competitiontribunal
south africa

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CRP065Jul13/PIL001Apr16

In the *In Limine application* matter between:

SOUTH AFRICAN MEDICAL ASSOCIATION **Applicant**

and

COUNCIL FOR MEDICAL SCHEMES **Respondent**

and

Case No's: CRP065Jul13/EXC263Mar16, CRP066Jul13/EXC262Mar16

In the Exception applications between:

SOUTH AFRICAN MEDICAL ASSOCIATION **Applicant**

and

COUNCIL FOR MEDICAL SCHEMES **Respondent**

and

Case No's: CRP066Jul13/AME023May16, CRP065Jul13/AME022May16

In the Amendment applications 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	:	Norman Manoim (Presiding Member) Anton Roskam (Tribunal Member) Yasmin Carrim (Tribunal Member)
Heard on	:	13 June 2016
Order issued on	:	15 August 2016
Reasons issued on	:	15 August 2016

Consolidated Decisions and Orders for Applications under case numbers: CRP065Jul13/PIL001Apr16 (*In Limine* application), CRP065Jul13/EXC263Mar16, CRP066Jul13/EXC262Mar16 (exception applications) and CRP066Jul13/AME023May16, CRP065Jul13/AME022May16 (amendment applications)

Introduction

[1] On 13 June 2016 the Competition Tribunal ("Tribunal") heard five interlocutory applications between two health sector entities, namely the Council for Medical Schemes ("CMS") and the South African Medical Association ("SAMA").

[2] CMS is a juristic person established in terms of s3 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]

[4] The five applications related to two complaints that CMS referred to the Tribunal in 2013 under s51(1) of the Competition Act[3] ("the Act") following a non-referral by the Commission ("the referrals"). The referrals concern billing guidelines that were approved by SAMA in 2009.

[5] The first referral relates to the insertion in the Doctors' Billing Manual of a descriptor medical tariff, which was adopted and published by SAMA and endorsed by the South African Paediatric Association ("SAPA").[4] This decision had the effect of including an additional category of neonates, thereby entitling neonatologists or paediatricians to bill an extra 50% to the tariff payable for neonates requiring intensive care.[5] CMS alleges that this conduct amounts to directly or indirectly fixing a purchase or selling price or any other trading condition in contravention of s4(1)(b)(i) of the Act.

[6] The second referral is in relation to billing guidelines that were determined by the Society for Cardiothoracic Surgeons of South Africa ("SOCTSA"),[6] and circulated to all cardiothoracic surgeons in South Africa in 2009. The guidelines

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[1] Act 131 of 1998.
[2] Act 56 of 1974.
[3] Act 89 of 1998.
[4] SAPA is an association representing paediatricians and neonatologists, or whose members are paediatricians, registered to practise as such under the HPA and compete with each other in providing specialist health care services that they are qualified to provide.
[5]See page 101 of the SAPA amendment application trial bundle.
[6] SOCTSA is a non-statutory public company representing cardiothoracic surgeons registered to practise as cardiothoracic surgeons in terms of the HPA. SOCTSA describes itself as an official group of SAMA which aims to represent the interests of cardiothoracic surgeons in South Africa, to promote the practice of Cardiothoracic Surgery and develop good relations with their societies in South Africa abroad.

were then approved by SOCTSA and SAMA in 2010.[7] CMS submits that this conduct by SAMA and SOCTSA is an agreement between parties in a horizontal relationship and involves directly or indirectly fixing a purchase or selling price or any other trading condition, thus in contravention of s4(1)(b)(i) of the Act.[8]

[7] The referrals were filed on 04 July 2013. Prior to that the CMS had lodged its complaints with the Commission in terms of s49B(2) on 21 May 2012. The Commission issued notices of non-referral in respect of both complaints on 31 May 2013. In its notices of non-referral the Commission stated that while it had formed the view that there was a likely contravention of s 4(1)(b)(i) of the Act, it had nevertheless non-referred the complaints because the issues raised in CMS's complaints were the subject of a wider investigation in the Commission's upcoming Health Market Inquiry ("Health Inquiry"). The Commission concluded that if CMS wished, it could pursue its rights in terms of s51(1) of Act, which it promptly pursued.

