricing. However, the Commission's economic expert showed that where distributors or traders add a large margin, there is no impact on supply as the supplier, the manufacturer or importer, does not receive a higher price and therefore there is no signal for a supply response.⁴⁸
- [91] BlueCollar's economic expert's argument that market power should be assessed with reference to a range of goods to establish dominance, is at odds with precedent on the point in the context of the undisputed market distortions due to the crisis. As previously stated in the context of decisions in *Dis-Chem*⁴⁹ and *Babelegi*,⁵⁰ it is possible to excessively price a product that forms only a small part of the respondent's business. We reiterate, context matters and in this case the alleged excessive pricing relates to PPE urgently required during a crisis period.
- [92] Contrary to the arguments raised by BlueCollar and Ateltico to the effect that SAPS could have self-supplied or engaged in a more expansive and rigorous tender process, we find on the evidence that SAPS, as a purchaser who had not previously acquired hand sanitiser and held no stock, was not in a position in the context of the urgency due to human lives being at stake, to negotiate, defer procurement or search for alternative suppliers at cheaper prices in the crisis situation that they found themselves in during the Covid-19 pandemic.⁵¹

⁴⁷ Transcript, p.489, line 20-21; p.490, line 1-8.

⁴⁸ Transcript, p.453, line 12-21; p.454, line 1-8.

⁴⁹ "*In the counterfactual world of pre-Covid, surgical face masks were but an insignificant item in Dis-Chem's overall business*" and Dis-Chem was found to have contravened the Competition Act (para 160).

⁵⁰ In the case of *Babelegi* "*the sale of masks formed a small part of its overall business*" and it was found in contravention of the Competition Act (para 12).

⁵¹ Transcript, p.36, line 16 to p.39, line 3; p.92, line 13 to p.96, line 18 and Transcript, p.100, line 1 to p.101, line 1.

- [93] Mr Mahlangu, who was responsible at that time for sourcing quotations on behalf of SAPS from suppliers of hand sanitiser explained that during the State of Emergency, SAPS had to source quotations for PPE products within a day because there were no PPEs at their stores and SAPS had members working on *inter alia* roadblocks who did not have PPEs.⁵² Further, he was not aware of other suppliers that were able to supply hand sanitiser during that time.⁵³
- [94] We find that SAPS at the time purchased the hand sanitiser from suppliers registered on the CSD who were able to satisfy the requirements of SAPS' RFQ's, to supply hand sanitisers within a very short time. SAPS did not have a choice given the crisis context, amplified by the large volumes of hand sanitiser required as well as the utmost urgency in order for SAPS' employees to safely fulfil their duties during the state of disaster.
- [95] SAPS was at BlueCollar's mercy despite the fact that the prices BlueCollar quoted were high when compared with *inter alia* the National Treasury list. BlueCollar's pricing is evidence that it could price independently specifically in relation to its customer SAPS. This is the very definition of market power. Indeed, the evidence shows that SAPS did not cancel the contract with BlueCollar, even when BlueCollar did not supply the hand sanitiser timeously. SAPS was forced to take the quantities that it could get at the price that BlueCollar commanded for the hand sanitiser. Furthermore, SAPS was forced given the urgency and shortages of hand sanitiser to purchase from those suppliers that during this time could secure hand sanitiser stock.
- [96] We find that the market circumstances during the Covid-19 pandemic, conferred market power upon BlueCollar for the urgent supply of hand sanitiser to SAPS.

⁵² Transcript, p.92, lines 13 to 19.

⁵³ Transcript, p.91, lines 10 and 11.

WAS BLUECOLLAR'S PRICING EXCESSIVE?

- [97] We turn now to analysing whether BlueCollar (acting on behalf of and/or within the ambit of its partnership with Ateltico) which had market power at the relevant time, engaged in excessive pricing.
- [98] The CAC in *Babelegi*, stated that “[i]n order to determine whether a price is excessive, a yardstick has to be established in order to establish a competitive price with which to assess whether the impugned price is excessive as compared to the yardstick price.”⁵⁴ This must be considered in the context of the Covid-19 virus which “has affected a disastrous impact on the health, economic and social fabric of societies throughout the world and in particular on the normal functioning of markets.”⁵⁵
- [99] As stated above, any regulations published by the Minister of the dtic must be considered when assessing excessive pricing (section 8(3)(f) of the Competition Act). The Consumer Protection Regulations published by the dtic Minister provide that an increase in cost which does not correspond to or is not equivalent to the increase in the cost of providing that good or service, or 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, will be relevant and critical for a determination of whether the price is excessive or unfair and will, *prima facie*, indicate that the price is excessive or unfair.
- [100] Read with regulation 4 of the Consumer Protection Regulations the relevant economic test for determining whether a price is excessive in the context of the Covid-19 pandemic is whether the price charged has any corresponding cost justification from the upstream supplier in the value chain.

⁵⁴ *Babelegi Appeal*, para 41.

⁵⁵ *Babelegi Appeal*, para 42.

[101] We need to determine the difference between the allegedly excessive mark-up / margin⁵⁶ and the competitive mark-up / margin, and whether or not the difference is reasonable, by reference in this case to appropriate pricing benchmarks.

Pricing benchmarks

[102] Since BlueCollar had not previously sold any hand sanitiser, we cannot compare the prices at which it sold hand sanitiser pre-pandemic and the prices at which it offered to sell hand sanitiser to SAPS in response to the RFQ.

[103] In this case, where we do not have historic pricing and margins of the supplier itself (as a reseller of hand sanitiser) against which comparisons may be undertaken, the Commission submitted that the National Treasury's price list of 15 April 2020 may be considered a benchmark. The list reflects pricing gleaned from other RFQs in government for the same product around the same time. That list has a price of R1 635.45 (incl. VAT) for 25L hand sanitiser containers, which is referred to as a maximum price that government entities should be paying.⁵⁷ Since this is a maximum price, a competitive price would sit at or below this figure, meaning it represents a conservative estimate of the competitive price. Thus, any price that is above this price would also be above a competitive price.

[104] As indicated, BlueCollar's average price per 25L container of hand sanitiser was R3 550.00 (incl. VAT) or R3 086.96 (excl. VAT). This price (incl. VAT) is more than double that which was contained in National Treasury's price list.

[105] BlueCollar argued that the correct benchmark would be a reference to BlueCollar's own typical margins on its activities unrelated to the sale of hand sanitiser. BlueCollar's typical margins *"is 43%, its mark-ups 73% and gross*

⁵⁶ In this case the relevant margin is gross margin since we are dealing with the reselling of hand sanitiser.

