COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CRP065Jul13/DSC197Dec16

In the application to compel matter between:

SOUTH AFRICAN MEDICAL ASSOCIATION **Applicant**

And

COUNCIL FOR MEDICAL SCHEMES **Respondent**

In Re:

The complaint referral between:

COUNCIL FOR MEDICAL SCHEMES **Applicant**

and

SOUTH AFRICAN PAEDIATRIC ASSOCIATION **First Respondent**

SOUTH AFRICAN MEDICAL ASSOCIATION **Second Respondent**

And

In Re:
The complaint referral between:

COUNCIL FOR MEDICAL SCHEMES **Applicant**

and

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

SOUTH AFRICAN MEDICAL ASSOCIATION **Second Respondent**

Panel : N Manoim (Presiding Member)
Y Carrim (Tribunal Member)

		E Daniels (Tribunal Member)
Heard on	:	14 February 2017
Order issued on	:	21 April 2017
Reasons issued on	:	21 April 2017

Order and Reasons

INTRODUCTION

[1] On 14 February 2017 the Competition Tribunal ("Tribunal") heard an application to compel further particulars ("**the application**") filed by the South African Medical Association ("SAMA"), to obtain further particulars from the Council for Medical Schemes ("CMS"). In the application SAMA requires the Tribunal to compel CMS to provide further particulars, failing which to dismiss CMS's two complaint referrals before the Tribunal. Coupled with the application is an amendment and strike out application in relation to certain allegations in CMS's papers, which SAMA is of the view are irrelevant and superfluous.

Parties

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

[3] SAMA is a non-profit organisation incorporated and registered in terms of the company laws of the Republic of South Africa. SAMA represents all medical practitioners registered to practise as medical practitioners in terms of the Health Professional Act ("HPA"). [2]

Background

[4] This application comes on the heels of a recent Tribunal decision handed down on 15 August 2016 ("the **Tribunal decision**").[3] In that matter the Tribunal had

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[1] Act 131 of 1998.
[2] Act 56 of 1974.
[3] See Tribunal decision in South African Medical Association vs. Council for Medical Schemes; case number; CRP065Jul13/PIL001Apr16.

to decide whether to dismiss two complaint referrals filed by CMS in 2013(“**2013 referrals**”). The two complaint referrals involve allegations of price fixing by SAMA and the South African Paediatric Association (“SAPA”) (herein referred to as the “**SAPA complaint**”), and SAMA and the Society for Cardiothoracic Surgeons of South Africa (“SOCTSA”)(herein referred to as the “**SOCTSA complaint**”). In the SAPA complaint SAMA’s alleged role in the determination, recommendation and publication in its Doctors’ Coding Manual, of a specific modifier known as Modifier 0019(b) forms the subject of the complaint. In the SOCTSA complaint, SAMA’s alleged role in the adoption and publication of specific guidelines determined by SOCTSA forms the subject of the complaint. In the Tribunal decision, we had to deal with five applications, namely two exception applications and an *In Limine* application filed by SAMA in relation to the SAPA and SOCTSA complaints, and two amendment applications filed by CMS in relation to its SAPA and SOCTSA complaints. SAMA, through its three applications was challenging the validity of CMS’s complaint referrals on the basis that they are incompetent not only in terms of the Act, but also in terms of the MSA. SAMA also sought to have the 2013 referrals set aside on the basis that the referrals are vague and embarrassing and do not disclose a cause of action in terms of section 4(1)(b) of the Competition Act.[4] As a response to SAMA’s applications, CMS filed two amendment applications wherein it sought to amend its 2013 referrals. However the way in which CMS sought to do this was by filing new affidavits to replace the old ones, as opposed to addressing the specifics of the objections raised by SAMA in its applications. The Tribunal decided to grant SAMA’s exception applications, dismiss CMS’s amendment applications, but provided CMS with an opportunity to amend its referrals in response to SAMA’s exceptions through the filing of supplementary affidavits.[5]

Order in Tribunal Decision

[5] In our Order dated 15 August 2016, in an effort to provide CMS with an opportunity to rectify its pleadings, we ordered as follows;

[4] Act 89 of 1998 as amended.
[5] Supra at footnote 3.

