COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 018580, 018598,018788
(017160, 017152)

In the applications for condonation between:

COUNCIL FOR MEDICAL SCHEMES **Applicant**

And

SOUTH AFRICAN MEDICAL ASSOCIATION **Respondent**

And

In the stay application matter between:

SOUTH AFRICAN MEDICAL ASSOCIATION **Applicant**

And

COUNCIL FOR MEDICAL SCHEMES **Respondent**

In Re:

The Complaint referral between:

COUNCIL FOR MEDICAL SCHEMES **Applicant**

and

SOUTH AFRICAN PAEDIATRIC ASSOCIATION **First Respondent**

SOUTH AFRICAN MEDICAL ASSOCIATION **Second Respondent**

And

In Re:
The Complaint referral between:

COUNCIL FOR MEDICAL SCHEMES **Applicant**

and

SOCIETY FOR CARDIOTHORACIC SURGEONS OF SOUTH AFRICA **First Respondent**

SOUTH AFRICAN MEDICAL ASSOCIATION **Second Respondent**

Panel	:	Yasmin Carrim (Presiding Member) Mondo Mazwai (Tribunal Member) Fiona Tregenna (Tribunal Member)
Heard on	:	09 October and 03 November 2014
Order issued on	:	1 December 2014
Reasons issued on	:	1 December 2014

Consolidated Decisions and Orders for Applications under case numbers: 018580, 018598, and 018788

Introduction

[1] On 09 October and 03 November 2014 the Competition Tribunal ("Tribunal") heard three matters, namely two applications seeking condonation (herein referred to as "the condonation application") brought by the Council for Medical Schemes ("CMS"), in relation to the late filing of two complaints that it referred to the Tribunal in 2013 under s51(1), as well as a stay application (herein referred to as "the stay application") brought by the South African Medical Association ("SAMA") in relation to the same complaint referrals.

[2] CMS is a juristic person established in terms of section 3 of the Medical Schemes Act [1]("MSA"). CMS was established as a regulatory authority to *inter alia*, control and co-ordinate the functioning of medical schemes in a manner that is complementary with the national health policy.

[3] SAMA is a non-profit organisation incorporated and registered in terms of the company laws of the Republic of South Africa. SAMA represents all medical

[1] Act 131 of 1998.

practitioners registered to practise as medical practitioners in terms of the Health Professional Act ("HPA"). [2]

[4] CMS' complaint referrals concern billing guidelines that were approved by SAMA in 2009. The first complaint relates to the insertion in the Doctors' Billing Manual of a descriptor medical tariff, which was adopted and published by SAMA and endorsed by the South African Paediatric Association ("SAPA")[3]. This decision had the effect of including an additional category of neonates, thereby entitling neonatologists or paediatricians to bill an extra 50% to the tariff payable for neonates requiring intensive care.[4] CMS contends that the conduct of SAPA and SAMA constitutes the act of directly or indirectly fixing a purchase or selling price or any other trading condition in contravention of section 4(1)(b)(i) of the Competition Act[5] ("the Act").

[5] The second complaint relates to the billing guidelines that were determined by the Society for Cardiothoracic Surgeons of South ("SOCTSA"),[6] and circulated to all cardiothoracic surgeons in South Africa in 2009. The guidelines were then approved by SOCTSA and SAMA in 2010.[7] CMS submits that this conduct by SAMA and SOCTSA is an agreement between parties in a horizontal relationship and involves directly or indirectly fixing a purchase or selling price or any other trading condition, thus in contravention of section 4(1)(b)(i) of the Act.[8]

[6] The referrals emanate from a notice of non-referral that was issued by the Competition Commission ("Commission") pursuant to two complaints that were lodged by CMS with the Commission on 21 May 2012. In its notice of non-referral, the Commission advised CMS that it believed that the conduct

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[2] Act 56 of 1974.
[3] SAPA is an association representing paediatricians and neonatologists, or whose members are paediatricians, registered to practise as such under the HPA and compete with each other in providing specialist health care services that they are qualified to provide.
[4] See page 291 of the record in the Stay application trial bundle, in CMS's referral to the Tribunal.
[5] Act 89 of 1998, as amended
[6] SOCTSA is a non-statutory public company representing cardiothoracic surgeons registered to practise as cardiothoracic surgeons in terms of the HPA. SOCTSA describes itself as an official group of SAMA which aims to represent the interests of cardiothoracic surgeons in South Africa, to promote the practice of Cardiothoracic Surgery and develop good relations with their societies in South Africa abroad.
[7] See page 383 of the Stay application bundle, in CMS's complaint referral to the Tribunal.
[8] Ibid