⁵⁷ Supporting Affidavit by Mr Aproskie para 61, p. 11, Bundle B.

*margin 43%*⁵⁸ (historically BlueCollar made between 42% to 55% gross profit).

- [106] However, the above margins / mark-ups do not relate to the reselling of hand sanitiser but to BlueCollar's business of the provision of occupational health services. BlueCollar's comparison to its own company margins is therefore misplaced. From an economic perspective one cannot in an excessive pricing case compare mark-ups / margins relating to altogether different types of activities (in this case the provision of occupational health services) as an appropriate benchmark for the competitive mark-up / margin for the resale of hand sanitiser.
- [107] We therefore do not accept the above arguments since the mark-up and margins applicable to the businesses of distributors or resellers / traders (in this case of hand sanitiser) are not comparable to the mark-ups / margins that can be earned in the business of providing occupational health services (which is what the abovementioned figures quoted by BlueCollar relate to).
- [108] BlueCollar's economic expert alleged that gross margins among publicly traded entities whose activities involve distribution or logistics vary widely depending on the firm concerned and over time, ranging between 10% and 50%.⁵⁹
- [109] BlueCollar's economic expert further alleged that BlueCollar's pricing falls within a reasonable pricing range when compared to competitors supplying hand sanitiser to SAPS. He argued that only one supplier on National Treasury's database, namely, Logan Medical and Surgical Supplies, was cheaper than BlueCollar (when compared on an equivalent VAT basis).⁶⁰ It was further argued that BlueCollar's price was only R500 above the median price of a range of different prices published by National Treasury and charged by other suppliers of hand sanitiser.

⁵⁸ BlueCollar's HoA, para 13.46.

⁵⁹ Bundle B, p.52, para 35.

⁶⁰ Logan Medical and Surgical Supplies' price per 25L was R 3 450.00.

- [110] As was stated in *Babelegi*, prices of other suppliers in a crisis period are typically not an appropriate benchmark for a competitive price as these suppliers may be exploiting the same distorted market conditions.⁶¹
- [111] The appropriate benchmarks in this case, as found in *inter alia Tsutsumani*, are the mark-ups and gross margins typically earned by firms that also operate as resellers or traders of non-perishable products such as hand sanitiser under normal competitive conditions (not during a crisis period). BlueCollar is a reseller of the hand sanitiser and not a manufacturer of a product. Therefore, gross margin as opposed to net margin is considered the appropriate benchmark.
- [112] Furthermore, in the case of distributors or traders such as BlueCollar, the cost to source the product is the primary cost, along with any externally paid logistics fees to get the product from the supplier to the distributor or trader, if the cost is not a delivered cost. The customary gross margin added by these distributors or traders to this cost of sourcing the product in tenders typically would cover all other internal costs, such as working capital and a contribution to overhead costs (management of logistics and warehousing).
- [113] It is common cause that gross profit margin is calculated based on two figures: a) revenue and b) cost of sales.⁶²
- [114] Having established that gross margin is the relevant measure for a reseller such as BlueCollar, the next question is what appropriate benchmarks are available for a competitive gross margin.
- [115] The Commission contends that appropriate gross margin benchmarks are gross margins in the range of 10% to 15%, which the Commission obtained from its investigations into “price gouging” and referrals for similar activities.

⁶¹ *Babelegi*, para 148.

⁶² BlueCollar’s financial expert calculated the gross profit margin in the same manner as the Commission’s economic expert ((sales less cost of sales) divided by sales). See Joint Statement of Experts, 5 February, Bundle B, p117 Table 4; and Commission’s submission dated 9 March 2021, p.405 Bundle E.

[116] According to the Commission's previous investigations, and matters relating to settlement orders that were confirmed by the Tribunal, gross margins of 10% to 15% for distributors and traders are evident from prior periods and/or more competitive emergency procurement suppliers. BlueCollar's economic expert did not strongly contest or dispute the relevance of the evidence used by the Commission's economic expert in estimating the competitive gross margin range of 10% to 15% as an appropriate benchmark. We conclude that a gross margin range of 10% to 15% is an appropriate benchmark for resellers or traders of non-perishable goods such as hand sanitiser.

BlueCollar's Cost of Sales

[117] We next consider what the experts agree on and what the disputes are between them in relation to the calculation of BlueCollar's gross profit margin.

[118] There is agreement between the Commission's economic expert and BlueCollar's financial expert on the revenue figure of R30,869,600 (excluding VAT) for the sale of hand sanitiser to SAPS during the complaint period.⁶³

[119] However, the experts differ on three issues regarding what cost items should be included under BlueCollar's costs of sales (to calculate gross margin). They differ on:

- 119.1 the treatment of VAT (on the purchase of hand sanitiser stock by BlueCollar), i.e., whether VAT inclusive or exclusive figures should be used when determining BlueCollar's costs of sales. BlueCollar's financial expert has included VAT costs, which the Commission's expert argued should be excluded since it is KSP (the holding company of Ateltico), not BlueCollar, that is VAT registered;

⁶³ Joint Statement of experts, 5 February 2021, p.114, Bundle B.

119.2 what other costs ought to be included in BlueCollar's costs of sales and what would constitute operational costs.⁶⁴ BlueCollar's financial expert included an additional amount of R3 million as "cost of sales other than material", which the Commission argued should be excluded because these costs apply to BlueCollar's business as a whole and are not project specific; and

119.3 the inclusion or exclusion of hand sanitiser stock not sold by BlueCollar to SAPS.⁶⁵ BlueCollar's expert's cost of sales figure is based on 10 105 units of hand sanitiser bought, whereas it only sold 10 000 units to SAPS. The Commission based its calculation on the 10 000 units actually sold to SAPS.

[120] The above disputes result in BlueCollar's financial expert arriving at a higher cost of sales figure for BlueCollar and a lower gross margin of 42%⁶⁶ and a mark-up of 73% (relative to the Commission's figures of 54% gross profit and 120% mark-up respectively⁶⁷).

[121] **Table 1** below summarises the agreement and disputes between the experts. We shall make cross-references to **Table 1** when we discuss the disputes in more detail below.

⁶⁴ Joint Statement of experts, 5 February, pp.114-118, Bundle B.

⁶⁵ Transcript p.463, lines 4-18.

⁶⁶ Joint Statement of experts, 5 February 2021, p.114, Bundle B.

⁶⁷ Commission's submission, 7 May 2021.