[5.1] CMS must file its supplementary affidavits in relation to its referrals under case numbers CRP066Jul13 and CRP065Jul13 within 20 business days of this order.

[5.2] The supplementary affidavits must clearly stipulate SAMA's involvement by indicating the following:

[5.2.1] the nature of the alleged horizontal relationship between SAMA and SAPA and between SAMA and SOCTSA;

[5.2.2] the manner in which s4(1)(b)(i) of the Act has been contravened by SAMA; and

[5.2.3] the difference in liability between SAMA and SAPA and between SAMA and SOCTSA.

[6] In compliance with the Tribunal decision, supplementary affidavits were filed by CMS in relation to both the SAPA complaint and SOCTSA complaint. SAMA then filed two notices requesting further particulars in relation to the SAPA complaint ("SAPA Notice") and the SOCTSA complaint ("SOCTSA Notice"). SAMA submitted that CMS's supplementary affidavits lack particularity and thus requested for further particulars. CMS refused to respond to such as it stated that its supplementary affidavits are sufficient for SAMA to file its answering affidavits. CMS did however attempt to respond to SAMA's requests for further particulars, in an attempt to try and expedite the matter.

[7] After numerous correspondences between the parties, a prehearing was convened by the Tribunal to determine the way forward as parties had reached a stalemate on how to proceed. The reason being was that SAMA alleged that CMS failed to comply with the Tribunal decision which allowed CMS to rectify its case i.e. its case was still not clear and thus vague and embarrassing, and its attempt to adequately respond to SAMA's request for further particulars was not sufficient. SAMA further stated that CMS either claimed that it does not have the requested documents, or it will provide them at a later stage during the

discovery process. It was thus agreed at that prehearing that SAMA must file an application to compel, which is the application before us.

Current application

[8] In this application SAMA submitted that CMS ought to respond to its requests for further particulars, failing which CMS's referrals should be dismissed because CMS failed to comply with the Tribunal decision. SAMA further submitted that CMS has still failed to make out a proper case against SAMA, or even plead the essential elements of section 4(1)(b)(i) of the Act. SAMA thus submitted that CMS should not be provided with yet another opportunity to formulate its case against SAMA. SAMA acknowledged that some of its requested particulars have been met by CMS through its answering affidavit to the current application and redacted its list accordingly. However it still insisted that some aspects of the indirect price fixing allegation lack sufficient particularity. For ease of convenience SAMA's final request for further particularity is listed in an Annexure to these reasons.

[9] SAMA also submitted that it is not clear from the numerous affidavits CMS has filed from 2013 to date, how SAMA has contravened section 4(b)(i) of the Act. Given the fact that CMS's complaints were initially filed in 2013, the referrals have obviously evolved overtime and such evolution has given rise to confusion and contradictions between all the various affidavits CMS has filed. SAMA therefore submitted that there is thus a *lacuna* in relation to the notices of motions, as the relief that CMS now seeks in its supplementary affidavits contradicts the notices of motions that were part of the complaint referrals filed with CMS's 2013 referrals.[6]

[10] CMS on the other hand submitted that the case against SAMA in each complaint referral is clear, however if the Tribunal is of the view that indeed further particularity is required, the Tribunal must guide CMS on what further particularity is required. CMS further submitted that SAMA did not make out a

[6] See page 31 of the trial bundle in SAMA's founding affidavit.

case for the two complaint referrals to be dismissed, as at least some of the particularity sought in relation to both complaints has been provided.

Assessment

[11] Having received the supplementary affidavits of CMS, read together with CMS's answering affidavit in the current application, we now turn to assess whether CMS has complied with our Order.

