REPUBLIC OF SOUTH AFRICA

Case No.: 105/LM/Dec04

In the large merger between:

Business Venture Investments 790 (Pty) Ltd Primary Acquiring Firm

and

Afrox Healthcare Limited Primary Target Firm

Reasons for Decision

Conditional Approval

1. The Competition Tribunal issued a Merger Clearance Certificate on 02 March 2005 approving with conditions the proposed merger between Business Venture Investments No. 790 (Pty) Ltd ("Bidco") and Afrox Healthcare Limited ("Ahealth").

2. Our order reads as follows:

The merger is approved in terms of section 16(2)(b) of the Act subject to the following conditions:

A. ELIMINATION OF CROSS- HOLDINGS

1. Regarding the interest of Mvelaphanda Capital (Pty) Ltd and Management of Mvelaphanda Capital (Pty) Ltd (collectively referred to as **"Mvelaphanda"**) in Tshwane Private Hospitals (Pty) Ltd ("Tshwane Private Hospitals"):

1.1 Mvelaphanda must dispose of its entire shareholding in Tshwane Private Hospitals within three months from date of this order or such longer period as the competition authorities may take to approve the merger notified to it regarding that disposal.

1.2 All directors of Mvelaphanda on the boards of Curamed Holdings Limited and Tshwane Private Hospitals must resign from the latter two boards, within one month of the date of this order.

1.3 Dr Jackie Mphafudi, who is a director on the board of Medi-Clinic and also a director of Mvelaphanda, must resign from the board of Medi-Clinic within one month of the date of this order.

2. Regarding the Industrial Development Corporation's ("**IDC**") interest in the Clinix Healthcare Group Limited ("**Clinix**"), provided the IDC acquires a shareholding in Bidco:

2.1 The IDC must dispose of its entire direct or indirect shareholding in Clinix within six months from the date on which it acquires shares in Bidco.

2.2 Any employee of the IDC, who is a director on the board of Clinix, must resign within one week of the date on which the IDC concludes the agreements necessary to give effect to the divestiture contemplated in 2.1.

B. RESTRICTIONS ON SALES OF EQUITY

1. For a period of 3 years from the date of this order –

1.1. If any shareholder in Bidco or the Company sells equity in Bidco or the Company to Medi-Clinic or to Netcare then that sale must be notified to the Competition Commission as a large merger;

1.2. If RMB acquires additional equity in the Company, directly or indirectly, so that its total effective equity in the Company is in excess of 25%, then the transaction, which raises the equity above that level ("additional equity transaction"), must be notified to the Competition Commission as a large merger.

1.3. Provided that the condition in paragraph B 1.2 –

1.3.1 Only applies for so long as First Rand Limited or any company controlled by it, holds in excess of 45% of the equity in Discovery Health Limited;

1.3.2 Does not apply if RMB disposes of the equity that gave rise to the additional equity transaction within 3 months of the date that it was acquired, and provided further that it gives notice to the

Commission at the time it acquires the additional equity and at the time when it disposes of it.

2. For the purpose of this order –

2.1 **"the C*ompany"*** means Ahealth Limited or any company into which the present business of Ahealth may be transferred;

2.2 ***"Bidco"*** means Business Venture Investments No. 790 (Pty) Limited;

2.3 ***"equity"*** depending on the context, means the issued share capital of the Company or Bidco, or an indirect interest in the share capital of the Company;

2.4 **"Netcare"** means Network Healthcare Holdings Limited or any company controlled by it;

2.5 *"**Medi Clinic**"* means Medi-Clinic Corporation Limited or any company controlled by it;

2.6 ***"RMB"*** means RMB Private Equity (Pty) Ltd, RMB Ventures (Pty) Ltd and FirstRand Bank Limited (acting through its Rand Merchant Bank Division) and or First Rand Limited, and includes any other company controlled by them.

C. A Merger Clearance Certificate be issued in terms of Competition Tribunal rule 35(5)(a).

3. The reasons for conditionally approving the merger are set out below.

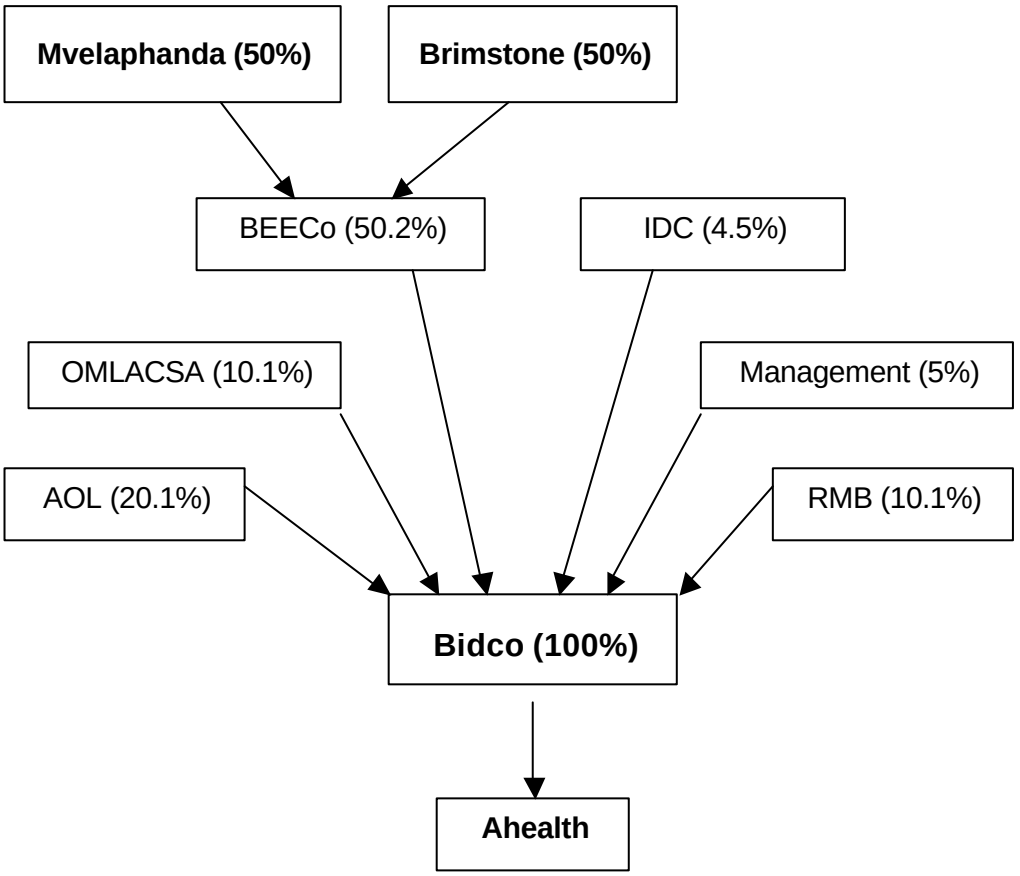
The Transaction

4. In terms of this transaction, all of the shares in Ahealth are to be acquired by Bidco, a shelf company created for purposes of the acquisition of Ahealth. In terms of the new transaction, the shareholding of the buying entity, Bidco, is as follows:

- Business Venture Investments No. 813 (Pty) Ltd ("BEECo") (comprising Brimstone and Mvelaphanda in equal shares) shall hold a 50.2% interest in Bidco;
- African Oxygen Limited ("AOL") as to 20.1%;
- Rand Merchant Bank Equity (Pty) Ltd ("RMB") as to 10.1%;

- Old Mutual Life Assurance Company (South Africa) ("OMLACSA") as to 10.1%;
- Industrial Development Corporation South Africa Ltd ("IDC") as to 4.5%; and
- Ahealth Management ("Management") as to 5%.

