competitiontribunal
south africa

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CP003Apr15/Joi120Sep15

In the interlocutory matter between:

Afrocentric Health Limited	Applicant
and	
Discovery Health Medical Scheme	1st Respondent
Discovery Health Limited	2nd Respondent
Retail Medical Scheme	3rd Respondent
Quantum Medical Aid Society	4th Respondent
LA Health Medical Scheme	5th Respondent
Lonmin Medical Scheme	6th Respondent
Naspers Medical Fund	7th Respondent
University of Kwazulu Natal Medical Scheme	8th Respondent
Remedi Medical Aid Scheme	9th Respondent
Anglo Medical Scheme	10th Respondent
BMW Employees Medical Aid Society	11th Respondent
Malcor Medical Scheme	12th Respondent
University of the Witwatersrand Johannesburg Staff Medical Aid Fund	13th Respondent
Anglovaal Group Medical Scheme	14th Respondent
Tsogo Sun Group Medical Scheme	15th Respondent
TFG Medical Aid Scheme	16th Respondent
Bankmed Medical Scheme	17th Respondent

In re the Complaint referral between

Afrocentric Healthcare Limited Applicant

and

Discovery Health Medical Scheme 1st Respondent

Discovery Health (Pty) Ltd 2nd Respondent

Panel : Yasmin Carrim (Presiding Member)
: Anton Roskam (Tribunal Member)
: Fiona Tregenna (Tribunal Member)
Heard on : 18 April 2016
Order Issued on : 15 August 2016
Reasons Issued on : 15 August 2016

Reasons for Decision

INTRODUCTION

[1] This matter concerns an application brought in terms of rule 45 of the Competition Tribunal's Rules ("CTR") for the joinder of fifteen medical schemes.

[2] The applicant, Afrocentric Health Ltd ("Afrocentric"), seeks to join the 3rd to 17th respondents to a complaint referred by it to the Competition Tribunal ("the Tribunal") in terms of section 51(1) of the Competition Act ("the Act").[1] The section 51(1) referral was made after the Competition Commission ("the Commission") had non-referred a complaint lodged by Afrocentric to it under section 49B(2).

[1] The Competition Act, 1998 (Act 89 of 1998).

[3] Afrocentric is a medical aid administrator. Discovery Health Medical Scheme ("DHMS"), the first respondent, is an open medical scheme. Discovery Health Limited ("DH"), the 2nd respondent, is an administrator of medical schemes and provides administration services to all the other respondents. The 3rd to 17th respondents are all closed medical schemes currently being or soon to be administered by DH.[2] Closed medical schemes are typically restricted to the employees of a particular employer or the members of a particular profession, trade, industry or calling. Open medical schemes, on the other hand, are open to any member of the public.[3]

[4] We have decided to dismiss the application for the joinder and our reasons follow.

BACKGROUND

[5] On 30 June 2014 Afrocentric submitted a complaint against DHMS and DH to the Commission in terms of section 49B(2) of the Act.

[6] On the CC1 form of the complaint (which we also refer to as "the s49B complaint") Afrocentric alleged that DH and DHMS contravened section 4 of the Act by engaging in a "*prohibited horizontal practice ito section 4(1)(b)(i), (ii) and/or (iii) alternatively collective bargaining ito section 4(1)(a)*". The prohibited collective bargaining complaint apparently emanates from the complainant's understanding of an earlier decision of the Tribunal, which involved the confirmation of a consent order between the Commission and the Board of Healthcare Funders of Southern Africa ("BHF"). In that matter BHF had admitted to contravening s 4(1)(b)(i) by directly or indirectly fixing prices, in that the association had recommended and published tariffs to and/or for its members.[4]

[2] The 17th respondent is in the process of moving to DH for administration services.
[3] All medical schemes (open and closed) are non-profit organisations, controlled and managed by an independent boards of trustees.
[4] Case no. 07/CR/Feb05.

[7] While the CC1 form cited only DH and DHMS, in the supporting affidavit attached to it, deposed to by Mr Dewald Dempers,[5] ("the s49B affidavit") it was alleged that DH and DHMS, together with *"14 other medical schemes administered by DH"*, were engaged in prohibited conduct which was in contravention of s4(1)(b), alternatively engaged in collective bargaining in contravention of s4(1)(a).[6]

[8] In paragraph 46 of the s49B affidavit and later in an unnumbered table found on page 26 of that document we find a reference to certain named medical schemes. It bears mention at this juncture that of the fifteen respondents Afrocentric now seeks to join in this application the following schemes were not mentioned on this list: the 10th respondent Anglo Medical Scheme, the 12th respondent Malcor Medical Scheme and the 16th respondent Bankmed Medical Scheme ("Bankmed"). Notably Altron Medical Aid Scheme ("Altron") which was listed in para 46 has not been cited as a respondent in this joinder application.[7] Bankmed had recently, in 2016, awarded a tender to DH for administration which explains why it was not originally referenced in the s49B complaint and later in the self-referral to the Tribunal.[8] No explanation however was provided by Afrocentric as to the whether Altron was still administered by DH and the positon of the 10th and 12th respondents.