Table 1: Costs as calculated by the experts⁶⁸

DESCRIPTION	COMMISSION	BLUECOLLAR
1. REVENUE		
1.1. Revenue excluding VAT	30 869 600	30 869 600
1.2. Revenue including VAT	35 500 000	35 500 000
2. COST OF SALES (MATERIAL)		
2.1. Cost of sales (material) including goods not sold and including VAT	14 872 836	14 872 836
2.2. Cost of sales (material) excluding goods not sold and including VAT	14 718 294	-
2.3. Cost of sales (material) including goods not sold and excluding VAT	14 200 839	-
2.4. Cost of sales (material) excluding goods not sold and excluding VAT	14 052 765	-
3. COSTS OF SALES OTHER THAN MATERIAL	-	3 000 000
3.1. Consultancy fee: Mahla S Holdings	729 010	729 010
3.2. Transport: Distinctive Westpoint	525 000	525 000
3.3. Security: LTMM Consultancy Services	600 000	600 000
3.4. Security: BH Radiology	232 492	232 492
3.5. Accommodation & Catering: Rekonakong	165 000	165 000
3.6. Salary: Maponya	85 000	85 000
3.7. Salary: Mahlangu	-	123 624

⁶⁸ As per the submissions by the Commission and BlueCollar dated 7 May 2021. Certain of the amounts reflected in Table 1 have been rounded off. Items 1, 2.1, 2.3, 2.4 and 3.1 to 3.9 are as per the joint statement of the experts. Item 2.2 is as calculated by the Commission's economic expert, Mr Aproskie. Item 3 is BlueCollar's financial expert, Ms Mukuze's submission which amount has been rounded off to R 3 million and calculated by adding the amounts in items 3.1 to 3.9. Item 4 for Ms Mukuze reflects an amount as per the joint statement and for Mr Aproskie, an amount as per evidence in the Tribunal.

3.8.	Rejected Stock	-	471 494
3.9.	Miscellaneous Costs	-	68 381
4.	PROFIT SHARE/PROJECT INTEREST	4 860 065	5 198 705

[122] We next consider each of the three disputes between the experts over what cost items to include under BlueCollar's cost of sales.

Treatment of VAT

[123] In short, the factual dispute between the experts in respect of VAT relates to the true relationship between BlueCollar and Ateltico and whether BlueCollar alone supplied SAPS with the hand sanitiser, or whether it did so in partnership with Ateltico.

[124] The debate arose as a result of the invoices for sanitiser supplied to BlueCollar being made out to KSP and the ultimate invoice from Ateltico to BlueCollar reflecting the VAT inclusive amounts.

[125] The Commission was of the view that it is likely that KSP purchased the product on behalf of Ateltico as it was VAT registered and could accordingly claim the input VAT.

[126] According to the Commission, without a VAT number, BlueCollar would not have been able to claim the input VAT. If BlueCollar acted alone, as BlueCollar argued, then the calculation of BlueCollar's financial expert reflecting VAT inclusive figures would be correctly included in the cost of sales. BlueCollar's financial expert used VAT inclusive figures in the cost of sales (see item 2.1 of **Table 1**: costs of sales including VAT).

- [127] However, if BlueCollar and Ateltico formed a partnership for purposes of supplying SAPS with hand sanitiser then the cost of sales would be computed on the basis of VAT exclusive figures as the partnership would be able to claim the input VAT (since KSP was VAT registered). The Commission's economic expert therefore argued that VAT exclusive figures should be used in the calculation of BlueCollar's cost of sales (see items 2.2 and 2.4 of **Table 1**: costs of sales excluding VAT).
- [128] For purposes of the debate on VAT i.e. whether it should be included in cost of sales since it was KSP which was VAT registered, not BlueCollar, we have taken an approach in favour of BlueCollar and have used VAT inclusive figures in BlueCollar's cost of sales (as contended for by BlueCollar). On this approach, BlueCollar's gross margin of 42% and mark-up of 73% is, in our view, still indicative of a *prima facie* excessive price.⁶⁹

"Cost of sales other than material"

- [129] BlueCollar's financial expert used a broad definition of cost of sales and included the following costs under costs of sales other than material: consultancy fees,⁷⁰ transport from Durban to Gauteng (SAPS)⁷¹, security services,⁷² accommodation and catering relating to the transport,⁷³ salary,⁷⁴ rejected stock,⁷⁵ and miscellaneous costs which include fuel, entertainment and telephone.⁷⁶ This collectively amounts to an amount of approximately R3 million (see items 3.1 to 3.9 listed under *"Cost of sales other than material"* in **Table 1** above).

⁶⁹ These figures are calculated by including VAT in the calculation of cost of sales, in terms of 10 105 units of sanitiser purchased by BlueCollar and taking the full R3 million into account for *"cost of sales other than material"* (as contended by BlueCollar's financial expert). Also see Commission's calculations of 7 May 2021 contained in Excel spreadsheet, Scenario 5, reflecting a 73% gross mark-up and a 42% gross margin.

⁷⁰ Item 3.1 in Table 1.

⁷¹ Item 3.2 in Table 1.

⁷² Items 3.3 and 3.4 in Table 1.

⁷³ Item 3.5 in Table 1.

⁷⁴ Items 3.6 and 3.7 in Table 1.

⁷⁵ Item 3.8 in Table 1.

⁷⁶ Item 3.9 in Table 1.

- [130] BlueCollar's financial expert testified that she had been provided with proof of payment of R2 931 618.20 in respect of what she considered to be direct costs (as opposed to overheads) incurred by BlueCollar associated with the provision of the hand sanitiser to SAPS. She also stated that there was an amount of R 68 830 relating to Ms Mahlangu's costs which she included in her calculation of direct sales costs although not specifically accounted for, but which amount she considered as immaterial in the context of the overall project.⁷⁷
- [131] The Commission argued that BlueCollar's financial expert's approach to the calculation of costs of sales, and in particular her inclusion of costs such as transport, security, consulting fees and salaries in cost of sales, is contradicted by the evidence on the record.
- [132] This is because, considering the financials of listed entities in the record, such as those of the Spar Group, transport costs are not included in cost of sales, but rather included in the firm's operational costs.⁷⁸
- [133] The Commission ultimately argues that the financial statements on the record show that transport and other costs to the end customer are not included in cost of sales. This is despite whether the firm in question is a distributor, or manufacturer, or any other type of business. Therefore, according to the Commission, none of the additional costs that make up the alleged R3 million should be included in cost of sales, but even if one does include the R3 million, BlueCollar would still be pricing excessively.⁷⁹
- [134] We do not consider it necessary to decide the different cost accounting approaches argued for by the experts. In our assessment, even if we were to take a conservative approach in favour of BlueCollar and include the entire R3 million in cost of sales, BlueCollar's gross margin of 42% and mark-up of 73% is in our view indicative of a- *prima facie* excessive price when compared to

⁷⁷ Transcript, p.311, lines 8 – 14.