5. The structure of the proposed transaction envisages that BEECo, AOL, RMB, and OMLACSA will jointly control Bidco.[1] Upon conclusion of the transaction the structure and shareholding of Bidco and Ahealth post-merger will be as follows:



6. As will be explained below, we are as yet not certain whether the IDC has already taken up its 4.5% equity stake in Bidco. In addition, it is noteworthy that the merging parties anticipate that "Doctors and BEE Groupings" will be introduced into the Bidco shareholding structure at some point in the future.[2]

[1] The merging parties' legal representative, Adv. Subel SC expressed it thus:

> *"What is being proposed in the structure is that BEECo, AOL, RMB, OMLACSA will jointly control Bidco. There is reference in the documents to the fact that the joint control will also be exercised by the IDC. That may or may not, depending on their role, and it also depends on the minority protections, because they may not meet the 10% threshold. <u>But at the very least BEECo, AOL, RMB and OMLACSA will jointly control Bidco</u>."* - **Page 5 of the transcript of 10 February 2005.**

[2] See the merging parties' letter (para. 4, page 2) addressed to the Commission erroneously dated 9 April 2005, but e-mailed to the Tribunal on 24 January 2005.

The Merging Parties

The primary acquiring firms

7. The primary acquiring firm is Bidco, a newly formed private company created solely for purposes of this acquisition. As noted Bidco is controlled by BEECo (an empowerment company which is in turn controlled by Mvelaphanda Strategic Investments (Pty) Ltd ("Mvelaphanda") and Brimstone Investment Corporation Limited ("Brimstone")), AOL, RMB and OMLACSA. As already noted, there was, at the time of writing, no clarification as to the IDC's role, that is, as to whether it had taken up an equity share in the company and signed the shareholders' agreement. We have, however, imposed a condition on the IDC which is, in turn, conditional upon the IDC having actually taken up an equity stake in the target company. For the purposes of this analysis then we treat the IDC as one of the primary acquiring firms.

8. **Mvelaphanda** is a wholly owned subsidiary of Mvelaphanda Holdings (Pty) Ltd ("Mvelaphanda Holdings"). Mvelaphanda Holdings is a leading black-owned investment holding company established in 1998. Mvelaphanda Holdings has major investments in a diverse range of sectors.[3] However, only Mvelaphanda's subsidiaries involved in the healthcare industry are relevant for purposes of this analysis.

9. In the healthcare industry, Mvelaphanda holds, through Mvelaphanda Capital (Pty) Ltd, an interest of 32% in Tshwane Private Hospital (Pty) Ltd ("**Tshwane Private Hospital**"). Tshwane Private Hospital is controlled by Medi-Clinic (which holds 51% of the shares therein). Tshwane Private Hospital in turn holds 63% of the shares in Curamed Holdings Limited ("**Curamed**"), which owns 6 hospitals in Pretoria. These interests have led the Commission to recommend the imposition of a condition on the approval of the transaction. This recommendation has been accepted by the Tribunal and the merging parties.

10. **Brimstone** is a BEE investment holding company. It too has investments in a wide range of sectors. Its only interest in healthcare is its 26.04% interest in the Scientific Group (Pty) Ltd ("the Scientific Group"). The Scientific Group is a company that distributes medical and pharmaceutical equipment.

11. **RMB** is a subsidiary of FirstRand Limited ("FirstRand"). FirstRand is a large group of companies in the financial services sector. Of principal relevance here is its

[3] See Page 79 of the merger filing – "An organogram (Exhibit 4) showing Mvelaphanda Holdings' interests in diverse industries.

controlling interest in Discovery Holdings Limited ("Discovery Holdings"). FirstRand holds approximately 65,6% of the issued shares in Discovery Holdings. Discovery Holdings is a specialist insurance company that finances and manages healthcare and other related risks. Discovery Holdings itself operates 4 main businesses, viz. Discovery Health, a South African medical aid scheme administrator; Discovery Life (South African life insurance products); Destiny Health (US based healthcare products); and PruHealth, which is UK based healthcare products. The vertical issues implicit in the FirstRand group's involvement in a large hospital grouping and a large healthcare-focused financial institutions accounts for a further condition imposed on this transaction.

12. The FirstRand group, through its various subsidiaries, also holds:

- 100% of Momentum Holdings.
- A 40% interest in Magna Medical Holdings (Pty) Limited, which in turn holds approximately 5% of the shares in Alliance Pharmaceuticals Limited ("Alliance"), which markets and distributes cosmetics, toiletries, and pharmaceutical products.
- A 70% interest in Surgitech (Pty) Limited, a company that imports and distributes disposable medical devices.
- A 30% interest in Eternity Private Health (Pty) Limited, a medical aid administrator.
- An effective 76% interest in Medicor PBM (Pty) Limited, which provides pharmaceutical benefit management services.[4]

13. **OMLACSA** is a wholly owned subsidiary of Old Mutual South Africa Limited ("OMSA") and is a registered long-term insurer. OMLACSA is primarily involved in all classes of life assurance and retirement funding in South Africa. It has minority shareholdings, and no board representation, in Netcare (1.591%), Medi-Clinic (0.148%), FirstRand (2.373%), and AOL (4.947%). OMLACSA also controls:

- Old Mutual Healthcare (Pty) Limited ("OMHC") which provides administration services, risk management services which include pharmacy benefit management, hospital benefit management, oncology management, etc). It further provides a health management program;

[4] In this regard, refer to pages 6 and 7 of the transcript of 10 February 2005.

- Old Mutual Health Insurance Limited ("OMHL") which provides short-term health insurance products under two policies, viz. Accident and Health; and Miscellaneous;
- Managedchoice (Pty) Ltd, a pharmaceutical management company[5];

14. The **IDC** is a state-owned national development finance institution ("DFI") mandated to promote, through its financing activities, economic growth, industrial development and economic empowerment. It provides loan and equity financing to a vast array of sectors including healthcare. Of relevance are its:

- 28.5% interest in Carecross Health (Pty) Limited which offers, through a national network of Carecross Health service providers, the delivery of primary healthcare to medical schemes, employer groups, managed healthcare companies and the state.
- effective 30.1% in Clinix Healthcare Group Limited ("**Clinix**") which owns a number of hospitals, viz. Clinix Selby Park Hospital, Lesedi Private Hospital, Clinix Private Hospital Sebokeng, Clinix Private Hospital Soweto, and Clinix Private Hospital Vosloorus.[6] We were informed that the IDC in fact controls Clinix by virtue of it being entitled to appoint four (4) of the fourteen (14) directors, which include the Chairman who has a second and casting vote. This horizontal relationship underlies a further condition recommended by the Commission and imposed by the Tribunal.
- 49.9% interest in Biomox Pharmaceuticals (Pty) Ltd – this is a pharmaceutical firm currently doing research and development of new products, specialising in mineral, vitamin and amino acid combinations.

15. As indicated above, **AOL** controls Ahealth, and holds approximately 69% of the issued share capital of Ahealth with the balance of the shares held by a wide variety of minority shareholders. AOL is primarily involved in the industrial gas business. Its controlling shareholder is, BOC Group plc, the British multinational supplier of industrial gases.

[5] The parties pointed out that this company was in the process of being wound up, and would result in its business being incorporated into OMHc. - Page 59 of the merger filing.
[6] See page 10 of the Commission's recommendations, and transcript of 10 February 2005 (page 9).