[12] *"the nature of the alleged horizontal relationship between SAMA and SAPA and between SAMA and SOCTSA"*

12.1 In relation to this point CMS alleged that SAMA is an association of firms whose members are in a horizontal relationship with each other, as is SAPA. With regards to SAMA, the firms who are alleged to be in a horizontal relationship with each other for purposes of the complaint referral are its members who are registered paediatricians and/or neonatologists providing the intensive care services to which the SAMA Modifier refers. CMS submitted that in relation to SAPA the firms who are alleged to be in a horizontal relationship with each other for purposes of the complaint referral, are its members who are registered paediatricians and/or neonatologists providing intensive care services to which the SAMA Modifier refers.

In relation to this point CMS alleged that SAMA is an association of firms whose members are in a horizontal relationship with each other, as is SOCTSA. With regards to SAMA the firms who are alleged to be in a horizontal relationship with each other for purposes of the complaint referral are its members who are registered cardiothoracic surgeons who perform CABG surgery. CMS submitted that in relation to SOCTSA the firms who are alleged to be in a horizontal relationship with each other for purposes

of the complaint referral are its members who are registered cardiothoracic surgeons who perform CABG surgery.

[13] *"the manner in which s4(1)(b)(i) of the Act has been contravened by SAMA"*;

13.1 CMS submitted that the conduct by SAMA which constitutes a contravention of the Act is its decision to publish the SAMA Modifier in the Doctors' Billing Manual, and thereby recommend its use by SAMA members. In relation to SAPA, CMS submitted that the conduct that amounts to a contravention of the Act is its decision to endorse the SAMA Modifier, and recommend its use to SAPA members.

13.2 CMS submitted that SAMA's alleged conduct which constitutes a contravention of the Act is its decision to approve the billing guidelines, distribute the billing guidelines on a SAMA letterhead, and offer support to all cardiothoracic surgeons who invoice in accordance with the billing guidelines. In relation to SOCTSA CMS submitted that SOCTSA's conduct which amounts to a contravention of the Act is its decision to develop, determine and approve the text of the billing guidelines "as a statement", apparently allow for the billing guidelines to be distributed by SAMA in a document that includes SOCTSA's logo and registration number, and offer support to all cardiothoracic surgeons who invoice in accordance with the billing guidelines.

[14] *"the difference in liability between SAMA and SAPA and between SAMA and SOCTSA"*

14.1 CMS submitted that by recommending that their members invoice in terms of the billing guidelines, which effectively authorises neonatologists and other paediatricians who are members of SAMA and/or SAPA to increase by 50% the prices they would otherwise have

charged for the intensive care services, subject to the application of Modifier 0019(b), SAMA and SAPA are alleged to have engaged in prohibited price fixing.

14.2 CMS submitted that by recommending that their members invoice in terms of the billing guidelines, which effectively authorises cardiothoracic surgeons who are members of SAMA and/or SOCTSA to charge a separate fee under code 1348 for each saphenous vein graft performed under a single anaesthetic, subject to the application of Modifier 0005, SAMA and SOCTSA are alleged to have engaged in prohibited price fixing.

[15] It is clear from the papers of CMS that clarity has been provided in relation to some of its allegations in the 2013 referrals and that CMS has complied with our Order.

[16] SAMA also conceded that CMS has met the requests for particularity but insisted that more particularity is required as envisaged in its list in the Annexure.[7] We therefore only need to consider the request for particularity listed in the Annexure.

[17] While CMS has attempted to provide further clarity pursuant to our Order, in our view the supplementary affidavits still fall short in explaining how the billing formula or guidelines in the two different complaints effectively amount to price fixing. In their affidavits the impugned conduct of SAMA, SAPA and SOCTSA is still described in relation to the *adoption and publication* of the modifier and the billing guidelines by SAMA, SAPA and SOCTSA respectively.

[18] In relation to the SAPA complaint CMS has still not provided sufficient detail as to how the recommended modifier published by SAMA and SAPA for use by their members is effectively operationalised into a contravention of section

[7] See page 283 of the trial bundle in SAMA's replying affidavit.