⁷⁸ Spar Group Financial Statements, p.2028. Bundle D.

⁷⁹ Transcript p.461, lines 20-21.

the relevant pricing benchmark of a gross margin of 10% to 15% which we have concluded is an appropriate benchmark for resellers or traders of non-perishable goods such as hand sanitiser.⁸⁰

Unsold inventory

[135] The Commission argued that with respect to the cost of sales, the cost can only refer to the inventory actually sold to SAPS i.e., 10 000 units.

[136] On the other hand, BlueCollar's financial expert's cost of sales figure is based on 10 105 units which is 105 units more than the 10 000 units actually supplied to SAPS (see item 2.1 of **Table 1** above "Costs of sales including goods not sold and including VAT"). If the 105 additional units are included in BlueCollar's costs of sales, this increases the costs of sales by approximately R150,000 (on a VAT exclusive basis),⁸¹ which in our view makes no material difference to the overall assessment of the excessiveness of the price. We shall therefore base our assessment on the 10 105 units as per BlueCollar's financial expert.

Conclusion on prima facie case of excessive pricing

[137] As indicated above, gross margin is the appropriate measure for firms operating as resellers or traders in the value chain. Furthermore, as also indicated above, and found in *Tsutsumani*, the Tribunal has found that gross margins of 10% to 15% are appropriate for resellers or traders of non-perishable goods such as hand sanitiser, based *inter alia* on past Commission investigations and consent order matters that were referred to the Tribunal.⁸²

⁸⁰ These figures are calculated by including VAT in the calculation of cost of sales, in terms of 10 105 units of sanitiser purchased by BlueCollar and taking the full R3 million into account for "*cost of sales other than material*" (as contended by BlueCollar's financial expert). Also see Commission's calculations of 7 May 2021 contained in Excel spreadsheet, Scenario 5, reflecting a 73% gross mark-up and a 42% gross margin.

⁸¹ This is the difference between the total cost based on all 10,105 units (R14,200,839.12) and the figure for 10,000 units used by Mr Aproskie (R14,052,765.14) – both figures in the Joint statement of experts, 27 February 2021, p.115, Bundle B.

⁸² *Tsutsumani*, paras 107 and 108.

- [138] When comparing BlueCollar's actual gross margin as determined by BlueCollar's financial expert - a gross margin of 42% and a mark-up of 73%⁸³ - it is substantially higher than the competitive gross margin for resellers of 10% to 15%. This difference amounts to a *prima facie* case of excessive pricing.
- [139] Furthermore, a comparison of BlueCollar's price of R3 550 (VAT incl.) to National Treasury's list price of 15 April 2020 of R1 635.45 (VAT incl.) reveals a material difference. BlueCollar's price is more than double the National Treasury list price and is indicative of a *prima facie* case of excessive pricing.
- [140] Taking into account a 15% gross margin as an appropriate benchmark, the Commission submitted that BlueCollar's overcharge to SAPS or the excessive profit of BlueCollar and Ateltico amounts to R9 842 734.⁸⁴ We shall round this amount off to R9.8 million in these reasons. This overcharge amount has been calculated on the best case scenario for BlueCollar in relation to the disputes between the experts regarding BlueCollar's costs of sales, i.e, including all the cost items argued for by BlueCollar and disputed by the Commission in relation to costs of sales (VAT, the additional R3 million costs other than material and 10 105 units of sanitiser).
- [141] Given the above, we conclude that the Commission has established a *prima facie* case of excessive pricing by BlueCollar. This means that the onus of showing that the price difference was not unreasonable falls upon BlueCollar.

⁸³ These figures are calculated by including VAT in the calculation of cost of sales, in terms of 10 105 units of sanitiser purchased by BlueCollar and taking the full R3 million into account for "*cost of sales other than material*" (as contended by BlueCollar's financial expert). Also see Commission's calculations of 7 May 2021 contained in Excel spreadsheet, Scenario 5, reflecting a 73% gross mark-up and a 42% gross margin.

⁸⁴ See Commission's calculations of 7 May 2021 contained in Excel spreadsheet, Scenario 5. For the reasons explained, Ateltico's profit share is not a justification for the excessive price.

ONUS SHIFT – CAN BLUECOLLAR SHOW THAT THE PRICE DIFFERENCE WAS NOT UNREASONABLE?

- [142] As the CAC found in *Babelegi*, under the reasonable test the respondent must provide a justification for its prices. In this regard, the CAC stated: "*[s]ection 8(3) covers both the s 8(2) enquiry and the case that a defendant firm must produce to show that, notwithstanding the prima facie finding, the price it charged is reasonable*". Both the determination of whether the price is excessive and the question of reasonableness are determined, *inter alia*, by the factors set out in section 8(3).⁸⁵
- [143] What then has BlueCollar proffered as a justification for the reasonableness of its price. As mentioned, the overcharge by BlueCollar in terms of its gross profit is R9.8 million and the mark-up is 73%. The gross margin is 42% higher than the 10% to 15% pricing benchmark (by 27% to 32% percent respectively).
- [144] Having given BlueCollar the benefit of including the costs that are in dispute in relation to costs of sales, the remaining cost issue over which there is a dispute between the experts is the finance costs. In accounting or economic terms, finance costs do not form part of costs of sales and are therefore not included in the calculation of gross profit.
- [145] BlueCollar's financial expert testified that she had included "finance costs" as an expense on the transaction. This appears as "profit share/"project interest" in **Table 1**.
- [146] The Commission contended that the amount included by BlueCollar's financial expert does not represent finance costs but Ateltico's profit share in terms of the partnership agreement.

⁸⁵ *Babelegi Appeal*, para 59.