The primary target firm

16. The primary target firm is **Ahealth**, a public company listed on the JSE Securities Exchange. Ahealth is controlled by AOL, which holds approximately 69% of the issued share capital of Ahealth. The remaining shares in Ahealth are held by a wide variety of minority shareholders. Ahealth is principally active in the private healthcare market.

Rationale for the transaction

17. From the perspective of BEECo and its owners, Mvelaphanda and Brimstone, the transaction represents a rare opportunity to acquire a significant stake in a business such as Ahealth – it is large, well placed in its sector, financially stable and well managed. It also represents the first significant incursion by BEE investors in the healthcare sector and is one of the largest BEE transactions ever. Accordingly, we are informed, when AOL and Ahealth issued a joint cautionary statement in July 2003 to the effect that AOL was in the process of considering its strategic options with regard to its shareholding in Ahealth, Bidco expressed interest in the acquisition thereof. In fact it appears that Bidco was formed in order to acquire an interest in Ahealth. However, the company that was formed at that time differed in one significant respect from the Bidco that is before us today – it was owned as to 25% by Medi-Clinic, a key competitor of Ahealth. The contemporary relevance of this is elaborated below.

18. RMB, OMLACSA and the IDC, who are the funders and, together with the BEE consortium, the joint controlling shareholder, aver that the opportunity to facilitate a landmark BEE transaction in the South African healthcare sector is the key driver of their participation in the transaction.[7] For reasons elaborated below it was necessary to complement their debt funding with equity stakes in Bidco.

19. AOL, the controlling shareholder of Ahealth, wished to extricate itself from the healthcare sector and to focus on its core industrial gas business. It appears that AOL is the only BOC Group subsidiary anywhere in the world that is involved in the healthcare sector. Although the factors initially motivating the entry of its South African subsidiary into this sector appear almost accidental, it nevertheless proceeded to build a highly successful business in healthcare. It now wishes to realise its investment and focus on its core gas business.

[7] Note that for all RMB and OMLACSA's stated commitment to BEE they make no secret of the fact that the BEE risk is effectively assumed by the state-owned IDC.

20. AOL initially intended to extricate itself completely. However when it became clear that the Medi-Clinic shareholding in, and funding of, the initial Bidco structure would not pass muster with the competition authorities, it nevertheless decided to proceed with the transaction even though this entailed it retaining a minority joint controlling stake in the newly constituted Bidco. This is the transaction that is before us today. Although AOL is committed to retaining its shareholding in Bidco for at least 2 (two) years, it has made no secret of its desire to exit this investment at the earliest opportunity.

Background to the transaction

21. While, on the face of it, this transaction is relatively uncontroversial from a competition perspective, there are, as already indicated, selected horizontal and vertical concerns.

22. As our description of the interests held by Mvelaphanda and the IDC in the healthcare sector suggest, there are several horizontal implications that command the attention of the competition authorities. However these are relatively easily cured by the imposition of several conditions and these, as we shall elaborate below, are contained in Part A of our order. As will be elaborated below, the merging parties did not oppose the conditions recommended by the Commission.

23. There are also several troubling vertical concerns that arise in consequence of the FirstRand group's involvement in the Discovery Health group. These, too, are cured by conditions imposed in Paragraphs 1.2 and 1.3 of Part B of our order.

24. However, in paragraph 1.1 of Part B of our order we impose several unusual restrictions on the future disposal of equity in Bidco and Ahealth. The underlying reasons for these conditions can only be understood in the context of an understanding of the history of this transaction.

25. In June 2003, AOL put its 69% shareholding in AHL up for sale. Medi-Clinic expressed an early interest and, initially, thought to go it alone. However, the evidence is that Medi-Clinic then decided to seek a BEE partner in order to overcome anticipated complications at the competition evaluation stage. Several empowerment partners were mooted. Medi-Clinic eventually decided to draw Mvelaphanda and Brimstone into the transaction and so Bidco was formed.[8]

[8] See Mr Swiegers' testimony, pages 5 & 14 of the transcript of 22 July 2004.

26. Note that Network Healthcare Holdings Limited ("Netcare"), which, together with Ahealth and Medi-clinic, is the third major participant in the private hospital services, also expressed interest in Ahealth and approached the merchant bankers. However Netcare was told that bids from other large hospital groups would not be entertained because of the problems that this would inevitably present on the competition evaluation of the transaction.[9] The relevance of this is outlined below.

27. Nevertheless, despite the refusal to admit Netcare to the bidding process, its rival, Medi-Clinic, and a BEE consortium comprising Brimstone and Mvelaphanda successfully bid for AOL's stake in AHL.[10] Medi-Clinic and its BEE partners formed a company known as "Bidco" for purposes of the acquisition. Bidco was held as to 25% by Medi-Clinic and 75% by Brimstone and Mvelaphanda, and the funding of the latter was secured through a Medi-Clinic/ Remgro guarantee to ABSA.[11] In addition, Medi-Clinic intended to acquire selected Ahealth hospitals representing some 2500 beds post the deal and entered into an agreement (the "Disposal and Co-operation Agreement') to this effect with its Bidco partners. Throughout these proceedings the intended sale of hospital beds to Medi-Clinic was referred to as the "T2 transaction". The merging parties insisted that this second acquisition would be notified to the competition authorities at a later stage and, so, only limited disclosure of T2 was made to the Commission.

28. Note that there were other credible participants in the bid process. A select group of potential buyers were approached in June 2003 and invited to participate in the sale process. This list comprised three financial institutions, namely Brait Private Equity, Ethos Private Equity and Platinum Equity as well as Bidvest and Fresenius.[12] However the Medi-Clinic consortium was prepared to offer a significant premium. This, of course, should not be surprising. Medi-Clinic was effectively prepared to offer what

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[9] See Mr Sacks' testimony, pages 2-3 of the transcript of 11 February 2005. See also page 8 of the affidavit of Dr Jack Shevel deposed to in the Medi-Clinic proceedings; as well as page 149 of volume 3 in the Medi-Clinic proceedings (That is, Annexure B – Letter to the Commission from WWB dated 25 February 2004).

[10] In terms of the previous merger filing, BEE Consortium shareholding comprised of Brimstone (as to 40%); Mvelaphanda (as to 40%); and a consortium of "Doctors and BEE Groupings" (as to 20%). BEE Consortium was to be jointly controlled by Brimstone and Mvelaphanda.

[11] Remgro is the controlling shareholder of Medi-Clinic.

[12] According to the documentation submitted to us during the Medi-Clinic proceedings, it seemed that Bidvest declined the invitation to participate whereas Fresenius and Platinum Equity declined to participate further in the process due to internal strategic reasons. During Phase I of the bidding process, three indicative bids were received from Brait, Ethos and Medi-Clinic. During Phase II of the sale process, Ethos and Brait were considered to be "preferred bidders", but discussions with Medi-Clinic were underway with a view, it appears, to clarifying Medi-Clinic's strategy regarding competition authorities constraints.

could accurately be described as a market power premium, that is, a premium for the influence over a major competitor that would accrue as a result of its participation in the Bidco consortium and, possibly more important, for the Afrox hospitals that were to be acquired in terms of T2.