[8] In response SAMA had raised a number of preliminary objections to the referrals in the High Court. On the basis of this, SAMA had requested a stay of proceedings which stay was granted by the Tribunal.[9] The Tribunal's decision was overturned by the Competition Appeal Court ("CAC") on appeal by CMS on 19 December 2014.[10] The matters were accordingly due to proceed in the Tribunal.

[9] At a pre-hearing held on 2 March 2016 SAMA indicated to the Tribunal that it intended filing two exception applications to the referrals as well as an *In Limine* application in relation to CMS's competence to refer the complaints under the

[7] See page 90 of the SOCTSA amendment application trial bundle.
[8] I See page 86 of the SOCTSA amendment application trial bundle.
[9] The Tribunal issued its decision to stay CMS's referrals in December 2014. See Tribunal decision in *Council for Medical Schemes vs South African Medical Association; case number: CRP065Jul13/STA009Apr14.*
[10] See Competition Appeal Court decision in *Council for Medical Schemes & Others vs South African Medical Association & Others: case number; 133/CAC/Dec14.*

Competition Act and the MSA. CMS advised that it intended filing two amendment applications in response to the exceptions.

[10] These five applications were heard on 13 June 2016 and are the subject of this decision. For the sake of convenience we have decided to address all of them in the same set of reasons.

***In Limine* Application**

[11] In this application, SAMA challenges the validity of the referrals on the basis that –

[11.1] It is not competent for CMS in terms of its own legislation namely s7, 8 and 12 of the MSA to enforce competition matters; [11]

[11.2] It is not competent for the CMS, another regulatory body, to enforce competition matters under the Competition Act because the legislative framework envisages that enforcement should be the prerogative of the Commission. Another organ of state could not enforce the Competition Act because the legislature had allocated that function to the Commission. Hence the word "person" in section 49B(2)(b) cannot be said to include an organ of state or a regulatory body such as the CMS;

[11.3] CMS was in breach of the Memorandum of Agreement ("MOA") entered into between CMS and the Commission;[12]

[11.4] The Commission's notices of non-referral were invalid because the Commission had expressed a *prima facie* view that the conduct was a likely contravention of s4(1)(b)(i) of the Act and ought to have

[11] These provisions of MSA are the empowering provisions for CMS, which stipulate inter alia the functions of CMS as a regulatory body.
[12] Prior to CMS's complaint referrals, CMS and the Commission had entered into an MOA in 2012, to address issues of co-operative governance, managing areas of concurrent jurisdiction as well as providing for the exchange of information and the protection of confidential information.

referred the matter to the Tribunal, conversely despite non-referring the complaint the Commission indicated that it would continue investigating the subject matter of the complaints in its Market Inquiry. Also related to this issue, SAMA sought from the Tribunal clarity about the validity of CMS's persistence with its complaint referrals before the Tribunal, given that the Commission is conducting a Market Inquiry which is investigating the very issues raised by CMS in its complaint referrals.

[12] We deal with the latter two grounds of objection first.

Invalid referral and MOA

[13] The Commission's notices of non-referral in respect of both complaints were issued in one document on 31 May 2013 ("the notice"). In paragraph 4.1 of the notice the Commission indeed expressed the view that the conduct complained of by CMS in both complaints gave rise to a likely contravention of s4(1)(b)(i) of the Act. However in the subsequent paragraphs the Commission goes on to explain that it is embarking on a Healthcare Market Inquiry primarily focused on the rising costs of healthcare in South Africa and that the determination and use of tariff guidelines by healthcare providers will be considered in that inquiry. In light of this the Commission had decided not to investigate the matter any further and was of the view that the complaint should be non-referred in the public interest.[13]

