



competitiontribunal
SOUTH AFRICA

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CO095Sep19

In the matter between:

Competition Commission

Applicant

And

Lenmed Ethekewini Hospital and Heart Centre (Pty)
Ltd

Respondent

Panel : M Mazwai (Presiding Member)
: E Daniels (Tribunal Panel Member)
: A Ndoni (Tribunal Panel Member)
Heard on : 09 October 2019
Decided on : 09 October 2019

Consent Agreement

The Tribunal hereby confirms the consent agreement as agreed to and proposed by the Competition Commission and Lenmed Ethekewini Hospital and Heart Centre (Pty) Ltd annexed hereto marked "A".

Ms Mondo Mazwai
Presiding Member

09 October 2019

Date

Concurring: Mr Enver Daniels and Ms Andiswa Ndoni

A

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
(HELD IN PRETORIA)

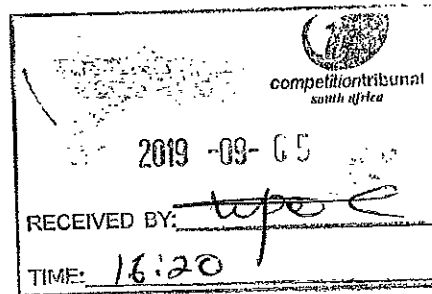
CT CASE NO: C0095 Sep 19

CC CASE NO: 2017JUN0053

In the matter between:

THE COMPETITION COMMISSION

And



Applicant

LENMED HEALTH PROPRIETARY LIMITED

First Respondent

LENMED ETHEKWINI HOSPITAL AND HEART CENTRE PROPRIETARY LIMITED

Second Respondent

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND LENMED HEALTH PROPRIETARY LIMITED AND LENMED ETHEKWINI HOSPITAL AND HEART CENTRE PROPRIETARY LIMITED IN RESPECT OF CONTRAVENTIONS OF SECTIONS 13A (1) and (3) OF THE COMPETITION ACT NO. 89 OF 1998, AS AMENDED

PREAMBLE

The Competition Commission ("the Commission"), Lenmed Health Proprietary Limited ("Lenmed") and Lenmed Ethekwini Hospital and Heart Centre Proprietary Limited ("eThekwini Hospital") hereby agree that an application be made to the Tribunal ("the Tribunal") for confirmation of this Consent Agreement as an order of the Tribunal in terms of section 49D of the Competition Act No. 89 of 1998, as amended ("the Act"), in respect of contraventions of sections 13A (1) and (3) of the Act, on the terms set out below:

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1. DEFINITIONS

For the purposes of this Consent Agreement the following definitions shall apply:

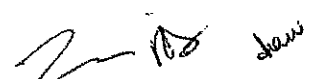
- 1.1 **“Act”** means the Competition Act No. 89 of 1998, as amended;
- 1.2 **“Commission”** means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Act, with its principal place of business at the DTI Campus, Block C: Mulayo Building, 77 Meintjies Street, Sunnyside, Pretoria;
- 1.3 **“Commissioner”** means the Commissioner of the Competition Commission appointed in terms of section 22 of the Act;
- 1.4 **“eThekwini Hospital”** Lenmed Ethekwini Hospital and Heart Centre (Pty) Ltd, a private company incorporated in terms of the laws of the Republic of South Africa, with its principal place of business at Riverhorse Valley Business Estate, Queen Nandi Drive, Durban, Kwa-Zulu Natal;
- 1.5 **“Lenmed”** means Lenmed Health (Pty) Ltd, a private company incorporated in terms of the laws of the Republic of South Africa, with its principal place of business at the corner of 14th Avenue and Hendrick Potgieter Street, Johannesburg;
- 1.6 **Lenmed / eThekwini Hospital 2010 Transaction** means the acquisition by Lenmed of additional issued share capital of 10.17% in eThekwini Hospital on 15 April 2010, and thereby increasing its shareholding in eThekwini hospital from 19.59% to 29.76%;
- 1.7 **“Parties”** means the Commission and the Respondents;

Z *B* *Jaww*

- 1.8 **“Respondents”** means Lenmed and eThekwini Hospital;
- 1.9 **“Consent Agreement”** means this agreement duly signed and concluded between the Commission and the respondents;
- 1.10 **“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 1st Floor, the dti Campus, Building C: Mulayo, 77 Meintjies Street, Sunnyside, Pretoria.