CMS complained of gave rise to a likely contravention of section 4(1)(b)(i) of the Act. However given that the Commission had embarked on a Healthcare Market Inquiry ("Inquiry"), primarily focused on the rising costs of health care in South Africa in which the subject matter of the CMS complaints, namely the determination of the tariff guidelines by healthcare providers would be investigated, it elected not to refer CMS' complaints to the Tribunal. In its letter, the Commission advised CMS that the non-referral was made without any decision by the Commission on the merits of the complaints, and CMS was thus free to exercise its rights in terms of section 51(1) of the Act and self-refer the matters to the Tribunal.[9] CMS did thereafter pursue what it believes it is entitled to, its rights under s51(1) of the Act.

[7] In response to the referrals by the CMS, SAMA launched a review application in the Gauteng High Court, which, *inter alia,* raised the question whether it was competent for CMS, an organ of state established under the Medical Schemes Act,[10] to pursue a complaint referral under section 51(1) of the Act.

[8] In the course of the parties' engagements regarding the review, it was pointed out to the CMS that its referrals to the Tribunal were out of time. CMS then filed a condonation application. SAMA opposed this application and filed its application to stay the proceedings at the Tribunal pending the outcome of the review in the High Court. CMS on the other hand opposed the stay proceedings on the basis that the Tribunal was the proper forum in which to canvas all the matters raised by SAMA in its review application.

Condonation application

[9] SAMA argued that we should stay the condonation application and all further proceedings in our forum because the review application raised a fundamental question as to the competence of the CMS to self-refer a complaint to this Tribunal. If the High Court found that it was not competent for the CMS to self-refer a complaint to this Tribunal then the matter would

[9] See pages 14-16 of the Condonation application bundle, in the Commission's letter of no referral to CMS.
[10] Act 131 of 1998.

end. There would be no need for us to consider any further aspects of it, including the condonation application. However the question arose whether the Tribunal would be able to consider a stay application of "all further proceedings", given that non-compliance with the procedures of the Tribunal might, as a matter of technicality, result in the matter not being properly before us, and that we might have before us a 'chicken or egg' situation as to which ought to be decided first.

[10] It was conceded eventually in reply by counsel for SAMA that if we were required to condone the late filing of the referral in order to "reach" a decision on the stay, SAMA would not oppose it. In our view, this concession was helpful in cutting through this dilemma. The granting of condonation, on the basis of a mere irregularity would remove any uncertainty about whether, technically, the matter was properly before the Tribunal. Moreover, the complaints make serious allegations about the impact of the tariff guidelines, as agreed between medical specialists and SAMA, on the cost of health care to vulnerable consumers. Were we to refuse condonation now instead of later and in the event that SAMA is unsuccessful in the review application, undue delays might be visited upon the resolution of a matter of great importance to all the parties concerned.

[11] All that remains is for us to satisfy ourselves that CMS has shown good cause why the late filing ought to be condoned.

[12] In an application to condone non-compliance with Tribunal rules the applicant must show good cause why the non-compliance ought to be condoned.[11] Good cause requires an explanation that the Tribunal would find adequate and acceptable in the circumstances of that particular case.[12] We have previously emphasized that courts have consistently refrained from attempting to formulate an exhaustive definition of "good cause" because it would

[11] Rule 54

[12] See Independent Estate Agents Action Committee & Kwazilu-Natal Property Services Ltd & Others, Case No: 25/CR/Apr02; Mapula Restaurant vs. Coca-Cola Fortune (Pty) Ltd, Case No: 91/CR/Aug07, paragraph 38, page 9; Mpho Makhathnini & Others vs. Glaxosmithkline South Africa (Pty) Ltd & Others, Case No: 34/CR/Apr04, paragraph 17, page 4.

hamper unnecessarily the exercise of the discretion vested in the Court.[13] In exercising its discretion whether or not to condone non-compliance with its rules, the Tribunal can have regard to a number of factors, including whether good cause was shown for the non-compliance, fairness to both sides, the degree of non-compliance and the explanation thereof, the prospects of success, prejudice suffered, the convenience of the Tribunal and the avoidance of delay in the administration of justice.[14] The Tribunal has however placed less weight on the requirement of the prospect of success in a condonation application, in instances where the applicant in the application has not had the benefit of a hearing in open court. [15]