[9] On 12 March 2015 the Commission notified Afrocentric that it had decided not to refer the complaint to the Tribunal. [9]

[10] In its letter to Afrocentric, the Commission stated that it had investigated the complaint and based on the available information at the time decided not to refer the matter to the Competition Tribunal for two reasons, namely –

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[5] CEO of Afrocentric at the time.
[6] Para 10 Complaint to the Commission 30 June 2014
[7] Para 46 also lists Afrox Medical Aid society, PG Bison Medical Aid society, Nampak SA Medical Scheme, Edcon Medical Aid Scheme and IBM (SA) Medical Aid Scheme which it lists and submits that these schemes have been amalgamated into DHMS.
[8] Para 17 of the respondent's answering affidavit to the joinder application.
[9] See letter dated 11 March 2015.

10.1. DH does not operate in the "same line of business" as the fourteen medical schemes which it administers. The Commission concluded that since DH engages in different economic activities from the medical schemes which it administers, the allegations that it engages in collusive conduct with medical schemes fails to substantiate a contravention of s4(1)(a) and 4(1)(b) of the Act.

10.2. Further that the outsourcing arrangements between medical schemes and medical scheme administrators form part of the Commission's market inquiry into the private healthcare sector currently underway. The Commission noted that the complainant has also made submissions to this inquiry.

[11] From this letter we see that the Commission had included fourteen medical schemes within the scope of their investigation. While it does not name them,[10] the Commission had communicated to the complainant that it considered the medical schemes to be in a separate market from the medical scheme administrators and that it did not consider the complaint as articulated, sufficient to sustain a contravention of s4 presumably because DH and the medical schemes it administered were not in a horizontal relationship. Having received the notice of non-referral, and notwithstanding the fact that it had been alerted to an apparent deficiency in its case by the Commission, Afrocentric elected to refer the complaint to the Tribunal in terms of s51(1) ("the self-referral").[11]

[12] The self-referral cited only DHMS and DH as respondents and relief in the form of an administrative penalty was only sought against these two respondents.

[10] Para 17 of the respondent's answering affidavit to the joinder application.
[11] On 10 April 2015.

[13] Both DH and DHMS opposed the self-referral and in their answering affidavits raised two preliminary objections; namely, material non-joinder and that the referral did not disclose a cause of action ("the exception").[12]

[14] Afrocentric subsequently[13] launched this application to join the fifteen medical schemes being administered by DH, including Bankmed ("the proposed respondents"). It sought to join the proposed respondents in terms of CTR 45 and on the basis of material interest and convenience.

[15] In support of its application, Afrocentric argued that because it was alleging conduct on the part of the 2nd to 13th and 15th respondents to be in contravention of s4, its relief against each of them would depend on the determination of the same questions of law and fact. For this reason, it argued that it was convenient to join them now instead of require Afrocentric to engage in separate actions against each of them. In relation to Bankmed it was accepted by Afrocentric that they had not been administered by DH at the time of the s49B complaint. However, given that the legality of their prospective arrangements with DH was being challenged on the same questions of law or fact by Afrocentric, it submitted that Bankmed should be joined. Afrocentric also argued that in any event Bankmed had a material interest, as did all the schemes administered by DH, in the outcome of these proceedings because the legality of their arrangements with DH were being challenged.

[16] While there were slight differences in nuance and emphasis in the cases put forward by the proposed respondents, in essence they opposed the application on two main grounds. The first basis of opposition was that Afrocentric was not entitled to join the proposed respondents, as this would offend the "referral rule" established by the courts. The second was that no substantive basis for joinder had been established because the referral did not disclose a cause of action.

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[12] See paras 3-10 of DH's Answering Affidavit and paras 15.1-15.11 of DHMS's Answering Affidavit
[13] On 26 August 2015

The referral rule

[17] In relation to the first ground the proposed respondents argued as follows. The s49B complaint had only been initiated against DH and DHMS. It had not been initiated by Afrocentric against the proposed respondents, as required by the prevailing jurisprudence. It was not competent in law for Afrocentric to expand the s49B complaint through joinder at the referral stage or for the Tribunal to consider such an expanded complaint at referral stage if the expanded complaint had not first been lodged with the Commission under s49B.