2. BACKGROUND TO THE COMMISSION’S INVESTIGATION

- 2.1 Prior to 2010, Lenmed held a non-controlling shareholding of 19.59% in eThekwini Hospital. On 15 April 2010, Lenmed acquired additional shares in eThekwini Hospital and thereby increased its shareholding from 19.59% to 29,76%.
- 2.2 The eThekwini’s Shareholders Agreement (“Shareholders Agreement”), included certain protections for minority shareholders. In terms of clause 12 of the Shareholders Agreement, matters requiring shareholders resolution included amongst others, approval of the Company’s business plan. In terms of the Shareholders Agreement, Lenmed with approximately 29% shareholding, was able to veto eThekwini Hospital’s business plan.
- 2.3 On 25 January 2017, the respondents approached the Commission for its view on whether Lenmed’s acquisition of additional shares in eThekwini Hospital on 15 April 2010, increasing its shareholding from 19.59% to 29,76% was a notifiable merger in terms of the Act.
- 2.4 The Commission confirmed that the above transaction amounted to a merger. The Commission requested the respondents to notify the Lenmed / eThekwini Hospital 2010 Transaction and allow the Commission to assess the effects within the relevant market. On 26 June 2017, the respondents filed a notice of an intermediate merger with the Commission. The Commission investigated

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the merger and approved the Lenmed / eThekwini Hospital 2010 Transaction without conditions because it did not raise competition and public interest concerns.

3. THE COMMISSION'S FINDINGS

- 3.1 The Commission found that Lenmed's ability to veto eThekwini's business plan is negative control over Lenmed's policy as contemplated by section 12(2)(g) of the Act. This type of acquisition of control is a merger as contemplated by section 12(1) of the Act. The Lenmed / eThekwini Hospital 2010 Transaction was an intermediate merger, contemplated in section 13A of the Act.
- 3.2 Based on the above, the Lenmed / eThekwini Hospital 2010 Transaction should have been notified to the Commission before 15 April 2010. The Lenmed / eThekwini Hospital 2010 Transaction was not formally notified to the Commission in accordance with section 13A (1) before 15 April 2010.
- 3.3 This merger was implemented on 15 April 2010 when Lenmed increased its shareholding in eThekwini Hospitals to approximately 29% without the approval of the competition authorities, in contravention of section 13A (3).
- 3.4 The respondents failed to notify a merger to the Commission before 15 April 2010, which was the date when the merger was implemented without notifying the Commission. The conduct of the respondents is in contravention of sections 13A (1) and (3) of the Act.

4. ADMISSION

The respondents admit that the Lenmed / eThekwini Hospital 2010 Transaction constituted a notifiable intermediate merger as defined in section 11(5)(b) of the Act and was implemented in contravention of sections 13A (1) and (3) of the Act.



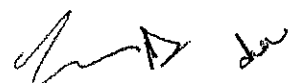
5. FUTURE CONDUCT

5.1 The respondents hereby undertake to:

- 5.1.1 not engage in any contravention of the Act;
- 5.1.2 develop, implement and monitor a competition law compliance programme as part of its corporate governance policy, which is designed to ensure that its employees, management, directors and agents do not engage in future contraventions of the Act. In particular, such compliance programme should include mechanisms for the identification, prevention, detection and monitoring of any contravention of the Act; and
- 5.1.3 submit a copy of such compliance programme to the Commission within 60 (sixty) business days from the date of confirmation of this Consent Agreement as an order by the Tribunal.

6. ADMINISTRATIVE PENALTY

- 6.1 Having regard to the provisions of section 58(1)(a)(ii) as read with sections 59(1)(d), 59(2) and 59(3) of the Act, the respondents agree to pay an administrative penalty on the basis of joint and several liability, the one paying, the other being absolved.
- 6.2 The parties agree that the settlement amount to be paid by the respondents will be R1 250 000 (One million two hundred and fifty thousand rands) within 60 days (sixty) days of this agreement being made an order of the Tribunal.
- 6.3 The settlement amount shall be paid into the Commission's bank account, details which are as follows:
- Name: The Competition Commission Fee Account**
Bank: Absa Bank, Pretoria
Account number: 4050778576



Branch code: 323 345

Ref: 2017JUN0053

6.4 The settlement amount will be paid over by the Commission to the National Revenue Fund in accordance with section 59(4) of the Act.

7. FULL AND FINAL SETTLEMENT

This Consent Agreement is entered into in full and final settlement and concludes all proceedings under case number 2017Jun0053 between the Commission and the respondents relating to the contraventions of section 13A (1) and (3) of the Act, upon confirmation by the Tribunal.

For: Lenmed Health Proprietary Limited

Dated and signed at LENASTIA on the 2 day of AUGUST 2019

PRAKASH BABOO DEVCHAND

Name in full:

Designation:

CHAIRMAN AND CEO

Bad

For: Lenmed Ethekwini Hospital and Heart Centre Proprietary Limited

Dated and signed at JOHANNESBURG on the 2 day of AUGUST 2019

Law

Name in full: NAUGHAN TERRIS FIRMAN

Designation: DIRECTOR

Law *D* *Law*

For the Commission

Dated and signed at ISHWANE on the 9th day of August 2019



TEMBINKOSI BONAKELE
COMMISSIONER