[13] In this case the explanation was that the late filing occurred despite CMS having instructed its former attorneys timeously. CMS' current attorneys have been unable to establish why their predecessors did not file the referrals on time. The filing was a mere 5 days late. The substance of the complaints is important not just because it implicates the right to access to health care services, as entrenched in section 27 of the Constitution,[16] but because it also raises rule of law concerns (in the form of compliance with orders of this Tribunal). The Commission has even itself recognised that the conduct complained of gives rise to a likely contravention of section 4(1)(b)(i) of the Act and is also possibly in breach of a consent order of the Competition Tribunal dated 26 April 2004[17]. Finally SAMA has not demonstrated any prejudice to it at all flowing from the fact that the self-referrals were filed a few days late.[18] Having regard to all of these factors, we are of the view that good cause has been shown. The late filing of the referrals by CMS is hereby condoned.

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[13] See Mpho Makhathnini & Others vs. Glaxosmithkline South Africa (Pty) Ltd & Others, Case No: 34/CR/Apr04, paragraph 17, page 4.
[14] See Mapula Restaurant vs. Coca-Cola Fortune (Pty) Ltd, Case No: 91/CR/Aug07, paragraph 38, page 9.
[15] Ibid: paragraph 25, page 6.
[16] The Constitution of the Republic of South Africa Act 108 of 1996.
[17] See Competition Commission vs. South African Medical Association, Case no: 23/CR/Apr04.
[18] See Mapula Restaurant vs. Coca-Cola Fortune (Pty) Ltd, Case No: 91/CR/Aug07, paragraph 38, page 9; Computicket (Pty) Ltd vs. The Competition Commission, Case No: 20/CR/Apr10, paragraph 28, page 8;

[14] We now turn to consider the stay application.

Stay application

[15] SAMA submitted that the two complaint referrals brought by CMS be stayed pending the outcome of the review application. If the review application is successful, the complaint referrals will be invalid and will have caused unnecessary wasted time and expenses, as well as substantial prejudice to SAMA if pursued in the interim.[19]

[16] The review application challenges the referral on a number of grounds. The first of which is that CMS' decision to enforce competition matters, which is the remit of the Competition Commission, is *ultra vires* the MSA. The MSA, read together with section 41(1)(g) of the Constitution, does not empower the CMS, an organ of state established with a mandate to act on behalf of the beneficiaries of medical schemes, to enforce competition matters under the Competition Act. While the MSA entitles the CMS to litigate in civil proceedings and as part of its enforcement functions under the MSA, its remit, as an organ of state is limited to the relationship between medical schemes and the beneficiaries under those schemes.

[17] SAMA also challenged the referrals on the basis that the decision was *ultra vires* the Competition Act. Seemingly this involves two grounds, namely that the Competition Act, read with a memorandum of understanding ("MOU")[20] between the Commission and the CMS, which regulates the relationship between the two agencies, confers primacy to the Commission as an enforcer of competition matters under the Competition Act. A second ground put forward is that the CMS as an organ of state could not be a complainant because the definition of complainant in section 1(1)(iv) of the Act only contemplated private complainants and not organs of state such as the CMS.

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[19] See pages 18-19 of the Stay application bundle.
[20] Memorandum of Agreement entered into between The Competition Commission and Council for Medical Schemes, no. 35759, dated 12 October 2012.

[18] SAMA had also launched the review application in terms of the Promotion of Administrative Justice Act [21]("PAJA"), alternatively on the basis that the impugned decisions by CMS violate the doctrine of legality and the rule of law as provided for under section 1(c) of the Constitution.[22] SAMA submitted that the review application has prospects of success, and the balance of convenience favours the stay until such time as the review application has been finally determined.

[19] Another factor in support of the stay put forward by SAMA was that the Commission's Inquiry into the health sector currently underway will address the issue of tariff guidelines. The interests of justice required that the Tribunal ought not to embark on this proceeding and CMS should await the outcome of the Commission's Inquiry. [23]

[20] CMS, on the other hand, submitted that the stay application should be dismissed because the Tribunal, and not the High Court, is the right forum to adjudicate the substantive dispute.[24] SAMA must show reasonable prospects of success, coupled with the requirement that SAMA must show that the issue concerned falls entirely outside the jurisdiction of the Tribunal.[25] If SAMA cannot satisfy both these requirements, then on this basis alone no stay can be granted.