4(1)(b)(i). By way of example no details are given about how the modifier is used in practice by the doctors and the manner in which SAMA and/or SAPA ensure adherence thereto. In the SOCTSA complaint a similar lacuna exists. CMS has not provided details of how the billing guidelines are operationalised in a manner so as to contravene s4(1)(b)(i).

[19] These defects notwithstanding we do not accept that CMS should provide all the particularity sought by SAMA in its final request because some have already been provided. For example the particularity sought in paragraphs 7.3 of the SAPA notice and 9.2 of the SOCTSA notice (see Annexure) regarding how prices could be enforced given that there are annual negotiations with medical schemes has already been answered as CMS states this is done by way of patients having to make co-payments. Some of the particularity sought by SAMA from CMS relates to information that would, if relevant, be in the possession of SAMA and/or SAPA members and would likely be the subject of discovery requests in the course of pre-trial proceedings and we have refused to grant these.

[20] Accordingly, with reference to the Annexure, we have granted SAMA's requests in paragraphs 5 to 7.1 of the SAPA notice but have refused paragraphs 7.2 and 7.3. We have granted SAMA's requests contained in paragraphs 7.1 to 7.3 but have refused 8 and 9 of the SOCSTA notice.

[21] Furthermore, in light of the importance of billing guidelines and codes to the public at large and to the medical profession in particular, we are of the view that a dismissal of the complaints would not serve the public interest. The billing practices of medical professionals have a direct bearing on the cost of healthcare and all the relevant parties that might be affected by the challenge being brought by CMS– medical schemes, practitioners, patients and professional associations - would benefit from a better ventilation of the issues in a matter that is of critical importance. In our view theirs and the interest of the public at large would be promoted by providing CMS with a further opportunity to file additional particulars and amend its papers as set out below in our order.

[22] In relation to the SAPA complaint SAMA pointed out first that the relief now sought by CMS is in relation to Modifier 0019(b) and not Modifier 0019. Secondly, SAMA submitted that CMS should file an application to amend its notice of motion to be in line with the current relief it seeks in its supplementary affidavit. Thirdly, the relief sought by CMS is not in line with CMS's primary goal since medical schemes also use Modifier 0019, and therefore the relief would be ineffective against medical schemes. SAMA therefore submitted that CMS must amend its notice of motion to correctly reflect the relief sought by it.

[23] In relation to the SOCTSA complaint, again SAMA submitted that the notice of motion needs to be amended to correctly reflect the relief that CMS now seeks in its supplementary affidavit. SAMA submitted that CMS needs to amend its notice of motion to reflect whether the alleged conduct constitutes the alleged determination by SAMA of the guidelines, or their alleged adoption or recommendation and publication thereof. If CMS is not alleging that SAMA is responsible for the determination of the guidelines, it must amend its notice of motion to this effect.

[24] In response to this, CMS explained that the SOCTSA complaint was premised around the 'Dr Botha complaint'.[8] The Dr Botha complaint related to a cardiothoracic surgeon who performed a coronary artery bypass surgery on a patient who was a member of PROFMED Medical Scheme. The surgery involved the grafting of various arteries. Dr Botha billed the medical scheme 100% of the unit price in respect of the first graft, 75% in relation to the second graft, 50% in relation to the third graft, and thereafter 25% in relation to the remainder of the grafts. However, PROFMED was only prepared to pay 100% of the first graft and 30% for the remainder of the grafts. Dr Botha had formulated his claim in accordance with the SOCTSA billing guidelines.

[8] See page 92 of the transcript of hearing.

[25] In the course of the hearing CMS conceded that its case against SAMA and SOCTSA in the SOCTSA case isnow limited to the Dr Botha complaint and that the relevant modifier in the SAPA complaint was Modifier 0019(b), and that it would have no difficulty with an order directing it to file amended notices of motions which reflect the amendments in accordance with the relief sought in the supplementary affidavits.