29. Bidco's bid was successful. Note that AOL's advisers expressed some doubt about the ability of this transaction to survive competition scrutiny. But it seems that the premium offered by the Medi-Clinic consortium prevailed over good sense and it was accepted. However, AOL insisted on a strict separation of this transaction from the subsequent sale of hospitals, and it insisted that all of the 'competition risk' would be borne by Medi-Clinic, that is, should T2 not surmount the competition hurdle, the validity of T1 would be unaffected. In short, AOL would get its premium and Medi-Clinic would be left to deal with prospective competition opposition to T2.[13]

30. Bidco then proposed a scheme of arrangement between Ahealth and its shareholders in terms of which Bidco would become the owner of the entire issued share capital of Ahealth. Ahealth's shares were to be de-listed from the JSE. We will, for convenience, refer to the initial transaction which involved Medi-Clinic as the "Medi-Clinic transaction".

31. The Medi-Clinic transaction was filed with the Commission on 5 December 2003. In terms of the Medi-Clinic transaction, AOL would sell, by way of a scheme of arrangement in terms of section 311 of the Companies Act (61 of 1973), its shareholding in Ahealth to the Bidco consortium comprising Mvelaphanda, Brimstone and Medi-Clinic.

32. Between December 2003 and 16 April 2004, the Commission conducted an investigation into the proposed Medi-Clinic merger. It concluded that it should be approved conditionally, and forwarded its written recommendations to the Competition Tribunal on the 16 April 2004. The conditions imposed by the Commission were essentially directed at curing the horizontal problems that Mvelaphanda's participation gave rise to and are broadly similar to those imposed in paragraph 1 of Part A of our

[13] See page 1099, Vol. 7 of Part C of the merger filing, and page 21 of Mr Swiegers' testimony, i.e., transcript of 22 July 2004. This is also evident in the following passage of Mr. Unterhalter's cross-examination of Mr Cor van Zyl of Ahealth:

> "**Adv Unterhalter**: *It also means, does it not, that insofar as there are any competition risks that may arise in the much spoken about transaction 2, those competition risks rest with the purchasers.*
>
> **Mr Van Zyl**: *That's correct.*" – **see transcript dated 20 July 2004, page 82**.

order in this transaction. The IDC was not involved in the Medi-Clinic transaction and hence the problems sought to be addressed in Para 2 of Part A of our order did not arise in the Medi-Clinic transaction. The FirstRand group was also not part of the Medi-Clinic transaction and hence the vertical issues that its participation portends also did not arise.

33. The Tribunal commenced hearings in respect of the Medi-Clinic transaction on 14 July 2004. Prior to the hearing, Netcare, together with several other smaller participants in this sector,[14] applied to the Tribunal to intervene in these proceedings. Neither the merging parties nor the Commission opposed the intervention application.

34. In the Medi-Clinic transaction proceedings the main point of contention from the intervenors' perspective was, not surprisingly, the role of Medi-Clinic. Recall that Medi-Clinic was, firstly, to have a 25% stake in Bidco, the firm that was to acquire control of Ahealth, secondly, to guarantee the massive loan capital required to effect the transaction, and, thirdly, to enter into a related transaction with Bidco, in terms of which the latter had agreed to sell 2500 of Ahealth's beds to it.

35. The Medi-Clinic transaction hearings were adjourned in August 2004 and were scheduled to recommence in September 2004. The August hearings did not go well for the merging parties. To the extent that the initial filings did not already reveal Medi-Clinic's actual role in the transaction, this was massively amplified by a comprehensive process of discovery initiated by the intervenors and by the oral evidence submitted to the Tribunal.

36. In short, what the process of discovery confirmed was that Medi-Clinic's attempt to cast itself as a 'passive, minority shareholder', interested only in facilitating the empowerment of one of its major competitors, was nothing other than a disingenuous attempt to shield from competition scrutiny the true nature of the transaction, the outcome of which would have had Medi-Clinic thoroughly dominating its competitor, Ahealth. Moreover a major reason for Medi-Clinic assuming control over Ahealth and its BEE shareholders was to give effect to an agreement in terms of which Medi-Clinic would have acquired approximately one-third of Ahealth's capacity thus changing the competitive landscape in the private hospital market. As disturbing, is the fact that Medi-Clinic had sought to achieve this outcome by the most cynical manipulation of the

[14] These included firms such as the East London Doctors Company Ltd; PE Hospital Investments Ltd; Clinix Health Group Ltd; Mid-Medic Holdings Ltd; and Community Healthcare Holdings Ltd.

government's – and the Competition Act's – support for Black Economic Empowerment.

37. Suffice to say that Medi-Clinic had left no stone unturned in its attempts to ensure its effective control over Bidco and Ahealth. It identified and paid for all the advisers to Bidco – the legal advisers, the competition advisers and the investment advisers. It held a 25% equity stake in Bidco, accompanied by a shareholders agreement which ensured its control over key competitive, financial and operational decisions. It guaranteed some R3.1 billion rand worth of loan capital. And, it had already secured an agreement from the BEE companies – nominally the ultimate controlling shareholders of Ahealth – that would have had Medi-Clinic acquire some 2500 beds from Ahealth. This was 'fronting' on a grand scale with Medi-Clinic, though holding a minority equity stake, thoroughly dominating its BEE partners.

38. During the adjournment period various negotiations took place between the merging parties. Further postponements were sought and granted. In December 2004 the parties filed a revised shareholders agreement that purported to address some of the concerns ventilated at the hearings. The revisions sought to strengthen Medi-Clinic's proclaimed passivity relative to its empowerment partners. To this end, it offered to place Medi-Clinic's equity stake in a trust which would be represented on the Bidco board by an independent director. However it resolutely clung to T2, that is, to its right to acquire 2500 hospital beds from Ahealth once the new control structure was in place.

The Scheme of Arrangement

39. A brief description of parallel proceedings in the High Court which focused on the validity of the Scheme of Arrangement is necessary if only because the settlement of this litigation purported to 'settle' simultaneously the stand-off between the Netcare-organised intervenors involved in the Tribunal procedures, on the one hand, and the various merging parties – Afrox/Ahealth, Medi-Clinic and the empowerment parties - on the other. It resulted in the much-revised transaction that is before us, a transaction in which AOL effectively replaces Medi-clinic.

40. On 14 October 2004 certain small shareholders[15] of Ahealth brought an application to the High Court for an order declaring that the scheme of arrangement had lapsed. In terms of the Securities Regulation Code, had this application been successful and the scheme lapsed, the bid may have been placed in terminal jeopardy. This litigation was ultimately settled when the applicants agreed to withdraw their challenge to the Scheme which was then extended by the Court.

41. We now proceed to deal with the terms of the High Court settlement. The application to the High Court was brought by two doctors. There were also two intervenors, both of whom appeared to be Netcare sponsored.[16] These two intervenors launched applications to be joined as co-applicants in the High Court on 24th November 2004.

42. In this High Court application, there were two settlement agreements, one of which was made an order of the Court.[17] We are concerned with those aspects of the settlement agreements that have direct reference to our proceedings, in particular those dealing with Medi-Clinic's withdrawal from both T1 and T2 and the provisions governing any future disposal of Afrox hospitals.

43. The settlement agreement provided, firstly, that Ahealth, AOL and the BEE participants in Bidco would procure Medi-Clinic's withdrawal from the transaction and that it sells its shares in Bidco. Medi-Clinic would also have to undertake not to participate in any restructured consortium to acquire Ahealth. Secondly, Ahealth, AOL and the empowerment parties also agreed to procure the cancellation of the disposal and co-operation agreement which was the agreement between Med-Clinic and its empowerment parties that governed T2, the disposal of Ahealth hospitals to Medi-Clinic.

