

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: 24/CR/Apr04

In the matter between:

The Competition Commission

Applicant

and

The Hospital Association of South Africa

First Respondent

Ordinary members of the First Respondent

Second Respondent

Order

Further to the application of the Competition Commission in terms of Section 49D, in the above matter -

The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondents.



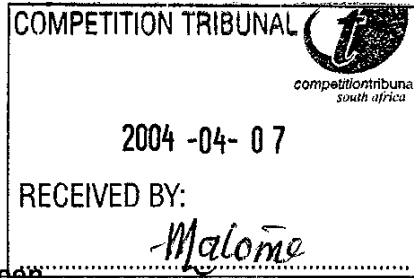
D.H. Lewis

26 April 2004

Date

Concurring: N. Manoim, U. Bhoola

**IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
HELD AT PRETORIA**



CASE NO: _____

In the matter between

COMPETITION COMMISSIONER Applicant

and

THE HOSPITAL ASSOCIATION OF SOUTH AFRICA First Respondent

ORDINARY MEMBERS OF FIRST RESPONDENT Second Respondent

**CONSENT ORDER, IN REGARD TO VIOLATION OF SECTION 4(1)(b)(i) OF THE
COMPETITION ACT, 1998 (ACT NO. 89 OF 1998)**

WHEREAS THE COMPETITION COMMISSIONER OF SOUTH AFRICA, THE APPLICANT HEREIN, INITIATED A COMPLAINT AGAINST THE RESPONDENT, AND,

HAVING REGARD to the Competition Act, 1998 (Act No. 89 of 1998), as amended by the Competition Second Amendment Act, 2000 (Act No. 39 of 2000), and in particular Chapter 2 and Chapter 5 thereof,

HAVING REGARD to the Form CC1 Complaint lodged by the Complainant and issued pursuant to Section 49B of the Competition Act, 1998 (Act No. 89 of 1998) as amended,

HAVING REGARD to the Rules for the Conduct of Proceedings in the Competition Commission pursuant to Government Notice 20384 in Government Gazette No. 22025 (Vol. 410 of 1999), and

HAVING REGARD to the parties hereto having agreed to be bound by the provisions of this Consent Order to resolve all possible disputes arising out of the aforementioned complaint initiated by the Complainant herein;

NS km.

NOW, THEREFORE, before the taking of any testimony, and without trial or adjudication of any issue of fact or law, and upon the consent of the Competition Commission (Complainant) and the Respondent, it is hereby ORDERED as follows:

1 DEFINITIONS

For the purposes of this Order the following definitions shall apply:

- 1.1 The "Act" means the Competition Act, 1998 (Act No. 89, of 1998), as amended.
- 1.2 Section 4(1)(b)(i) means section 4(1)(b)(i) of the Act which states that:
- "(1) An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if –*
- (b) it involves any of the following restrictive horizontal practices:*
- (i) directly or indirectly fixing a purchase or selling price or any other trading condition."*
- 1.3 "Agree" means to enter into any contract, arrangement or understanding, whether oral or written.
- 1.4 "The Commission" means the Competition Commission of South Africa, a statutory body, established in terms of section 19 of the Act, with its principal place of business at Building B, Glenfield Office Park, Corner Glenwood Road and Oberon Street, Faerie Glen, Pretoria, Gauteng.
- 1.5 "The Competition Tribunal" means the Competition Tribunal of South Africa, a statutory body, established in terms of section 26 of the Act, with its principal place of business at Building C, Glenfield Office Park, Corner Glenwood Road and Oberon Street, Faerie Glen, Pretoria, Gauteng.
- 1.6 "The Complaint" means the complaint initiated by the Competition Commissioner in terms of Section 49B(1) of the Act and filed with the Commission, under case number 2002AUG164.
- 1.7 "The Complainant" means the Competition Commissioner ("Commissioner") of the Competition Commission of South Africa.