[21] A great deal of time was spent on the issue of the Tribunal's jurisdiction, stemming ostensibly from an earlier claim by CMS that the Tribunal enjoyed exclusive jurisdiction to hear the issues raised by SAMA in its review application. This was vehemently opposed by SAMA on the basis that the Tribunal, as a specialist body established under the Competition Act did not enjoy jurisdiction over the interpretation of the MSA or to decide its own powers under the Competition Act, This was a matter only for the High Court.

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[21] Act 3 of 2000.
[22] See page 21 of the Stay application bundle.
[23] See page 56 of the Transcript of the hearing dated 09 October 2014.
[24] See page 897 of the Stay application bundle.
[25] See page 4 of CMS's Heads of argument.

At the hearing of the matter the CMS conceded that at the very least the Tribunal and the High Court enjoyed concurrent jurisdiction to consider the lawfulness or otherwise, of CMS as a complainant under both the MSA and the Competition Act.

[22] In our view, the debate around jurisdiction conflated the two main basis put up by SAMA in support of its *stay* application with the review application itself. On the one hand there is the review application lodged in the High Court on the basis of the "public law grounds" which include questions whether the CMS is acting *ultra vires* the MSA, in contravention of section 41(1)(g) of the Constitution, unlawfully (either under PAJA or under the Constitutional standard of legality) and *ultra vires* the Competition Act. The second basis which could be labelled a "quasi *lis alibis pendens*" ground - in the sense that the matter is being considered elsewhere and quasi because that Inquiry is not equivalent to the evaluation of the specific complaints - revolves around the fact that the Commission has embarked on an Inquiry into the entire health sector in which the issue of tariff guidelines, in general, would be under consideration.

[23] The determination of all the public law issues is located firmly in the inherent jurisdiction of the High Court. Even if for the sake of argument, we were to assume there was some concurrent jurisdiction between the High Court and the Tribunal in respect of these issues, we are not required to determine the review application simply because that application has been launched in the High Court and not in the Tribunal. Nor are we required to decide the ambit of our jurisdiction *vis-as-vis* that of the High Court. All that we have to decide is whether a case has been made out to grant a *stay* of our proceedings in light of the two processes currently underway which may have a bearing on the complaints that have been referred to us.

[24] In other words, relevant to the consideration of the stay application are two central factors, the first being that there is currently underway a review application in the High Court, on the basis of the "public law grounds", of the decision by CMS to self-refer. While we are not required to decide the review application itself, we are required, as was urged upon us by CMS to consider

whether each of these grounds had any *merit* so as to determine the "reasonable prospects of success" as set out in *Novartis*[26] by this Tribunal for the grant of a stay. The purpose of this exercise is to assess whether a review application has been launched in another forum simply to "switch the game away from the Tribunal"[27] and to cause delay in the resolution of the alleged contraventions of the Competition Act. The second of these, namely the "quasi *lis alibi pendens*" basis, involves the fact that the Commission has embarked on an industry wide inquiry in which the subject of tariff guidelines is to be considered, the outcome of which would have a significant bearing on the substance of these complaints. SAMA argues that the Commission's Inquiry will address CMS complaints and for this reason we should stay the referrals.

Public law grounds

[25] We were urged by CMS to adopt the approach set out in *Novartis* in order to determine whether the stay should be granted. In *Norvatis,* the Tribunal, following the approach in *Mhlungu,*[28] held that to determine whether a stay application should be granted or denied, the test to be applied comprises three requirements, namely, whether the applicant has reasonable prospects of success in the High Court review, whether it is in the interests of justice to stay the proceedings, and the balance of convenience.[29] The Tribunal went on to say that in deciding whether to grant a stay, the reasonable prospect of success is of course, to be understood as a *sine qua non* of a referral (read "stay"), not as in itself a sufficient ground. The definition for a stay is a request for a delay and an unwarranted delay of a proceeding is unjust, more especially when the applicant fails to show that the referral has reasonable prospects of success.[30]

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[26] Novartis SA (Pty) Ltd vs. Main Street 2 Street 2 (Pty) Ltd (2), Case No: 22/CR/B/Jun01,
[27] As articulated by counsel on behalf of CMS
[28] S vs. Mhlungu and Others 1995 (3) SA 867 (CC).
[29] See Olympic Passenger Service (Pty) Ltd Ramlagan 1957 (2) SA 382(D) at 383F, where it was held that balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against prejudice of the respondents if the interdict be granted.
[30] Supra at footnote 23, paragraph 16, page 6.