- [147] The Commission alleges that BlueCollar and Ateltico were in a profit-sharing partnership. It submits that in terms of the MOA, BlueCollar and Ateltico agreed to share in the profit derived from supplying hand sanitisers to SAPS on the basis of a 60/40 split.⁸⁶
- [148] Given the alleged partnership, the Commission submitted that the finance costs were not a pure debt-financing expense but a profit-sharing relationship between partners and should be treated as such. BlueCollar's financial expert was of the view that the profit share must be treated as one would a debt-financing relationship since the profit share is recorded as an expense ("Project loan interest") on the project's income statement.⁸⁷
- [149] Therefore, this raises the question – what is the true nature of the relationship between BlueCollar and Ateltico? The issue in dispute concerns the 40% profit share of Ateltico and how that should be treated, whether it is merely debt financing or profit share from the partnership.
- [150] The amount is significant – either approximately R4.8 million (according to the Commission's economic expert) or approximately R5.2 million⁸⁸ (according to BlueCollar's financial expert) (see item 4 of **Table 1** above). Importantly the very magnitude of the alleged "interest expense" is the reason that BlueCollar argues it is a relevant consideration that should be taken into account.
- [151] The Commission on the other hand argued that the magnitude of the alleged "interest expense" in the context of this case is inextricably linked to the excessiveness of the price. In other words, the higher the price charged by BlueCollar to SAPS, the higher the profit made by BlueCollar, and the higher Ateltico's 40% profit share. It is clear that Ateltico wanted a share of the profits of the transaction rather than any typical interest payment. The agreement

⁸⁶ Founding Affidavit, paras 9 and 10. Supporting affidavit, para 66. Replying affidavit, para 40.

⁸⁷ Joint Statement of the Competition Commission and Brendmo Inc., 27 February 2021, p.116, Bundle B.

⁸⁸ BlueCollar's financial expert based this on her calculations, whereas the Commission's economic expert used the evidence in the record (Bundle A, p.71, p.75 and Bundle D, p.945). Transcript, p.460, lines 1-10.

with Ateltico was concluded in this way precisely because BlueCollar could in the context of the pandemic charge SAPS a high price, according to the Commission.

[152] BlueCollar’s economic expert contended that the Commission’s approach in treating the payments made to Ateltico as a profit share (i.e., partnership) rather than a debt cost, may have the unintended effect of potentially eliminating these kind of profit share agreements and that this will have a detrimental effect on small businesses in particular and in relation to this case the ability for small businesses to be able to compete.

[153] In our view, this argument is misplaced. It is not the principle of financing through profit share which is at issue, but rather the excessiveness of the price charged by the BlueCollar and Ateltico partnership to SAPS. If there was no excessive price charged, the issue would not arise. Furthermore, Ateltico explicitly shared in the benefits of this contravention of the Act.

What is the true nature of the relationship between BlueCollar and Ateltico?

[154] In its answering affidavit, BlueCollar admitted that the Commission’s joint partner assertion was true. However, Ateltico’s answering affidavit denies this by stating that *“BlueCollar only approached Ateltico for funding after BlueCollar had already been awarded the order from SAPS”*.

[155] The following provisions in the MOA are relevant:

155.1 The MOA clearly identifies in clause 1 that: *“the parties for the purposes of this agreement have come together for the acquisition/procurement and supply of Hand Sanitisers to the SAPS”*. The MOA is stipulated to have come into effect on the *“date of last signature⁸⁹ and... remain in force until the supply and*

⁸⁹ The last date of signature is 31 March 2020.

procurement of the hand sanitisers have terminated and the duties of both parties have been fulfilled.”⁹⁰

155.2 Clause 2 in the MOA states that Ateltico’s “role/ function ... is the procurement of the hand sanitisers, and any other roles/ functions will have to be discussed and decided between the parties”;

155.3 Ateltico agrees, at clause 3.1 to “furnish/ provide the funding for this acquisition”;

155.4 In terms of clause 3.4 of the MOA between BlueCollar and Ateltico, BlueCollar was to pay Ateltico 40% of the profits which it earned from supplying hand sanitiser to SAPS. Clause 3.4 provides that “[p]rofit sharing will come into affect (sic) after Ateltico’s costs have been recovered”, with Ateltico receiving 40% (clause 3.4.1) of the profit and BlueCollar receiving 60% (clause 3.4.2).⁹¹

155.5 Furthermore, the MOA states that: “(O)n receipt of payment from client/ SAPS, the monies received will be allocated [such that the] payments received will first be allocated/ paid to Ateltico Investments for their funding into this project before any other payments are done, BlueCollar Occupational Health confirms and agrees that they are satisfied with this allocation/ set off. The entire amount owing to Ateltico Investments will have to be first settled with the incoming payments received.”⁹²

[156] Ateltico argued that the correct interpretation of the MOA was that Ateltico loaned the funds to BlueCollar and that they were not partners. The Commission submitted that the oral explanation by Ateltico cannot detract from the provisions of the MOA which are clear and unambiguous and demonstrate a partnership agreement.

⁹⁰ Clause 2.1

⁹¹ Clauses 3.2 and 3.4.

⁹² Clause 3.1 and clause 3.2.

[157] We find that Ateltico did not merely play a passive role in the transaction as a funder as it alleges, but participated in partnership with BlueCollar and benefitted a 40% share in the profit from the prohibited conduct. We were persuaded that the relationship was a partnership for the following reasons:

157.1 It is clear from clause 3.4 of the MOA that after costs (i.e. funding costs by Ateltico) have been paid, profit sharing will come into effect. In this regard, Ms Mahlangu's evidence was that at the time of concluding the MOA with Ateltico BlueCollar had calculated the estimated costs of purchasing the 10 000 units and discussed the costs and profit with Ateltico. Ms Mahlangu states:

“...it was made mention that there are going to be expenses and cost into delivering this, and then, once that has been sorted, we have an expectation as Ateltico to a 40%.

...

The only information that was known [was] the order itself, how much was it, because they wanted to see the actual order from the client and, number two, we had quite a number of quotations that we have sourced already that we then presented to them and said that this is at what price, the estimated price on average that we're expecting to pay for each unit.”⁹³

157.2 The evidence also shows Ateltico being involved in a more active role than that of an arms-length lender. Invoices were made to and paid by KSP, on behalf of Ateltico, and KSP paid suppliers directly to facilitate the delivery of hand sanitisers to SAPS.⁹⁴ Further, an invoice shows that stock was ultimately delivered to KSP, not BlueCollar;⁹⁵

⁹³ Transcript, p.244, line 12 to p.245, line 3. See also, p.257, lines 9 to 13, and p.258, lines 2-6.

⁹⁴ First Respondent's Supplementary Answering Affidavit, Bundle A, p.361.

⁹⁵ KOA Logistics invoice, p.94, Bundle A.