Strike out application

[26] This then leaves us to consider only the issue of the strike out application. SAMA submitted that if the Tribunal does not dismiss the two complaint referrals we should strike out certain allegations in CMS's supplementary affidavits on the basis that they have no bearing on the allegations brought against SAMA. In addition these allegations unnecessarily burden the papers (CMS's supplementary affidavits) and generate unnecessary costs to the prejudice of SAMA.

[27] The allegations that SAMA would like struck out relate to a consent order of 2004 in which SAMA arrived at a settlement with the Commission.[9] CMS relies on the consent order to show that SAMA is an association of medical practitioners, constitutes an association of firms in a horizontal relationship as envisaged in the Act; and the allegations are also in relation to the alleged effect of the alleged conduct on scheme beneficiaries.

[28] SAMA submitted that the reason why CMS cannot rely on the consent order is because in that consent order the conduct complained of at that time was against the whole of SAMA, wherein the SAPA and SOCTSA complaints are only against some members of SAMA. Furthermore SAMA submitted that the conduct of the consent order is different from the conduct complained of in the SAPA and SOCTSA complaints. In the 2004 consent order, the conduct related to the determination, recommendation and publication of benchmark tariffs for medical services, whereas the current complaints before us relate to procedural

[9] See Competition Commission v South African Medical Association; case number; 23/CR/Apr04.

codes, descriptors and modifiers. Furthermore, SAMA also submitted that CMS's attempt to treat the 2004 consent order as *res judicata* or issue of estoppel is inappropriate. Lastly, SAMA submitted that in relation to the issue of the effect of the alleged conduct on SAMA's beneficiaries, it must also be struck out as it is not required under section 4(1)(b)(i) of the Act, to prove effects.

[29] In response CMS submitted that it does not seek to rely on the 2004 consent order as a substitution for pleading material facts and points of law. The allegations are made merely to show that SAMA has in the past admitted that it is an association of firms and that its members are in a horizontal relationship. It merely provides evidence of the nature of SAMA and the way in which its members relate to one another.

[30] CMS submitted further that before we can grant SAMA's strike out application, the Tribunal needs to be satisfied that SAMA has fully established that the evidence complained of is irrelevant and that it will suffer prejudice should the alleged offensive material remain.

[31] In our view the allegations in relation to the 2004 consent order provide invaluable context to the two referrals and cannot be said to be irrelevant or cause prejudice to SAMA, particularly so in light of the fact that CMS relies on it in the limited way as explained. The application is accordingly dismissed.

ORDER

1. After having heard the parties in the current application, the Competition Tribunal orders as follows:

2. In relation to the SAPA complaint SAMA's application to compel further particulars and amendment application are granted as follows:

2.1 CMS must amend its notice of motion in the SAPA complaint and limit it to the Modifier 0019(b);

2.2 CMS must provide the particularity sought by SAMA in relation to the SAPA complaint as set out in paragraphs 5 to 7.1 in SAPA notice. In so doing CMS must elaborate on the recommendation and binding nature of SAMA's publication. It must clarify how the alleged formula is converted from its recommendation to adherence by the relevant specialists. CMS must explain why it is important for SAMA to publish these guidelines, how SAMA is able to achieve compliance with these guidelines by doctors and what mechanisms, if any, are utilised by SAMA to punish non-compliance.

2.3 CMS must file new set of pleadings and consolidate all its papers so that it has one set of pleadings for the SAPA complaint;

3. In relation to the SOCTSA complaint SAMA's application to compel further particulars and amendment application are granted as follows-

3.1 CMS must amend its notice of motion in the SOCTSA complaint and limit it to the "Dr Botha" complaint;

3.2 CMS must provide the particularity sought by SAMA in relation to the SOCTSA complaint as set out in paragraphs 7.1 to 7.3 in the SOCSTA notice. In so doing CMS must elaborate on the recommendation and binding nature of SAMA's publication. It must clarify how the alleged formula is converted from its recommendation to adherence by the relevant specialists. CMS must explain why it is important for SAMA to publish these guidelines, how SAMA is able to achieve compliance with these guidelines by doctors and what mechanisms, if any, are utilised by SAMA to punish non-compliance.;

3.3 CMS must file new set of pleadings and consolidate its papers so that it has one set of pleadings for its SOCTSA complaint.