44. Thirdly, the agreement provided that the new owners of Ahealth would ensure that neither Medi-Clinic nor Netcare would acquire any hospital from Ahealth unless they had been given an 'equal opportunity' to acquire the hospitals offered for sale. It required that any future proposed disposal be notified in writing simultaneously to both

[15] These were Dr Johannes Paulus Franciscus Dalmeyer; Wendy Couhan. There were also two intervening applicants, Bridi (Pty) Ltd; and Stratospheric Investments CC.
[16] When asked by the Tribunal whether it was common cause that Netcare paid legal costs of these two intervenors, Mr Sacks replied as follows: *"We certainly had an agreement to support the legal costs"*. – See Sacks' testimony on page 11 of the transcript of 11 February 2005.
[17] This relates to an agreement of settlement between the parties marked "X1" paragraphs 1-10 in terms of the High Court Order dated 2 December 2004. – See page 1006-1014 contained in File 3 of the merging parties' subsequent filings.

Netcare and Medi-Clinic both of whom are to be afforded the same rights of access to information and/or the assets which are subject of the proposed disposal for due diligence purposes, and both will be entitled to submit offers in relation to the proposed acquisition or disposal.

45. The proceedings before the High Court and the various settlements were extensively reported in the media. We then invited the parties to appraise us of these reported developments which clearly implicated the pending resumption of our own hearings. This meeting took place on the 6 December 2004. We were advised that the deal had been restructured. In essence we were advised that AOL would substitute itself for Medi-Clinic in the Bidco structure, that new institutional shareholders and lenders had been introduced to the transaction, and that all agreements and understandings pertaining to the future disposal of Afrox hospital had been cancelled and disavowed. We were also advised that the new transaction would be filed as a new notification.

The hearing of the present merger

46. The new transaction was filed on the 14th December 2004. The hearing in respect of the present merger was held on the 10th and 11th February 2005. The Commission did not call any witnesses. The merging parties called Mr James Archer, a representative of RMB, who addressed the Tribunal on the funding model as well as on the vertical issues raised by Discovery Health's position within the FirstRand group of companies.

47. The Tribunal called the following witnesses:

1. Mr Rick Hogben (Chief Executive of AOL)
2. Dr. Jakes Gerwel (Chairman of the Brimstone, who will also be the first Chairman of Bidco post-merger)
3. Mr Michael Flemming (Chief Executive Officer of Ahealth).

48. Further to this, the Tribunal requested that representatives from the Council of Medical Schemes, Medi-Clinic and Netcare be represented at the hearing. Mr Alex van der Heever[18], Mr Gerhard Swiegers[19] and Mr Michael Sacks and Mr. Neil Lazarus[20]

[18] Mr van der Heever is the Special Advisor to the Registrar of the Council of Medical Schemes.
[19] Mr Swiegers is the Financial Director of Medi-Clinic.
[20] Mr Sacks is Chairman of Netcare. Mr. Lazarus was an adviser to Netcare.

appeared and testified on behalf of the Council of Medical Schemes, Medi-Clinic and Netcare respectively.

The Competition Analysis

49. The target firm, **Ahealth,** is a private healthcare service provider which operates two divisions, viz. a private hospital division and a healthcare services division.

50. The private hospital division comprises 63 private hospitals which are able to perform a wide range of medical services and which are located throughout South Africa.[21] The healthcare services division includes Lifecare Special Health, a public-private partnership with the government, which has 21 chronic care hospitals and 2 acute-care hospitals; Direct Medicines, a pharmaceutical benefit management company; and Afrox Occupational Healthcare, a leading provider of contracted on-site workplace healthcare.

51. The primary acquiring firm, **Bidco**, has been established specifically for the purpose of making this acquisition. It has no interests other than those acquired in this transaction. On the face of it then, this is a classic conglomerate transaction whereby a new entrant, Bidco has entered the private hospital market via the acquisition of an existing player, Ahealth. We have, however, noted that certain members of the consortium of acquiring firms have interests in the healthcare industry which raise certain horizontal and vertical issues.

52. In addition, in our discussion of the background to the transaction, we have also noted Medi-Clinic's manifest intention to acquire a large portion of Ahealth's assets. The evidence also establishes Medi-Clinic's palpable reluctance to relinquish the rights to these assets that it believed that it had acquired in terms of the Disposal and Co-operation Agreement. Note that it was only on the 19th October 2004 that Medi-Clinic finally agreed to walk away from T2 which, it believed, had been secured by the disposal agreement – indeed it appears that even after Medi-Clinic had accepted that it would be replaced by AOL in the transaction to acquire Ahealth, it still clung on to the notion that it would acquire the Ahealth assets that it desired,[22] although it had reduced

[21] According to the parties, nine (9) out of 63 of these hospitals are associate hospitals, as well as one hospital in Gaborone (Botswana). The Ahealth hospital portfolio includes key hospitals such as Eugene Marais; Entabeni; Flora Clinic; St Dominics; St Georges; the Glynnwood; Vincent Palloti; Westville; and Wilgers.
[22] See page 10 of the additional documents (i.e., File 1) filed by the merging parties.

its demand from 2500 to 1500 beds.[23] Ultimately, the BEE parties were required to compensate Medi-Clinic to the tune of some R50 million for relinquishing the rights which it believed had been secured through the disposal agreement.

53. These factors account for the imposition of certain conditions on the approval of the transaction. The order is divided into two sets of conditions. Part A attempts to secure the elimination of certain cross-holdings, while Part B imposes certain limitations on possible future sales of equity in the merged entity. For ease of exposition it is convenient to structure the competition analysis as an explanation of the conditions imposed in our order. However before turning to an explanation of the conditions imposed, a brief comment on the relevant market is apposite.

Relevant markets

54. For the purposes of this evaluation, we are satisfied to conclude that the relevant product market is that for the provision of private hospital services. We note however that a more extensive analysis, were it to be required, may reveal a more complex view of the product market. We simply observe that private hospitals provide services to individual patients, to healthcare funders and to private healthcare practitioners and each of these may, on more extensive enquiry, delineate a separate product market.

55. While the existence of three pre-dominant national groups of private hospitals who price nationally – AHL, Netcare and Medi-Clinic – suggests that the geographic market is national, there are particularly complex issues involved in the delineation of geographic markets in hospital mergers. We have little doubt that the geographic markets in which healthcare funders and healthcare practitioners engage with the providers of hospital services interact are national. It appears, moreover, that the national hospital chains price nationally thus reinforcing the existence of a national market. Equally it is clear that the market in which the private hospital services are provided to patients is local although even this may not be the case in respect of the provision of particular, highly specialised services. Note too that, although patients may consume these services in geographically bounded sub-national markets, because the pricing is national – and, for most patients, determined in national negotiations between the hospitals and the funders – pricing is not responsive to regionally particular market conditions.

[23] Refer to Mr Swiegers' testimony, pages 37-41 of the transcript of 11 February 2005.

Elimination of cross-holdings – provisions of Part A of the Tribunal's order

56. A horizontal overlap exists between the activities of some of the merging parties. Part A of our order is intended to address the competition concerns raised by these horizontal overlaps.

57. In its assessment, the Commission found that the only activities of the acquiring firm which could be regarded as reasonably substitutable with the activities of Ahealth are the interest held by Mvelaphanda in Tshwane Private Hospital and the IDC's control of the Clinix group.