[18] Furthermore in the s49B complaint Afrocentric alleged that open and closed medical schemes do not compete for members[14], but in the self-referral it was now seeking to redefine the market to suggest that all medical schemes competed in the broad medical schemes market.[15] In other words, the argument went, if Afrocentric now desires to expand the complaint (and seek relief) against the proposed respondents it ought to first lodge a new expanded complaint with the Commission (i.e. a new s49B complaint). The proposed respondents relied on *Glaxo* and *Woodlands*[16] in support of this argument.

No cause of action

[19] In relation to the second ground of opposition, the proposed respondents argued that because the self-referral did not disclose a cause of action to substantiate a contravention of s4, no substantive basis had been established for joinder and the application ought to be dismissed.[17]

[20] In relation to the former ground, Afrocentric argued that although the complaint lodged with the Commission (and subsequently the self-referral)

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[14] See para 25 of Afrocentrics's s49B affidavit.
[15] See para 6 of the Afrocentric's self-referral affidavit
[16] Glaxo Wellcome v National Association of Pharmaceutical Wholesalers [2002] zacac 3 (21 October 2002) and Woodlands Dairy v Competition Commission 2010 (6) SA 108 (SCA)
[17] The respondents pointed to several aspects of the self-referral in support of this contention

did not seek relief against the proposed respondents, the content of the supporting affidavit in the s49B complaint did expressly refer to the conduct of the proposed respondents which amounted to a contravention of s4(1)(a) or (b). This was contained, for example, in paragraph 10 of the s49B complaint, where it was alleged that DH and DHMS "*...in conjunction with 14 other medical schemes administered by Discovery Health".* In their joinder application, Afrocentric urged the Tribunal not to adopt an over formalistic approach to the fact they were not cited as respondents in the CC1 form s49B complaint because their *conduct* had been complained of in the supporting affidavit. Joinder at referral stage was therefore competent and in accordance with the principles established in *Glaxo*.

[21] Afrocentric submitted that its self-referral did disclose a cause of action and that in any event this objection should be raised in the course of the self-referral itself (i.e. in the main matter) and that it was not a basis for an opposition to the joinder issue.

[22] Afrocentric argued further as follows: The test for joinder, is a question of whether, in terms of CTR45(1), the relief sought by Afrocentric against the proposed respondents would depend on the determination of the same questions of law or fact. The test under common law is whether material interest or convenience and not whether the referral was excipiable. All the proposed respondents had a material interest in the outcome of these proceedings because the legality of their agreement with DH was being challenged and it would be convenient to join them at this point of the proceedings.

ASSESSMENT

[23] The relevant provision of CTR 45 provides the following:

> *"(1) The Tribunal, or the assigned member, as the case may be, may combine any number of persons, whether jointly, jointly and severally, separately, or in the alternative, as parties in the same proceedings, if their respective rights to relief depend on the determination of substantially the same question of law or facts.*

.....

4) *An application to join any person as a party to proceedings, or to be substituted for an existing party, must be accompanied by copies of all documents previously delivered, unless the person concerned or that person's representative is already in possession of those documents.*

(5) *No joinder or substitution in terms of this rule will affect any prior steps taken in the proceedings."*

[24] From CTR 45(1) it is evident that the Tribunal *may* combine any number of persons as parties in the same proceedings if their respective rights to relief depend on the determination of substantially the same question of law or facts. As indicated by the use of the word "may", rather than the peremptory "must", the power to combine any number of persons in the same proceeding is discretionary.

[25] This rule is analogous to Uniform Rule 10.1 and 10.3 of the High Court.[18] Uniform rule 10.1 applies to the joinder of plaintiffs and 10.3 to joinder of defendants. In terms of Uniform rule 10.3 any number of respondents may be sued in one action either jointly, jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action. Until the promulgation of Uniform rule 10, it was not possible under the common law for a plaintiff, with separate causes of action against two or more defendants, to sue them in one summons. Uniform rule 10 altered the common law by permitting such joinder provided that the right to relief or the question arising depends on the determination of substantially the same question of law or fact. However, the common law rules relating to obligatory joinder remain unaltered; namely that anyone with a direct and substantial interest in a matter must be joined.[19]

[18] See Harms B-10.1
[19] See Harms B-102

[26] Leaving aside the issue of the referral rule debate, it cannot be disputed that all the proposed respondents would have a substantial interest in the outcome of this matter. All of them are medical schemes who have engaged or are in the process of engaging DH as their administrative agent to *inter alia* negotiate tariffs with health service providers, attend to claims submitted by members and to ensure compliance with regulatory and financial imperatives of the medical scheme itself. The fact that the legality of these arrangements is being challenged by Afrocentric would suggest that they have a direct and substantial interest in the outcome of these proceedings.