- 1.8 “*The Respondents*” means the Hospital Association of South Africa, an association of private hospitals and ambulatory clinics with its principal place of business at Building No. 7, Visionmed Office Park, 269 Beyers Naude Drive, Northcliff, Gauteng Province, and its ordinary members.
- 1.9 “*Person*” includes any natural person, corporation, association, firm, partnership, or other business or legal entity.
- 1.10 “*The Consent Order*” means this agreement in its duly signed form by both the *Commission* and the *Respondents* and confirmed by the Competition Tribunal in terms of Section 49D(1) of the Act.

2 APPLICABILITY

This *Consent Order* is binding on both the Applicant and the *Respondents*.

3 JURISDICTION

The *Competition Tribunal* has jurisdiction over the subject matter of this *Consent Order* and over each of the consenting parties hereto.

4 ALLEGATION OF CONTRAVENTION OF THE ACT

- 4.1 In its complaint initiation submission, the Complainant made the following allegation:

- 4.1.1 The First Respondent determines, recommends and publishes benchmark tariffs for hospital services on an annual basis. These recommended tariffs are embodied in an annual publication entitled *HASA Recommended Tariffs for Private Hospitals Private Psychiatric Hospitals*.

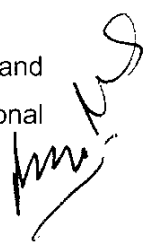
- 4.2 In the Commission's view, the conduct referred to in 4.1.1 above constitutes a contravention of section 4(1)(b)(i) of the Act.

5 COMMISSION'S INVESTIGATION

- 5.1 Following the initiation of the complaint, the Commission undertook an investigation into the alleged prohibited practices of the Respondents

- 5.2 The investigation revealed that:

- 5.2.1 The First Respondent exists to represent its members and promote and further their interests. In its activities it deals with both the professional



and business aspects of its members. It offers to its members advice and services on issues such as quality and service, information technology, legislative developments, nursing and related matters in the health industry.

5.2.2 The First Respondent provides these services to more than 93% (ninety three *per centum*) of South Africa's privately owned hospitals. These numbered, according to the First Respondent's March 2001 version of its Articles of Association, 169 (one hundred and sixty-nine) hospitals (comprising the ordinary members, defined in terms of the Articles of Association as "a person who is admitted to ordinary membership in terms of articles 3.1, 3.3, 3.4, 3.6, and 3.7 read collectively), which together had 22 062 (twenty two thousand and sixty-two) beds in all of South Africa. The First Respondent also then had a further 10 (ten) associate members, comprising 1720 (one thousand and twenty) beds. Associate members are defined in the Articles of Association as "*...persons, whether in the Republic or not, conducting institutions which in the opinion of the Board [of Directors] are not eligible for ordinary membership but because of their special nature comply with some of the criteria of a private hospital...*"

5.3 The Respondents wish to record that:

5.3.1 The First Respondent's tariff was developed based on a zero based model which incorporated the minimum requirements set out in regulation 158 (promulgated in terms of Section 44 of the Health Act 63 of 1977).

5.3.2 The tariff was amended annually to reflect changes in input costs of established hospitals. These amendments were arrived at by having regard to inflationary related statistical data submitted by the various hospitals on items such as pharmaceuticals, wards, theatre technology and salaries;

5.3.3 The tariff was a recommended tariff and there were no obligations on the part of any of the members of the First Respondent to adhere to the tariff. Furthermore there is no provision in the articles of association for the enforcement thereof. As far as HASA was aware the tariff was rarely applied.

A handwritten signature in black ink, appearing to be 'MS' followed by a stylized flourish.