[26] SAMA also accepted that the test had three elements but suggested that the Tribunal should adopt a lower threshold relying on the *American Cyanamid* case that *"the claim is not frivolous and vexatious; in other words, that there is a serious question to be tried"*.[31] This was discussed by the Tribunal in *Monsanto*[32], but was rejected. On appeal, the Competition Appeal Court ("CAC")[33] confirmed the Tribunal's approach, saw no reason to depart from earlier decisions in which the basis for a stay was set and assessed the matter based on the reasonable prospect of success, the interest of justice and balance of convenience.

[27] While we appreciate that the CMS is not a private complainant pursuing private interests, its decision to embark on enforcement of competition matters certainly raises matters of public concern and questions of regulatory remit. This is a matter that warrants consideration by the High Court, the outcome of which would have relevance for other regulators who may be faced with similar questions. If resolved in favour of SAMA, it would not only put an end to the proceedings brought by the CMS in this forum, thereby avoiding a lengthy trial and inconvenience to the respondents (in the referral) but would also provide guidance to other regulators wishing to embark on similar courses of action. While the granting of a stay would cause certain delays in the resolution of the referrals by the CMS, it does not follow that the resolution of the substantive complaint need endlessly be delayed.

[28] Accordingly, we find that the prospects of success are not unreasonable and the interests of justice and the balance of convenience favour the granting of a stay application pending the determination of the review application.

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[31] See American Cyanamid Co vs. Ethicon Ltd [1975] 1 All ER 504 at page 510.

[33] See Monsanto South Africa (Pty) Ltd & Others vs. Bowman Gillfillan & Others, Case No. 109/CAC/JUN11, paragraph 15, page 17.

Quasi-lis alibi pendens grounds

[29] Given that the stay has been granted on the basis that there is currently a review application underway in the High Court which raises a fundamental, and in our view an important question about the competency of a regulatory body such as the CMS to self-refer a complaint in our forum, we do not consider it necessary to make a decision based on this ground. However we make the observation that the Commission's Inquiry into the health sector may take a considerable length of time and that its consideration of tariff guidelines may be of a general nature and not sufficiently specific to the respondents' (in the referrals) tariffs which constitute the subject matter of these referrals. Were SAMA to be unsuccessful in its review application, and the matter was remitted to the Tribunal, it is not axiomatic that this Tribunal would grant a stay simply because of the Commission's Inquiry into the sector. Other considerations such as harm to beneficiaries of medical schemes and consumers in general may be considerations that may militate against a decision to stay the proceedings. But that is a matter to be decided at a later stage.

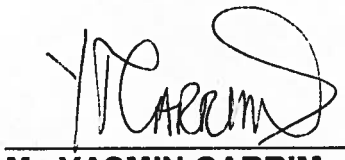
Costs

[30] Our discretion to make an award for costs in these applications was not questioned. Both sides sought their costs and seemingly for this purpose SAMA accepted that the CMS could be considered a complainant under section 57(2) of the Competition Act. While the customary rule is that costs follow the suit, in this instance both parties have achieved a successful outcome, albeit partial. We also have regard to the fact that the CMS, while pursuing to enforce the referrals in its own right, is not pursuing private interests. SAMA on the other hand, has not raised a frivolous question but one that may have consequences for all regulatory bodies in the place of the CMS. In these circumstances, fairness requires that neither party be mulcted, with an award of costs. Accordingly there is no order as to costs.

ORDER

1. The late filing of the complaint referrals filed under case number 017152 and 017160 in terms of section 51(1) of the Act is hereby condoned.
2. The proceedings in respect of case number 017152 and 017160 are stayed pending the outcome of the review application launched by SAMA in the Gauteng High Court under case number 75235/2013.

3. There is no order as to costs



Ms YASMIN CARRIM

1 December 2014
Date

Ms Mondo Mazwai and Prof. Fiona Tregenna concurring.

Tribunal Researcher: Caroline Sserufusa

For CMS: Mr S. Budlender and Mr J. Berger instructed by Norton Rose Fulbright

For SAMA: Mr S Symon, SC and Ms K.Turner instructed by Werksmans Attorneys