58. Mvelaphanda holds a minority interest (32%) in Tshwane Private Hospitals. However, the Commission's concerns arise from the identity of the 51% controlling shareholder, Medi-Clinic. It appears that Medi-Clinic occupies four seats on the board of Tshwane while Mvelaphanda holds two seats. Mvelaphanda also has a seat on the board of Curamed, a Pretoria-based hospital grouping controlled by Tshwane. The Commission is concerned that the mutual involvement in Tshwane of one of the controlling shareholders of the post-merger AHL and Medi-Clinic may provide a platform for an exchange of information between the two competitors. In order to address these concerns, the Commission recommended the divestiture of Mvelaphanda's interest in Tshwane Private Hospitals. It also recommends that approval of the merger be made conditional upon Mvelaphanda representatives relinquishing their seats on the boards of Tshwane, Curamed and Medi-Clinic. Mvelaphanda has not opposed this condition and there is no need for us to examine it further.

59. We should however add that the background to this particular transaction and general indications of a co-operative relationship between the major players in the private hospital services market strongly endorse the Commission's concerns. We need look no further than the agreement concluded between Netcare and Medi-Clinic with respect to future disposals of Ahealth assets for evidence of the ease with which the hospitals are willing to conclude agreements of dubious validity in terms of the Competition Act. We note too the following assessment by RMB analysts of competitive conditions in the relevant market:

> *"The strategic behaviour of these groups has historically been characterised by a conscious avoidance of price competition. Rather than attempt to aggressively win market share through price wars and intensive advertising*

campaigns, the hospital groups – via their joint membership of the Hospital Association of South Africa ("HASA") – have managed to standardize industry pricing by agreeing set tariffs with the Medical Aids represented by the Board of Healthcare Funders ("BHF")…

The key issue will be the extent to which the dissolution of the formal, collective price setting arrangement in favour of one-to-one negotiations will increase the likelihood of price competition amongst the primary service providers. On the face of it, the encroachment of the Government on the private sector (via the establishment of private wards) and the diminishing growth opportunities in the top end of the local market could provide an incentive for one of the primary service providers to break ranks and initiate a price war in order to increase market share and sustain the growth performances that shareholders have grown accustomed to. This is, in our view, unlikely. The primary service providers have operated as a cartel over the past 3 years and have established exceptionally healthy profit margins". [24]

60. In commenting on this assessment Mr. Hogben conceded that the private hospitals did not compete on price. He described the competitive dynamics of the market in the following terms:

"…The basis of competition between private hospitals is about several elements, of which price is not really one…The basis of competition between a hospital is distinct units. It's about its location. It's about the quality of the doctors that it has that work there and the quality of the doctors that work in those hospitals is really driven in many ways by the quality of the hospital facility and the quality of care that is given in that hospital…The question of price as a competing factor between the hospitals is of lesser significance, unless it becomes extreme." [25]

61. This is clearly a market that warrants the closest attention of the competition authorities. We share the Commission's concerns at the possibility of co-operation between Medi-Clinic and Ahealth and, accordingly, we have no hesitation in accepting the Commission's recommendation which is reflected in paragraph 1 of Part A of our order.

[24] Our emphasis. See the transcript of 10 February 2005, pages 103-104 as well as pages 1227-1228 of File 3 of the merging parties' subsequent filings.
[25] Refer to pages 105-106 of the transcript of 10 February 2005.

62. The Commission is also concerned at the overlap between the IDC's control of the Clinix Group of hospitals and its share in control of Ahealth. Again it appears that the IDC tendered to divest itself of its holdings in Clinix Holdings and there is, similarly, no need to examine this further.

Restrictions on the sale of equity – provisions of Part B of the Tribunal's order

63. The conditions imposed in Part B of our order derive from two distinct sets of concerns. Those imposed in para 1.1 of Part B – 'if any shareholder in Bidco or the Company sells equity in Bidco or the Company to Medi-Clinic or to Netcare then that sale must be notified to the Competition Commission as a large merger' – derive from the particular background to this transaction. In short, we are not convinced by Medi-Clinic's assurances regarding future designs on Ahealth's assets. Moreover the terms of the settlement indicate that Netcare may have similar designs. The condition imposed in Para 1.1 is designed to ensure that were either of these groups to attempt to acquire interests in Ahealth itself or in its controlling shareholder, Bidco, that this transaction would be subject to the most comprehensive form of scrutiny provided for in the Competition Act.

64. The conditions imposed in Para 1.2 of Part B – 'if RMB acquires additional equity in the Company, directly or indirectly, so that its total effective equity in the Company is in excess of 25%, then the transaction, which raises the equity above that level ("additional equity transaction"), must be notified to the Competition Commission as a large merger' – derive from RMB's interest in Discovery Holdings, a company whose activities are vertically linked to those of the target company in this transaction.

65. We now turn to a detailed examination of each of the sets of conditions imposed in Part B.

Para 1.1 of Part B of our order – change in control of Bidco or Ahealth

66. We have already indicated that Medi-Clinic's primary objective in participating in the initial transaction was to gain control over a significant proportion of Ahealth's assets. This was expressed as 2500 hospital beds which were to be sold by the new owners of Ahealth to Medi-Clinic on conclusion of the sale. In both the Commission's investigation and in the Medi-clinic hearings before the Tribunal, representatives of Medi-Clinic and its BEE partners were at pains to insist that this subsequent sale of hospital bids

represented little more than a conceptual understanding between the members of the original Bidco consortium. In fact it is absolutely clear that they were being exceedingly economical with the truth. Medi-Clinic entered the transaction – T1 – with the express intent of getting its hands on the Ahealth hospitals, this to be effected in the transaction dubbed, T2. Contrary to the evidence presented to the Commission and to the Tribunal, this was a done deal – the hospitals were, with the assistance of Mr. Rick Hogben, already identified and the disposal agreement had been drawn up and signed. And, in any event, should its BEE partners have reneged on T2, Medi-Clinic's control of the merged entity's funding and its participation on Ahealth's board would have enabled it to secure compliance with the disposal agreement. We have already recorded the extreme reluctance with which Medi-Clinic relinquished these rights.

67. It was precisely the prospect of Medi-Clinic's acquisition of the Ahealth beds that underpinned Netcare's aggressive intervention in the initial hearings before the Tribunal. This is why the agreements struck as a direct consequence of the High Court application in respect of the scheme of arrangement are careful to ensure both Medi-Clinic's exit from T1 and its express disavowal of the continued existence of any agreements to acquire hospital beds from the merged entity. However, while it is not difficult to understand why Netcare should be well satisfied with this outcome, from the perspective of those concerned to promote competition in the private hospital market, Medi-Clinic's (and Afrox's) assurances and the terms of the settlement agreement which commits Ahealth and its owners to treating Netcare and Medi-Clinic equally in the event of a future disposal, provide cold comfort and this for two reasons:

68. Firstly, we are troubled that, even in the hearings in respect of this present transaction, Mr. Hogben, AOL CEO and its future representative on the board of Bidco, insisted on his lack of knowledge of, or participation in, T2. He insisted that he only became aware of the existence of the disposal agreement when the papers in the Medi-Clinic transaction were filed with the Commission. This is directly contradicted by Mr. Swiegers' evidence in these hearings and the probabilities clearly favour Swiegers' version. We note that despite the express opposition of Ahealth's senior management, the evidence submitted in the Medi-Clinic hearings is that Mr. Hogben actively participated in the selection of those of Ahealth's hospitals that were to be sold to Medi-Clinic. Mr. Hogben insisted that he was not aware of a *signed* agreement. But, even if this is so and we doubt that, it is neither here nor there - Mr. Hogben was certainly aware of Medi-Clinic's strong designs. At best his claimed lack of knowledge of the existence of a binding agreement may have been part of a scheme best described as

'plausible deniability', an express attempt to shield himself from truths that may be inconvenient for him to acknowledge in a forum such as the Tribunal.[26] As elaborated above, we understand why it was convenient for AOL to distance itself from T2. AOL, after all, had made certain that its exit was firmly secured by the successful conclusion of T1. But we do not accept Mr. Hogben's denial of knowledge of, indeed complicity in, Medi-Clinic's designs on the assets of Ahealth. We are accordingly not content to accept his assurances regarding the absence of any side agreements regarding the future disposal of Ahealth assets. We are pleased that Dr. Gerwel has added his own disavowal of the existence of any side agreement regarding future disposals. However, Mr. Hogben with his intimate knowledge of the market in question, will be an influential member of the board and, it is undeniably he who, of the Ahealth management, proved most amenable to the sell-off to Medi-Clinic. He also represents a shareholder, AOL, explicitly anxious to exit its investment in Ahealth.