- 5.3.4 The First Respondent has engaged the Competition authorities on tariff related issues since 1986 and up until August 2000 enjoyed an exemption to publish its recommended tariff;
- 5.3.5 On 7 July 2000 the First Respondent applied for a further exemption for the period September 2000 to August 2001. In anticipation of securing the exemption the First Respondent negotiated a 2001 tariff prior to the expiry of the August 2000 exemption period. *The First Respondent is of the view that the act of making and publishing this tariff was done within the scheme of the exemption. The Commission disagrees with this view;*
- 5.3.6 On 18 October 2000 the First Respondent asked the Commission to provide it with an advisory opinion which addressed the circumstances under which the Competition Commission would be prepared to grant an exemption and the legal basis for it refusing to grant an exemption. This request was prompted by the fact that the Commission had indicated that it was not prepared to consider the First Respondent's exemption application in isolation and that it wanted to first investigate the broader private healthcare industry.
- 5.3.7 In November 2000 the First Respondent met with the Director General of the Health Department (on the suggestion of the Commission) and sought a special dispensation. Whilst the Director General, in the First Respondent's opinion, recognised at the meeting that there was indeed a need for a special dispensation, the Director General failed, despite the First Respondent's best efforts, to take matters sufficiently further;
- 5.3.8 On 17 January 2001 the First Respondent received a letter from the Commission in which the Commission advised that it was researching the health care sector and was accordingly not in a position to provide an advisory opinion.
- 5.3.9 During the course of 2001 a draft tariff was prepared for 2002 on the basis of a weighted average inflation. This tariff was neither negotiated with the members of the First Respondent, nor published in the ordinary manner. *The First Respondent was therefore of the view that it had not acted unlawfully, The Commission disagrees with this view*
- 5.3.10 Up until August 2000, the First Respondent enjoyed an exemption to provide a coding system for the purposes of billing of patients who patronised its members. In this connection, the First Respondent determined, recommended and published, on an annual basis, tariffs for



the pricing of hospital services. These tariffs were contained in an annual publication of the First Respondent entitled "HASA Recommended Tariffs for Private Hospitals Private Psychiatric Hospitals" ("the Tariff").

5.4 In conducting its investigation the Commission had regard to how the First Respondent came to determine, recommend and publish benchmarks tariffs for hospital services. In so doing it established that the industry had developed recommended tariffs as a consequence of, *inter alia*, the following factors:

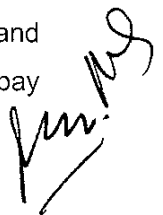
5.4.1 historically the private healthcare industry has always been highly regulated. The level of statutory intervention played a significant role in entrenching a system of recommended tariffs. By way of example, in terms of the Medical Schemes Act 43 of 1975, the Board of Healthcare Funders ("BHF") was obliged to prescribe a scale of benefits for the provision of services to a member of a medical scheme or a dependant of such member. BHF published its scale of benefits in the Government Gazette. To this day Section 29(l)(q) of the Medical Schemes Act 131 of 1998, as amended, obliges medical schemes to provide in their rules for the payment of benefits to a scale or tariff or recommended guide;

5.4.2 recommended tariffs were in keeping with the business of the provision of healthcare services which requires ethical standards of a level not usually expected of other businesses. The development of a system of tariffs was therefore a response to a substantive need for a code of ethics or code of conduct;

5.4.3 The Respondents wish to record further that, in their opinion:

5.4.3.1 the system of the tariffs facilitated the development of new hospitals because it created a cost platform which gave potential financiers a basis for calculating their risk. Integral to this risk assessment was the ability of the new hospitals to compete with established hospitals with significantly different costs to capital;

5.4.3.2 the system of tariffs eased the administrative burden thereby facilitating the expeditious settlement of claims. This had a very real benefit for providers who were not in a position to extend credit and for the members of schemes who were not in a position to pay deposits.



5.5 In the Commission's view, the conduct described in 4.1.1 above constitutes a contravention of section 4(1)(b)(i) of the Act. To prove a contravention of the above section, the following elements must be shown:

5.5.1 an agreement between, or concerted practice by firms, **or** a decision, by an association of firms;

5.5.2 the agreement must be between or among parties in a horizontal relationship **or** the decision must be taken by an association of horizontally related firms;

5.5.3 the agreement, concerted practice or decision must involve fixing a purchase or selling price or any other trading condition.

5.6 The Commission is of the view that:

5.6.1 the First Respondent is an association of firms;

5.6.2 the First Respondent determined, recommended and published tariffs to its members;

5.6.3 the First Respondent's recommendation had the effect of fixing a selling price.

6. STATEMENT OF CONDUCT

6.1 The Respondents admit that the First Respondent is an association of firms that determines, recommends and publishes tariffs, to and on behalf of its members, for the provision of hospital services.