- 157.3 The MOA provides that an Ateltico director is to be added as signatory to BlueCollar's business account "*which will be receiving the funds from the client (SAPS)*";⁹⁶
- 157.4 There is no surety included in the MOA. This is not consistent with a mere lender that seeks to guarantee that the loan will be paid back. As stated above, Ms Mahlangu discussed the profit and costs with Ateltico before the MOA was concluded. The 40% profit that was added therefore appears unrelated to any risk that Ateltico allegedly faced;
- 157.5 Ateltico was paid on 17 April 2020, approximately 17 days after the MOA was concluded.⁹⁷ Even if one were to assume that this was a loan arrangement with interest applied to it, and calculated the interest rate - taking into consideration the relatively short term of the loan - the interest rate that Ateltico would have charged BlueCollar (in terms of Ateltico's profit share amount) is not reconcilable with what a reasonable interest rate in terms of a debt relationship would be. The Commission's economic expert calculated the effective "interest rate" at 1 382% p.a. (simple) or 2 076 640% p.a. (compounded).⁹⁸ Such interest rate is clearly not what one would expect of a debt relationship. Furthermore, the terms of the MOA do not resemble that of a debt relationship since no reference is made to words like 'principal', 'loan', 'interest', 'debt', or 'borrowing';
- 157.6 Consistent with clause 3.4 above of the MOA, Ateltico was paid not merely finance costs but received a 40% profit share beyond its finance costs.

⁹⁶ Clause 3.3.

⁹⁷ Proof of Payment, Bundle A, p.358.

⁹⁸ Calculation of implied interest rate, Mr Aproskie, 24 March 2021.

[158] For the above reasons we find that BlueCollar and Ateltico were in a partnership.

[159] We conclude that since BlueCollar and Ateltico formed a partnership for the provision of hand sanitiser to SAPS, Ateltico's profit share should not be taken into account as justification for the excessive price. The assessment of the pricing conduct must be made in reference to the transaction as a whole, and the profit share due to Ateltico cannot be considered an expense against the project. Thus, we conclude that Ateltico's profit share cannot be used to justify the difference between the price / margin charged by BlueCollar to SAPS and the competitive price / margin.

Conclusion on reasonableness

[160] As indicated above the relevant margin for a reseller such as BlueCollar is gross margin, since it was not involved in the manufacturing of the hand sanitiser.

[161] BlueCollar argued that as Ms Mahlangu had never supplied hand sanitiser before and did not know how to price for the risks and costs associated with it, BlueCollar's pricing was justifiable, based on BlueCollar's usual gross margins of between 42% and 55%.⁹⁹

[162] The Commission in response stated that margins of 42% to 55% may be appropriate in the context of BlueCollar's standard day-to-day business of providing occupational health services. However, they are not appropriate in the context of a distributor or trader, which is the most apposite comparator for BlueCollar supplying hand sanitiser to SAPS as a reseller in a crisis period.

[163] Ms Mahlangu's testimony confirmed the relatively simple distribution model of buying as a trader, selling and getting the product to the customer, in this case

⁹⁹ Transcript, p.472.

SAPS: "...we don't have to manufacture anything, we just need to find a supplier and the[n] go and deliver".¹⁰⁰

- [164] We conclude that BlueCollar's comparison to its own company margins of 42% to 55% is misplaced in an excessive pricing assessment with the context of a pandemic. One cannot in an excessive pricing case compare mark-ups / margins relating to altogether different types of activities (in this case occupational health services) as an appropriate benchmark for the competitive mark-up / margin for the resale of hand sanitiser.
- [165] In the circumstances, we find that the prices charged by BlueCollar to SAPS were not reasonable. Having traversed BlueCollar's cost justifications for the provision of the sanitiser to SAPS, BlueCollar has been unable to show that its price is reasonable. BlueCollar thus has failed to discharge the onus in section 8(2) to show that its price charged to SAPS for hand sanitiser was reasonable. This means that the overcharge amount to SAPS of R9.8 million based on BlueCollar's actual gross margin of 42% compared to a competitive gross margin of 15%, as indicated above, remains.
- [166] Given the above, we find that the prices charged to SAPS for hand sanitiser were significantly higher than a competitive price and that the price difference is unreasonable.

CONSUMER DETRIMENT

- [167] We now turn to the final requirement of section 8(1)(a) which is that the excessive price must have been charged to the "*detriment of consumers or customers*". As stated by the CAC in *Mittal*, this assessment involves a value judgement.
- [168] BlueCollar appears to contend that detriment cannot be shown where there is only one "*consumer and buyer*", i.e., SAPS. However, the CAC in *Mittal* clearly

¹⁰⁰ Transcript, p.239.

determined that an “*excessive price may be charged to a single customer*”. Accordingly, detriment to a single customer or consumer constitutes sufficient grounds on which to find that BlueCollar has charged an excessive price in breach of section 8(1)(a) of the Competition Act.

[169] Again, as found by the CAC in *Babelegi* context matters and one must consider SAPS crucial role during the pandemic. SAPS is the customer detrimentally affected by the excessive price charged. It is also the consumer, as are its employees who are to be provided with hand sanitiser. Importantly, SAPS serves the public of South Africa. Furthermore, government entities, as well as private entities, are recognised as customers in terms of the Competition Act. There can be no doubt that conduct such as excessive pricing impacts negatively on Government’s resources, puts pressure on the fiscus and negatively impacts taxpayers. Moreover, the Covid-19 pandemic created a crisis situation placing consumers in a vulnerable situation, in this case where the product in question was critical to prevent the spread of the corona virus.

[170] Furthermore, the large size of the contract, the number of units involved (i.e., 10 000 units actually supplied to SAPS) and the overcharge to SAPS of R9.8 million, add to the severity of the exploitative behaviour.

[171] Under the circumstances, we find that BlueCollar (acting on behalf of and/or within the ambit of its partnership with Ateltico) engaged in excessive pricing to the detriment of customers or consumers.

Can Ateltico be held liable for the administrative penalty?

[172] Ateltico argues that the complaint against it is misplaced and that the elements of section 8(1)(a) of the Competition Act cannot be established against Ateltico because the relevant conduct relates to BlueCollar’s conduct in respect of the

contract with SAPS “*in which Ateltico played no part...and played no role in pricing the hand sanitiser in question*”.¹⁰¹

[173] Ateltico’s argument centres around the fact that “*there was no relationship between the entities at all ‘when BlueCollar was responding to the RFQ’*”¹⁰².

[174] Ateltico further argues that the Commission’s notice of motion does not seek an order that Ateltico abused its dominant position or charged an excessive price.