69. Secondly, we are extremely concerned at aspects of the settlement agreement, effectively an agreement between Ahealth, Medi-Clinic and Netcare. What it explicitly purports to do is to manage any future disposals of Ahealth hospitals so as to ensure a 'level playing field' between Netcare and Medi-Clinic. While we understand why this provides comfort to Netcare, an agreement which effectively requires the putative competitors to sit down and trade any future disposal of assets cannot be well received in the ranks of those anxious to promote competition in an industry which expert analysts already describe as a cartel and in which there has, through, this whole sorry affair, been a massive exchange of information between the competitors. This agreement potentially compounds the information exchange. As we have already intimated, we believe that, in the ordinary course, such an agreement may well fall foul of the provisions of Section 4(1)(a) of the Act.

70. We have already noted Netcare's stated interest in acquiring Ahealth's assets. It attempted, at the outset, to participate in the bidding for Ahealth's assets but was

[26] Mr Michael Flemming, CEO of AHL, when asked by the Commission about the T2, particularly his knowledge about the hospitals to be disposed of by Bidco to Medi-Clinic, responded as follows: *"As far as I'm aware no official or legal agreement exists between Bidco and Medi-Clinic around which hospitals. I have attended a meeting where a number of potential targets were discussed, but that was not either a complete or exhaustive list and from that discussion we were unable to leave the meeting with any definitive answer of which hospitals would be taken over".* He went further to say that at the first meeting about disposals, Medi-Clinic, Bidco and 3 members of Afrox executive were present, and this was where he indicated his unhappiness to their proposal and in fact terminated the meeting at his instance and further indicated to Medi-Clinic and Bidco that he would not continue as Chief Executive Officer of Ahealth if that was the case. - **See the transcript of Mr Flemming's interview by the Commission on 15 March 2004, page 3, 19.**

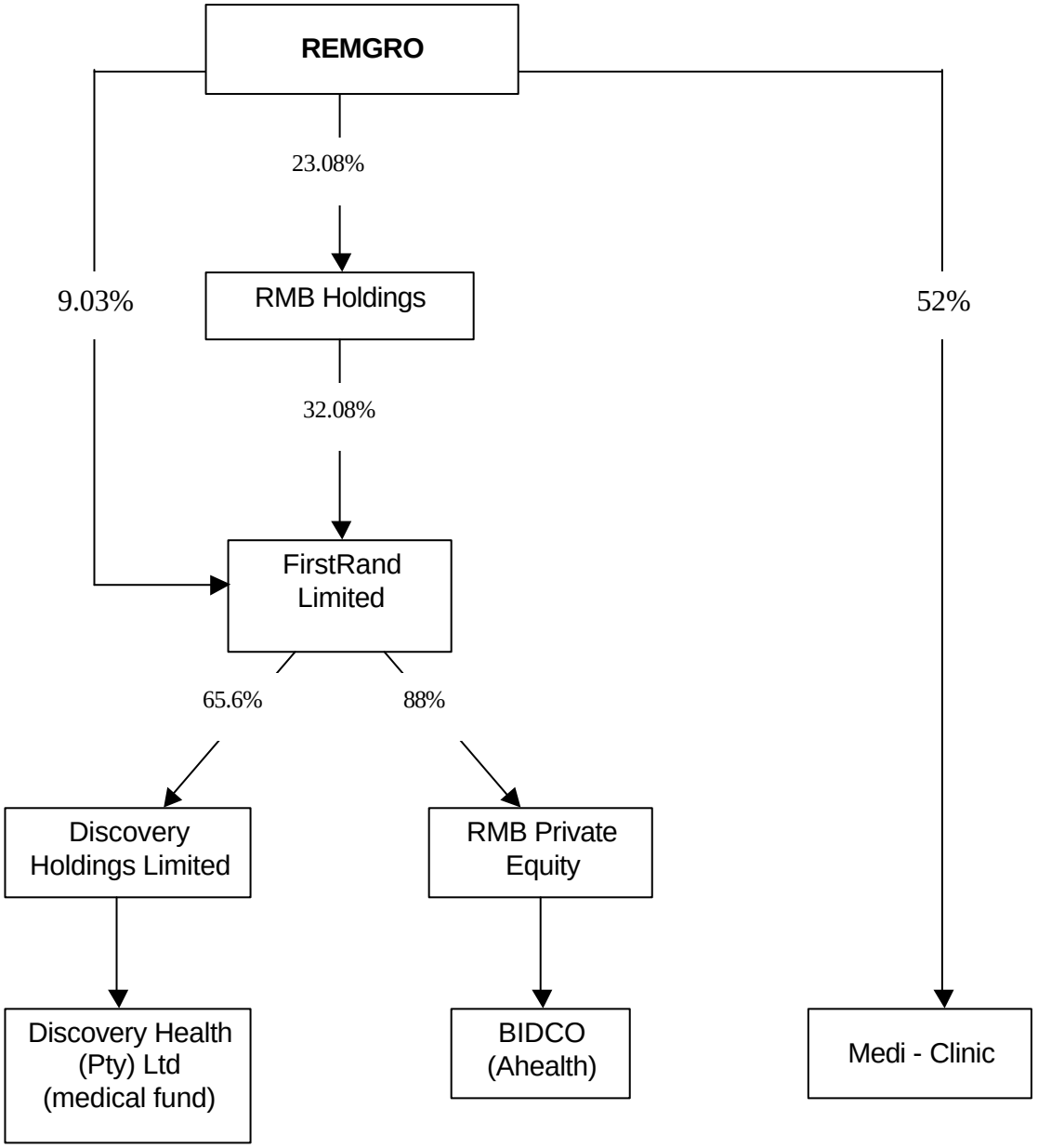
rebuffed by the investment bankers. The evidence is that even during the course of the battle for control of Ahealth there were exchanges between Dr. Edwin Hertzog and Mr. Michael Sacks, respectively the chairmen of Medi-Clinic and Netcare. In short, Netcare was thwarted in its efforts to acquire Ahealth; it, in turn, was instrumental in preventing Medi-Clinic from acquiring Ahealth. And, in the end, an agreement has been reached that ensures that, in the event of Ahealth selling any of its hospitals, neither Medi-Clinic nor Netcare will be advantaged in that sale. We repeat: we understand why Netcare is satisfied with this outcome. And we understand that, though second best, Medi-Clinic, its wounds salved by a payment (from the coffers of the empowerment parties) of some R50 million, is at least assured that it will get a 'fair' chance to acquire assets in the future. For our part, this remains very far from a disavowal of interest in the assets of Ahealth.