6.2 The Respondents further admit that the aforesaid determination and recommendation falls within the ambit of section 4(1)(b)(i) of the Act, in that it amounts to the practice of fixing a selling price, conduct which is prohibited by section 4(1)(b)(i) of the Act.

6.3 The Respondents thus admit that, in the circumstances, the conduct, as described under 4.1.1 above constitutes a contravention of section 4(1)(b)(i) of the Act.

7. AGREEMENT CONCERNING CONDUCT

7.1 The First Respondents confirms that it no longer:

7.1.1 determines, recommends or publishes tariffs to or for its members;



- 7.1.2 engages in any conduct which facilitates an agreement between its members on prices.
- 7.2 The First Respondent *confirms that it has already* informed its members that it will no longer be recommending or publishing recommended tariffs for the provision of medical services, nor engaging in any conduct which facilitates an agreement between its members on prices. A copy of a recent notice to members is annexed hereto marked "A". The notice was published in the January 2004 edition of the first respondents publication known as LegalWatch. In addition, the First Respondent provided the Commission with a copy of a comprehensive competition law compliance policy document, which it published to its members in February 2003. A copy of which is annexed hereto marked "B". On Wednesday, July 30, 2003, members were once again reminded to acquaint themselves with the Competition Policy. A copy of that notice is annexed hereto marked as "C".
- 7.3 The First Respondent further undertakes to also publish the notice in its official publications, periodicals, communiqué's, newsletters and electronic communication.

8. SCOPE OF THE CONSENT ORDER

The consent agreement embraces the publication of all tariffs by the First Respondent, including its members and any discussions and/or understanding on the part of the First Respondent or its members with SAMA and/or BHF in relation to the SAMA , BHF or First Respondent's tariffs.

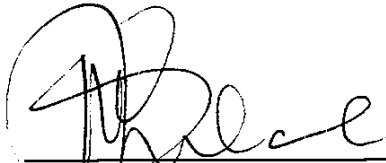
9. ADMINISTRATIVE PENALTY

- 9.1 In accordance with the provisions of section 58(1)(a)(iii) read with section 59(1)(a), 59(2) and (3) of the Act, the Respondents are liable for an administrative penalty.
- 9.2.1 The Respondents have agreed to pay a penalty in the amount of R 4 500 000.00 (Four Million Five Hundred Thousand Rand);
- 9.2.2 The Respondents will pay a minimum of 50% of the penalty within sixty (60) days of the confirmation of this Consent Order by the Competition Tribunal;
- 9.2.3 The Respondents will pay the balance of the penalty within one hundred and twenty (120) days of the confirmation of this Consent Order by the Competition Tribunal




Thus done and signed by the Parties here below.

PARTIES



**COMPETITION COMMISSIONER
ON BEHALF OF APPLICANT**

17/2/04
.....
DATE



**THE HOSPITAL ASSOCIATION OF SOUTH AFRICA
ON BEHALF OF RESPONDENTS**

9/02/04
.....
DATE

**THE REGISTRAR
COMPETITION TRIBUNAL**

DATED AND SIGNED ON THIS _____ DAY OF _____
2004 AT _____

1. _____
Chairperson of the Tribunal

2. _____
Panel Member

3. _____
Panel Member

Tariffs and Competition Commission Investigation.

Subject to the Competition Commissions investigation of BHF, SAMA and HASA, and which was reported in the July issue of LegalWatch, members are asked to note the following:

HASA is in the process of entering into a 'Consent Order' agreement with the Competition Commission of South Africa. Such an Order, made in terms of the Competition Act, means that HASA and its members, will not have to give testimony or be subject to any trial or adjudication of any issue of fact or law. Instead by virtue of a 'Consent Order' both the Competition Commission and HASA agree to certain conditions, as well as the payment of an admission of guilt penalty.

In accordance with such agreement, HASA has undertaken to inform members of HASA that it (the Association) shall no-longer recommend and/or publish a Recommended Tariff for Private Hospitals and Psychiatric Hospitals for the provision of medical services. Nor shall it (the Association) engage in any conduct, which facilitates and/or be interpreted, as an agreement between its members on prices. This includes consultation with any other stakeholder within the industry around any issue concerning price.