[175] As already stated, we note that although the Commission’s Notice of Motion does not specifically seek an order declaring Ateltico’s conduct to be in contravention of section 8(1)(a) of the Competition Act, upon consideration of the pleadings, there is no doubt that this relief is sought.¹⁰³

[176] Further, the Commission submits that the prohibition of excessive pricing relates to a “*dominant firm*”.

[177] The Commission points to the definition of a “*firm*” contained in section 1 of the Competition Act which provides that a “*firm*” includes a partnership.

[178] In this regard, we look to what is said in *Delatoy*¹⁰⁴ where the Tribunal stated:

“[38] The Act does not define a “firm” but tells us what a “firm” includes i.e. “firm includes a person, partnership or a trust.

[39] It is clear from what the word “firm” includes that it is not restricted to or limited to liability companies, but is inclusive of natural persons, trusts and partnerships...”

¹⁰¹ Second Respondent’s Answering Affidavit, para 10.

¹⁰² Second Respondent’s Answering Affidavit, para 27.

¹⁰³ Supporting Affidavit to the Complaint Referral, para 3, read with paras 66, 67, 69, 70 and 71. Also Replying Affidavit, paras 42, 237 to 239, 252 to 254 and 261.

¹⁰⁴ *Competition Commission v Delatoy Investments (Pty) Ltd and Others* (CR212Feb15) [2016] ZACT 37 (14 April 2016), paras 38 and 39 (“*Delatoy*”).

[179] In *Delatoy* the Tribunal in considering whether the first to eleventh respondents constituted a firm for the purposes of the Competition Act, accepted and understood that:

“the word ‘firm’ can mean different things in different contexts. It could mean an economic entity, or a group where the component parts of it are related to each other in such a way that they constitute a single economic entity.”¹⁰⁵ (emphasis added)

[180] The Tribunal in *Delatoy* upheld the Commission’s argument that when assessing whether an entity constitutes a firm in the competition context,

“one must not look at the company law perspective of separate legal personality ... the relevant concept is the economically functional relationships between entities”.¹⁰⁶ (emphasis added)

[181] The Tribunal also looked to how the European jurisprudence has come to interpret an “*undertaking*” observing that a choice has been made in some cases not to be fixated with the structure of a collection of entities, but to rather concentrate on how the entities are put to work in a fashion, which does not observe the separation of persons.¹⁰⁷

[182] On the evidence, the economically functional relationship between BlueCollar and Ateltico had features that go above and beyond a mere “funder” and the typical features of a loan.

[183] *Delatoy* confirms that where a firm benefits from the anti-competitive behaviour, that firm should also be subject to whatever consequences come from that behaviour. Regardless of whether the legal form of partnership was met *Delatoy* provides that in terms of the Competition Act, this is but one specie of a “firm” as understood in competition terms.

¹⁰⁵ *Delatoy*, para 40.

¹⁰⁶ *Delatoy*, para 41.

¹⁰⁷ *Delatoy*, para 54.

- [184] On an application of the law to the facts before us, we find that BlueCollar and Ateltico combined to form a partnership which constituted a “*firm*” within the definition of the Competition Act for the purposes of procuring hand sanitiser and supplying such hand sanitiser to SAPS pursuant to the RFQ of 21 March 2020.
- [185] We find that BlueCollar acted on behalf of or within the ambit of its partnership with Ateltico. Ateltico benefitted from the prohibited conduct through its partnership and profit sharing with BlueCollar and therefore is also liable for the penalty for contravening section 8(1)(a) of the Competition Act.

REMEDIES

- [186] In its Notice of Motion, the Commission seeks *inter alia* the following relief against BlueCollar and Ateltico:

- 186.1 Declaring that BlueCollar’s pricing conduct for hand sanitiser in 25L containers during the period 21 March 2020 to 15 April 2020 has contravened the provisions of section 8(1)(a) of the Competition Act, read with Regulation 4 of the Consumer Protection Regulations;
- 186.2 Interdicting and restraining BlueCollar from engaging in any further conduct in contravention of section 8(1)(a) of the Competition Act;
- 186.3 Directing that BlueCollar and Ateltico are jointly and severally liable for the payment of an administrative penalty, in terms of section 58(1)(a)(iii) of the Competition Act, equal to ten percent of “*its*” annual turnover in the Republic and “*their*” exports from the Republic during “*its*” preceding financial year, the first paying absolving the other;

186.4 Granting such further order as the Tribunal determines appropriate, to remedy the “*Respondent’s*” conduct in contravention of section 8(1)(a) of the Competition Act; and

186.5 Granting such further and / or alternative relief as the Tribunal may deem appropriate.

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

[188] Having found that BlueCollar engaged in excessive pricing to the detriment of customers or consumers, and that BlueCollar acted on behalf of or within the ambit of its partnership with Ateltico, we now turn to determining an appropriate penalty.

[189] The Commission argued that the Tribunal should apply the same methodology as in the *Dis-Chem* matter to calculate an appropriate penalty. In that case the Tribunal considered the treble damages penalty calculation methodology applied in the US.¹⁰⁸ It entails multiplying the overcharge by three. The Commission argued that this is consistent with section 59(3) of the Act since the penalty determination in terms of section 59(3) includes the consideration of loss or damage suffered as a result of the contravention, which is what the treble damages methodology seeks to achieve. This approach seeks to deter others from engaging in price gouging. The Commission pointed out that the Tribunal in *Dis-Chem* ultimately doubled the overcharge amount.

¹⁰⁸ *Dis-Chem*, at para 243.

[190] The Commission further argued that it would be appropriate to cap the penalty to an amount of 10% of the combined turnover of BlueCollar and Ateltico. In the circumstances of this case the Commission submitted that the revenue generated from the SAPS hand sanitiser procurement and supply, namely R35 500 000 (incl. VAT) be used as a basis for determining the statutory cap in respect of the firm.

[191] BlueCollar argued that no penalty should be imposed.

[192] In relation to which turnover should be applied to determine a penalty, BlueCollar argued that it is important to note that BlueCollar delivers occupational health services and not hand sanitiser products. Even more so the product was delivered as a once-off delivery to SAPS. Therefore, should a penalty of up to 10% be imposed on BlueCollar's annual turnover, that penalty should not be imposed on BlueCollar's business which delivers occupational health services. This service it argued is not at all part of this dispute before this Court and would be wholly *contra bonos mores* to impose a penalty upon.

[193] Ateltico argued that no administrative penalty may be imposed by the Tribunal on Ateltico, since no finding is sought against Ateltico that it has contravened section 8(1)(a).