71. For these reasons we believe that it is prudent to ensure that the competition authorities remain involved in any subsequent attempt to dispose of Ahealth or Bidco equity. We have, moreover, required that any future disposition of Ahealth assets to Netcare or Medi-Clinic be subject to the scrutiny that a large merger invites, that is, that it be subject to our authorisation. This we have done, because our processes are transparent and allow for intervention by third parties. Had the Medi-Clinic transaction not been subject to the powerful disinfectant that sunlight proved to be, it may well have escaped effective competition scrutiny.

Para 1.2 of Part B of our order – vertical concerns

72. Although there are several vertical relationships contained in the restructured transaction, it is only through RMB's participation in the present transaction that potentially serious competition concerns are raised. OMLACSA's interest in managed care and healthcare funding is noted. These interests are, however, relatively minor and will not be dealt with further.

73. RMB is a subsidiary of FirstRand Limited ("FirstRand"), a large financial services group with various interests in the healthcare sector. However it is only FirstRand's interest in Discovery Holdings Limited that is of significance for our purposes. Note the organogram below:



74. FirstRand Ltd. controls both Discovery Ltd and RMB Private Equity. It holds a 65% shareholding in Discovery Holdings Limited ("Discovery Holdings"). Discovery Holdings, in turn, controls Discovery Health (medical aid fund), Discovery Life (life insurance products), Destiny Health (US-based healthcare products) and PruHealth (UK based healthcare products). Our concern lies with the vertical relationship from Discovery Medical Scheme through to its administrator, Discovery Holdings.

75. At the pre-hearing held on 25 January 2005, we requested that the Commission and merging parties file a submission commenting on the vertical issues arising from RMB's links to Ahealth and, through the FirstRand Group, to Discovery Holdings.

76. We also requested RMB to make a available a witness who would be capable of dealing with these vertical issues and who would also be able to elucidate the financial structure for the new transaction. We also requested that the Council for Medical Schemes ("Council") comment on this vertical link.

77. Our concerns are closely echoed by the Council for Medical Schemes which has undertaken a characteristically comprehensive analysis of this potentially troublesome link. In brief, the Council, like us, believes that vertical integration between, on the one hand, a major player in the medical scheme administrator and managed care markets and, on the other, a key participant in the private hospital market, bodes ill for the healthcare sector. The Council referred to indications in certain documents of the possibility of RMB increasing its equity stake. In particular, the Council's concerns related to the FirtRand Group's strategic intentions with respect to the healthcare sector. Clearly Discovery is regarded as a strategic investment. The question arises: does FirstRand's participation in this transaction represent the assumption of a similar strategic interest in another part of the healthcare value chain? The Council also noted that since the transaction involved a high degree of leveraging from the FirstRand Group, there was a risk that, at a later stage, this debt may be converted into equity and, hence, the assumption of a significantly greater stake in Ahealth.

78. The Council advised that after having met with the parties, it was satisfied that RMB did not regard its interest in Ahealth as strategic, but rather as a specific investment made in the ordinary course of its banking activities to facilitate this transaction. From the Council's discussions with the merging parties it seemed that only in extreme circumstances would the debt be converted into equity and only in the event of the entire arrangement failing.

79. We have, nevertheless, elected to impose a condition to address vertical concerns that would arise should First Rand increase its stake in Ahealth to over 25%. Should this occur, and should they continue to hold equity in excess of 45% in Discovery Holdings, then their assumption of additional equity in Ahealth would have to be notified to the Competition Commission as a large merger. This condition would not apply were First Rand to dispose of the additional equity so acquired within three months.

80. Although strictly speaking a horizontal concern, we also note here potential concerns arising from Remgro's substantial interest in RMB Holdings. Consult again

the organogram above. This reveals that Remgro, through RMB Holdings and a direct equity stake, has an equity stake of some 17% in FirstRand Ltd, which, in turn, controls Discovery Holdings Ltd. and shares in control of Bidco. Remgro is also shown to control Medi-Clinic. Again, given the background to this transaction, we were anxious to ensure that this did not hold out the possibility of facilitating co-operation between Ahealth and Medi-Clinic. However this concern was persuasively dispelled by witnesses at the hearing.

81. Mr. Swiegers averred that Remgro could not, through an equity interest of some 17%, exercise control over RMB much less over its subsidiaries, including Discovery, several links down the corporate ownership structure. Swiegers stated:

> *"Discovery is an independent company. They have got shareholders listed on the Johannesburg Stock Exchange and that company and the Board of that company needs to act in its fiduciary capacity towards all the shareholders, including those minorities…Discovery is a different listed company from FirstRand."*[27]

82. Mr. Archer, who gave evidence on behalf of RMB's Private Equity Division, echoed the view that the ability of Remgro to influence FirstRand was extremely limited:

> *I have no knowledge of it. I mean what I can do is, clearly I have read the press and I saw the allegations. So the one thing I did go and do was just check up what Remgro's effective shareholding was in the First Rand Group. It holds 9.5% directly. It holds indirectly via RMB Holdings, RMB Holdings in turn holds directly into First Rand. So its effective collective interest directly into First Rand is 17.04% and secondly there are 14 Directors on the First Rand Board of which only one is a Rembrandt nominee, being an individual I think called Dennis Falk.*
>
> *So, my sense is the influence there is quite limited. Clearly if you are looking further down the group to Discovery, well First Rand only owns 65% of Discovery. So there are obviously significant further dilutions. If you are trying to look at the Rembrandt, look through effective interest and if you were to look down the other leg of the deal being First Rand's effective holding in Ahealth, remembering working backwards, we are in all likelihood a 10.1% shareholder.*
>
> *In the various entities that hold those interests, there are minority shareholdings in RMB Private Equity and RMB Ventures and then we go all the way up the group to First Rand Limited. The monitories in RMB Venture are 15%. RMB Private Equity*

[27] Transcript of 11 February 2005, pages 44-47.

are 6% and RMB Private Equity holds the Group's interest in ventures. So there are significant dilutions. So by the time you look through at the effective holding through RMB's 10% interest in A Health, you are talking about a very small stake. Allied to the fact that they have no involvement or interaction. I have got no involvement interaction. So that is all I can tell you from the actual, factual shareholding position."[28]

83. Archer was asked whether RMB would be, by virtue of its parent company's stake in Discovery, be able to ensure that the Discovery business was placed with a particular hospital group, in this case, Ahealth.[29] He noted that the shareholders' agreement provided for the recusal of parties involved in potential interest conflicts of this sort. The Agreement also contained specific minority protections that required, in related party dealings, the written approval of shareholders holding 10% or more. These protections, and RMB Equity's relatively small stake in Ahealth, limited its ability to influence the process.

Public Interest Issues

84. Although there are residual competition concerns arising from the particular background to this transaction and from certain vertical considerations, we note that it is an important boost to black economic empowerment. We are satisfied that the Medi-Clinic's exit from the transaction and the conditions imposed ensure that these public interest gains are not achieved at the expense of consumers of private hospital services.

Finding

85. The transaction is conditionally approved. Our order is reproduced above.

_____ **09 May 2005**

David Lewis **Date**

Concurring: **Norman Manoim and Thandi Orleyn**

For the merging parties:	Adv. Arnold Subel SC with him Adv. Robin Pearse instructed by *Knowles Hussein Lindsay Inc*.
For the Commission:	Adv. Martin Brassey SC with him Adv. Hamilton Maenetjie instructed by *Mahlangu Nkomo Mabandla Ratshimbilani Inc*.

[28] Transcript of 11 February 2005, page 79-80
[29] Ibid, page 88.