[27] However whether or not joinder of the proposed respondents ought to be permitted at *this point* in these proceedings is a matter of our discretion. That discretion is conferred upon us not only in terms of CTR 45(1), but also in the provisions of s55 read with CTR 55, which confer on the Tribunal a wide discretion to conduct and manage its proceedings, such discretion to be exercised on a case by case basis. [20]

[28] Recall that in the answers to the self-referral, both DH and DHMS have alleged that the referral discloses no cause of action for a s4 contravention because DH and DHMS are not parties in a horizontal relationship.[21] They argue that DH competes with other medical scheme administrators and DHMS with other open medical schemes. They allege further that there can be no co-ordinated conduct between restricted medical schemes and open medical schemes because, on Afrocentric's own version as stated in para 8.4 of the self-referral affidavit, they do not compete with each other and are therefore not in a horizontal relationship as contemplated in s4.

[29] In their submissions at the joinder hearing on 20 April 2016, the proposed respondents relied on the same argument as a basis for opposing the joinder.

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[20] See paras 24-30 of *Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa (Pty) Ltd and Others* (Case No. 08/CR/Feb01) and paras 13-14 of *Cancun Trading and others v Seven-Eleven Corporation SA (Pty) Ltd* (Case No. 18/IR/Dec99).

[21] See paras 3 and 13 of the Discovery Health AA and paras 9.11 of the DHMS AA

[30] While we agree with Afrocentric that the test for joinder is not whether or not the referral discloses a cause of action and that is a matter that ought to be raised and decided in the main matter, we cannot ignore the fact that the issue has already been raised by the 1st and 2nd respondents in their answering affidavits to the Afrocentric's founding affidavit in the self-referral and that the proposed respondents rely upon the same grounds as a basis for opposing the joinder.

[31] Given that all the respondents have raised this challenge – the 1st and 2nd respondents as an exception in the referral and the proposed respondents in this joinder application – it would be in the interests of justice that the exception be determined before putting the proposed respondents to the cost and effort of mounting a defence to a case that is alleged to be unclear. If the exception is upheld, then one of two possibilities will result. The first possibility is that the referral is dismissed. This would render the joinder unnecessary. The second is that it will lead to a better articulation or understanding of the case, which might prevent protracted proceedings and which might go a long way in enabling the proposed respondents to assess their position in relation thereto. In fairness, the fifteen proposed respondents, which are all non-profit medical schemes acting on behalf of consumers, are entitled to clarity and coherence in the case that they are being asked to join.

[32] In light of the above we are of the view that joinder, at this point of the proceedings prior to the determination of the exception, would be unfair and would put the proposed respondents to the unnecessary cost of preparing for a case that is already being challenged at a substantive level. For this reason we are of the view that the joinder application should be dismissed at this stage.

[33] It does not follow that any of the proposed respondents cannot participate in the referral should they so desire. In terms of s53(1)(a)(iv) the Tribunal is entitled to permit any person who has a material interest to participate in a hearing provided the interests of that person are not adequately represented by another participant.

[34] At the same time, proceedings which seek to challenge the legality of the arrangements of medical schemes that act on behalf of their members, could pose a significant risk to consumers, who are their beneficiaries, and therefore ought not to be protracted. It is imperative therefore that the exception be determined expeditiously. The 1st and 2nd respondents have already indicated their desire to approach this Tribunal for a hearing in that regard.[22]

[35] Accordingly, we make the following order.

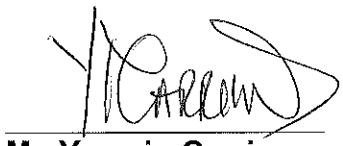
Order

[36] The joinder application in respect of the proposed respondents is dismissed.

[37] The following directive is made–

37.1. The parties must approach the Registrar within 10 days hereof to set-down the hearing of the exception application.

[38] There is no order as to costs.



Ms Yasmin Carrim

15 August 2016
DATE

Mr Anton Roskam and Prof Fiona Tregenna concurring

Tribunal Researcher:	Aneesa Ravat
For the applicant:	Adv. Subel and adv Landman instructed by Rooth & Wessels Attorneys
For the respondents:	Adv Wim Trengrove and Adv Bhana instructed by ENS for the 3rd to 17th respondents and Adv Engelbrecht instructed by Bowman Gilfillan for the 14th respondent

[22] See letter dated 7 August and email dated 7 August 2016 from DHMS and DH respectively.