Our assessment

[194] An administrative penalty may be imposed under section 59(1)(a) of the Competition Act for a contravention of section 8(1)(a) which prohibits excessive pricing. The Tribunal has an unfettered discretion to determine the quantum of the penalty to be imposed after consideration of the factors listed under section 59(3) (which penalty "*may not exceed 10 per cent of the firm's annual turnover in the Republic and its exports from the Republic during the firm's preceding financial year*" - section 59(2)).

[195] The CAC in *Isipani* confirmed that the “*power of the Tribunal to impose a penalty on an errant party is one that lies within its discretion. It is a discretion that is wide and cannot be fettered even by its own Guidelines or policies.*”¹⁰⁹

[196] In *Babelegi* the CAC confirmed that the determination of an appropriate penalty is not a precise scientific determination.¹¹⁰ This matter involves excessive pricing in the context of the Covid pandemic.

[197] Section 59(3) stipulates the factors that the Tribunal must consider in determining an appropriate penalty:

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

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

197.3 the behaviour of the respondent;

197.4 the market circumstances in which the contravention took place, including whether, and to what extent, the contravention had an impact upon small and medium businesses and firms owned or controlled by historically disadvantaged persons;

197.5 the level of profit derived from the contravention;

197.6 the degree to which the respondent has cooperated with the Commission and the Tribunal;

197.7 whether the respondent has previously been found in contravention of the Competition Act; and

¹⁰⁹ *Isipani Construction (Pty) Ltd v Competition Commission* (144/CAC/Aug16CT, 019950) [2017] ZACAC 3 (14 September 2017), para 30.

¹¹⁰ *Babelegi* Appeal, para 71.

197.8 whether the conduct has previously been found to be a contravention of the Competition Act or is substantially the same as conduct regarding which Guidelines have been issued by the Competition Commission in terms of section 79.

[198] In *Southern Pipeline Contractors*, the CAC confirmed that an administrative penalty should promote the important objective of deterrence, and that it “*should be proportional in severity to the degree of blameworthiness of the offending party, the nature of the offence and its effect on the South African economy in general and consumers in particular*”.¹¹¹ These principles were recently reconfirmed by the CAC in *Babelegi*.¹¹²

[199] In our view, most of the factors listed in section 59(3) above are not in favour of BlueCollar:

199.1 The conduct concerned is particularly egregious when one considers its social consequences. BlueCollar is found to have exploited a pandemic by charging excessively for goods i.e., hand sanitiser that is crucial for the combatting of the pandemic. At the time at which the conduct took place, there was no other defence against Covid-19 which was taking human lives at a monumental pace. The penalty needs to express the disdain for price gouging in particular, as a form of excessive pricing.

199.2 The price charged to SAPS was found to be excessive and the overcharge to SAPS (which Ateltico also profited from) was R9.8 million.

[200] The factors in favour of BlueCollar taken into account in mitigation is the fact that BlueCollar is a first-time offender.

¹¹¹ *Southern Pipeline Contractors and Another v Competition Commission* [2011] 2 CPLR 239 (CAC), para 9.

¹¹² *Babelegi Appeal*, para 72.

- [201] BlueCollar's economic expert also argued that BlueCollar's status as a black-female owned business must be considered. However, we do not find that BlueCollar's status as a black-female owned business exonerates it from the consequences arising from a contravention of section 8(1)(a) of the Competition Act. As was held in *Eldan*¹¹³ status as an HDP provider does not exonerate respondents from adverse findings and any alleged hardship faced by the respondent (BlueCollar in this case) does not outweigh the broader interests of justice and public policy.
- [202] There is no doubt that when a firm profits from excessive pricing, the amount by which, in this case Government, is overcharged, impacts negatively on the fiscus and Government's budget, as well as on taxpayers. Furthermore, the penalty amount for excessive pricing should be such that it acts as a deterrent to other firms doing the same, specifically in the context of exploitative conduct during a crisis situation. We find that the aggravating factors, specifically, the exploitative conduct of BlueCollar, by far outweigh the one mitigating factor in this case.
- [203] Given that the aggravating factors, specifically, the exploitative conduct of BlueCollar, by far outweigh any mitigation, and the principle that the penalty should promote the important objective of deterrence (as indicated by the CAC), read with the significant overcharge to SAPS during a crisis period, we find that it is appropriate to impose a maximum penalty of 10% on the turnover of R35 500 000 (incl. VAT) derived from the sale of the hand sanitiser to SAPS.
- [204] This amount does not exceed the statutory cap in section 59(2) of the Competition Act. We consider the firm to be the BlueCollar and Ateltico partnership and the appropriate preceding financial year to be the year ending 28 February 2021. The turnover derived from the sale of hand sanitiser to SAPS was in the year ending 28 February 2021 and it is common cause that

¹¹³ *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa*, CR024May15/SA073Jul20.

this turnover was R 35 500 000 (incl. VAT). 10% of this, applied as the statutory cap, is R 3 550 000.

[205] We note that this penalty amount is significantly lower than the excess profit (i.e., the overcharge) derived by BlueCollar acting in partnership with Ateltico. However, the statutory cap of 10% limits the penalty amount that can be imposed.

[206] It is noteworthy that in terms of section 65(6) of the Competition Act, a person who has suffered loss as a result of a prohibited practice (in this case SAPS), may commence action in a civil court for damages arising out of a prohibited practice.

[207] We find BlueCollar and Ateltico, given that Ateltico benefitted from the prohibited conduct through its partnership and profit sharing with BlueCollar, to be jointly and severally liable for the payment of the abovementioned administrative penalty, the one paying the other to be absolved.

ORDER

We find that:

- [1] BlueCollar (acting on behalf of and/or within the ambit of its partnership with Ateltico) has contravened section 8(1)(a) of the Act during the period 5 April 2020 to 29 April 2020.
- [2] BlueCollar and Ateltico are jointly and severally liable to pay an administrative penalty of R 3 550 000 within 30 business days of the date of this order, the one paying the other to be absolved.
- [3] There is no order as to costs.



Ms Mondo Mazwai

3 April 2023

Date

Mr Andreas Wessels and Ms Andiswa Ndoni concurring

Tribunal Case Manager:	Ms Mpumelelo Tshabalala
For the Applicant:	Ms Maya Swart
For the First Respondent:	Adv Kirsty Wilson, instructed by Mpoyana Ledwaba Attorneys
For the Second Respondent:	Mr Jonathan De Wet of De Wet Leitch Hands Inc.