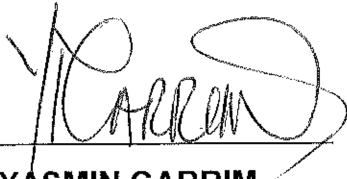
4. CMS must file such consolidated pleadings (as contemplated in 1.3 and 2.3 above) for the SAPA and SOCTSA complaints within 20 business days of this order;

5. SAMA must file answering affidavits to both complaints within 20 business days thereof; and

6. CMS must file its replying affidavits within 15 business days of SAMA's answering affidavits.

7. SAMA's strike out application is dismissed.

8. Each party must bear its own costs.



Ms YASMIN CARRIM

21 April 2017

Date

Mr Enver Daniels and Mr Norman Manoim concurring.

Tribunal Researcher	: Caroline Sserufusa
For CMS	: Mr S. Budlender and Mr J. Berger instructed by Norton Rose Fulbright
For SAMA	: Mr S Symon, SC and Ms K.Turner instructed by Werksmans Attorneys

ANNEXURE

SAPA complaint (paragraphs 5 to 7 of SAPA Notice)

5. How a decision by SAMA relating to the determination and publishing of Modifier 0019(b)[10] gives rise to an indirect price fixing, without relying on any allegations relating to the application of Modifier 0019(b);

6. Whether CMS's allegation is that the decision by SAMA relating to the determination and publishing of Modifier 0019(b) fixes the prices of certain intensive care items performed on neonates or that it increases the charges thereof by 50%, and in either case, how such decision does so;

 7.1 If the decision referred to by CMS fixes prices of certain intensive care items performed on neonates, how is the alleged formula used by SAMA?

 7.2 Provide the selling prices that have allegedly been fixed by the alleged decision and clarify whether those selling prices have changed at all over the period of the complainant. Also provide price levels at which these prices were fixed; and

 7.3 Provide details on how Paediatricians/neonatologists are able to enforce the alleged price fixing considering the fact that annual negotiations with medical schemes take place in relation to pricing.

SOCTSA complaint (paragraphs 7 to 9 of SOCTSA Notice)

7.1 How a decision by SAMA relating to the determination and endorsement and publishing of the SOCTSA guidelines gives rise to indirect price fixing, without

[10] Modifier 0019(b) is part of a descriptor of a tariff that was adopted and published by SAMA in the Doctors' Billing Manual. This descriptor was adopted and published by the National Health Reference Price List ("NHRPL") issued by the Department of Health. SAMA, before publishing it, inserted an extra paragraph that entitles paediatricians and neonatologists to bill an extra 50% to the tariff chargeable for treating neonates requiring intensive care. Modifier 0019(b) thus refers to neonates requiring intensive care.

relying on any allegations relating to the application or implementation of the contents of the SOCTSA guidelines by cardiothoracic surgeons;

7.2 How the alleged formula is used or implemented by SAMA;

7.3 How the alleged formula amounts to indirect price fixing by SAMA and SOCTSA;

8. clarify whether CMS's allegation is that the decision by SAMA relating to the determination, endorsement or publishing of the SOCTSA guidelines fixes prices for medical services to which those SOCTSA guidelines refer;

9.1 Provide the selling prices that have allegedly been fixed by SAMA over the period of the complaint for each of the SOCTSA guidelines (bearing in mind that the SOCTSA guidelines do not contain any fees, tariffs or prices); and

9.2 Provide sufficient details of how individual cardiothoracic surgeons are able to enforce the selling prices, given the fact that annual negotiations with medical schemes take place in relation to pricing.