Furthermore, members are informed that HASA's comprehensive 'Competition Policy' now constitutes part of its Ethical Rules, and all members are advised to strictly follow such policy, as well as inform the Board of Directors of any non-compliance, if such comes to the attention of members.

The Administrative penalty first proposed by the Competition Commission of South Africa was for the amount of 9.6 million Rand, but was rejected by HASA on behalf of its members. Subject to legal negotiation with the Competition Commission this amount was reduced to 4.5 million Rand, and shall constitute full and final settlement of the matter against HASA. Cognisance must be given to the fact, that should HASA have been referred to the Tribunal and found guilty of contravening the Act, its members could have been fined 10% of their annual turnover.

A full explanation in regards to the above 'Consent Order', will be forwarded to all members of HASA by the Board of Directors once finalised.

National Price Reference List.

The abovementioned reference list is available on the Council for Medical Schemes website at www.medicalschemes.com

In addition, Circular 15-17 and the Reference Manual for the above have now been published, and can also be accessed at the abovestated web site.

"B"



The Hospital Association of South Africa

Policy Document: Competition Law

The Hospital Association of South Africa (hereinafter referred to as HASA) represents the private hospital industry in South Africa. It has a membership base comprising about 95% of private hospitals in the Republic. HASA is a section 21 company whose Board of Directors is elected annually by member hospitals from executives employed within the private hospital industry.

HASA plays many varied roles in service of the private hospital industry. It disseminates industry information by producing a monthly newsletter, maintaining a web page, and producing an annual publication called Health Annals. The Association also hosts national and regional industry conferences, represents the private hospital industry in government and other forums and advises and comments on new and existing legislation affecting private hospitals. HASA participates on behalf of the industry in the Health and Welfare Sectoral Education and Training Authority established in terms of the Skills Development Act, in standards generating bodies and other structures established in terms of the South Africa Qualifications Authority Act and on the South African Advertising Standards Authority.

At all times HASA members must ensure their compliance with related legislation and/or regulation, and in particular must ensure that with any discussion with any individual, institution, body and/or association, that their representations are compliant with Competition Law (see the Competition Act [Act No. 89 of 1998]) In accordance with this law, HASA enunciates the following policy:

1. That at all times members will act within the clearly defined provisions of HASA's Articles of Association (as registered and amended from time to time), and shall at no time deviate from these provisions under any circumstance whatsoever.
2. That any and all discussions relating to competition law and/or antitrust matters, shall be in strict compliance with this policy document, and that no deviation whatsoever will be considered being valid or binding on HASA or its members.
3. That no member of HASA on behalf of the Association shall engage in any discussion of; price, pricing procedures, discounts, credit terms, cost, production levels, liabilities, investments (current or projected), market information and/or commercial matters there related, with any individual, institution, organisation, association and/or body
4. That at all times members of HASA who act on behalf of the Association, acquaint themselves with this policy document, and when in doubt as to any conduct which may or may not be in violation of this policy, that legal clarity first be obtained from the Executive Officer: Legal Affairs.

The following Conduct will be deemed to be in violation of this policy document, and shall not be interpreted as being limited to those points as discussed hereunder:

1. Any discussion in regards to what constitutes a fair profit margin.
2. Any discussion around price, pricing procedures, discounts, and/or credit arrangements, as it relates to any service, product, relationship, and/or arrangement, with any individual, institution, organisation, association and/or body This shall include the State.
3. Any discussion around respective production concerns, levels of supply and/or inventory.
4. Any discussion around competing interests, levels of service, and/or prices, with a fellow member of HASA.

The following activities may be prohibited, and members are to ensure that at all times there is strict compliance with these provisions as stated, and should be reviewed by the Executive Officer: Legal Affairs in advance:

- Communications with any professional body, association, representative body, statutory Council, government agency, and/or government department (at national and/or provincial level)

Understanding that in terms of section 81 of the Act, the provisions of competition law are equally applicable to the State.

- Any meeting and/or gathering where there is a discussion around or move toward the: standardisation of products, procedures, services and/or supply of goods Including but not limited to fees, tariffs and related matters.
- Any meeting where there is a joint discussion around Codes of Conduct, Certification and/or Standards applicable to the industry.

Members are therefore, required to:

- 1 Where possible have legal counsel at such meetings and/or discussions. This counsel shall not be limited to the Executive Officer: Legal Affairs, but shall also include independent and/or internal legal advisors.
- 2 Obtain a comprehensive agenda before any such meeting is attended, and ensure that the topics there provided are closely followed. In other words, members should resist allowing any discussion outside the provisions of those provided for in the agenda. Members should also ensure, that where possible, legal counsel are approached to give opinion in regards to the points raised on such an agenda, in advance
3. Obtain minutes of these meetings, and where necessary ensure that HASA members are accurately recorded and/or represented.

What to do in the event of a meeting that violates the above stated policy:

Should any meeting deviate from the authorised agenda, and in your opinion or that of legal counsel become anti-competitive in any way whatsoever, then members are advised to do the following:

- (a) Immediately inform the meeting that in your opinion the discussion violates the policy document of HASA and that you object to continuing such discussion, and as such your continued participation in the meeting is subject to the discussion ending, and the meeting continuing in terms of the authorised and/or accepted agenda.
- (b) That in the event of such discussion continuing despite your objection, that the member immediately remove him or herself from that meeting, understanding that both active and/or passive participation in such discussions is equally prohibited in terms of the Act.
- (c) Members should ensure that in the event of the above happening, that their objections are noted for the record, and as soon as possible inform your respective legal counsel of this fact (if not present at the aforementioned meeting). The responsible person (member or legal counsel) will then re-iterate your (HASA's) objection in writing to the organisers of that meeting, within 24 hrs of having left or concluded that meeting

K. Worrall-Clare

Executive Officer: Legal Affairs.

LegalWatch

Wednesday, July
30, 2003

Volume 2 July,
Number 14

**Competition
Commission referral
of HASA, BHF and
SAMA to the
Tribunal.**

Competition Commissioner

Members would have read extensive reports in the newspapers concerning the Competition Commissioner's decision to refer HASA, BHF and SAMA to the Competition Tribunal for alleged 'collusive practices' under the Competition Act. This was as a direct result of an investigation conducted and initiated by the Commission almost 15 months ago, and where HASA was requested to submit certain information together with BHF and SAMA.

Members are accordingly advised that our attorneys on record are: Mr. Martin Versfeld and Mr. Anthony Norton of Webber Wentzel Bownes.

HASA is of the opinion that it has had a bona fide relationship with the Competition Commission since 1997, during which it requested and was granted an exemption under that law to publish a recommended non-binding tariff. This exemption was extended under the new Competition Act, for a period of one year, and expired in August 2000. We intend therefore, co-operating fully with the Commission, where it is hoped that HASA can clarify its position and avert the need for protracted litigation. We will keep members updated in this regard.

**Members are
therefore, advised
to access the Bill
on the Web Site
provided.**

Members are advised to once again acquaint themselves with the HASA Competition Policy, as passed by the Board of Directors in February 2003, and which appears on our web site at www.hasa.co.za

**Copies of your
Information manual
should be sent to
Adv. K. Worrall-
Clare (posted to the
address supplied
below)**

Promotion of Access to Information Act.

Members are reminded to submit their companies (private hospitals) 'Information Manual', in which it sets out how individuals are to request access to information, to the relevant authorities by the end of August 2003. No further extension will be considered by the State.

Members are advised that this is compulsory in law, and that every private company must submit a manual in terms of this Act. Furthermore the private hospital must register such with the Human Rights Commission, as well as print a copy in the Government Gazette (which has a cost implication for the hospital). HASA has drafted a copy of such a manual for members use, and can be obtained from legal@hasa.co.za Should you require such, then email at the address provided and ask for the 'Template Information Manual', or access such directly from our web site at www.hasa.co.za