[14] SAMA's submission was that the Commission's non-referral was not valid if the Commission had come to the conclusion that a prohibited practice had occurred. It argued that the Commission ought to have referred the complaint to the Tribunal as required by s 50(2)(a) of the Act. A referral under s 50(2)(a) was peremptory by the use of the word "must" if the Commission had determined that a prohibited practice has been established.[14] In other words it

[13] Paragraphs 4,2 – 4,3 and 5 of the Commission's notice of non-referrals at page 182 of the SAPA amendment application trial bundle.
[14] See s50(2)(a) of the Act.

was not open to the Commission to non-refer on any other grounds once it had determined that a prohibited practice had been established. Conversely once it had non-referred the complaints it was not open to the Commission to continue investigating them.

[15] These arguments might have had some validity had they been made in the context of a review application in terms of s27(1)(c) of the Act. As it stands the Commission's decision to non-refer was not challenged by SAMA at the time and accordingly remains binding and valid. It is trite law, as established by the Constitutional Court in *MEC for Health*[15] that a party seeking to contend that an administrative action is invalid must formally seek in the form of a review application, for the decision to be set aside.[16] SAMA made no attempt to review the Commission's decision to non-refer and the notices remain valid until set aside by this Tribunal under s 27(1)(c) or a relevant court.[17]

[16] The last issue namely SAMA "requiring clarity" from the Tribunal about CMS's persistence in referring the complaints despite the existence of the Market Inquiry is not a proper legal basis of challenge. In any event, the Tribunal has already considered this matter in its stay decision and did not grant the stay on that basis.[18] We note that the Market Inquiry is still underway and likely to endure for a considerable length of time. Moreover, as explained by the Commission in paragraphs 4.2 and 4.3 of its notice of non-referral, the Inquiry is not concerned with the specific effect of the SAPA and SOCTSA billing codes on consumers but is concerned with the rising costs of healthcare and the "the determination and use of tariff guidelines by healthcare providers" in general. The fact that there is an Inquiry underway in the rising costs of healthcare in general ought not to be a basis for delaying the enforcement of

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[15] See *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute 2014 (3) SA 481 (CC) at paragraph 82-83.*

[16] Ibid

[17] See also *Oudekraal Estates (Pty) Ltd v The City of Cape Town and others (25/08) [2009] ZASCA 85 (3 September 2009); Seale v Van Rooyen NO and others; Provincial Government, North West province v Van Rooyen NO and Others [2008] ZASCA 28; 2008 (4) SA 43 (SCA) at paragraph 14; and Norgold Investments (Pty) Ltd v Minister of Minerals and Energy of the Republic of South Africa and Others [2011] ZASCA 49; [2011] 3 All SA 610 (SCA) at paragraph 46.*

[18] See Tribunal decision in *Council for Medical Schemes vs South African Medical Association; case number: CRP065Jul13/STA009Apr14, at paragraph 29.*

specific allegations of anti-competitive conduct and the addressing of the possible harm to consumers due to contraventions of the Act.[19]

[17] The third basis of challenge namely that the referrals by CMS were in breach of the MOA between it and the Commission also has no merit. In the first instance SAMA could not support this contention by reference to any specific provision of the MOA that had allegedly been breached. More importantly the MOA between the CMS and the Commission was not in existence at the time that the referrals were made and hence CMS's rights to enforce competition matters could not have been influenced or affected by a non-existent MOA. In any event the CMS does not enjoy concurrent jurisdiction to regulate competition matters under the MSA, as does a regulatory body such as the Independent Communications Authority of South Africa ("ICASA"), which enjoys competition jurisdiction under the Electronic Communications Act ("ECA").[20] If the CMS wishes to enforce competition matters on behalf of its beneficiaries it can only do so in terms of the Competition Act and through the agencies established thereunder.

[18] Which brings us to consider the next relevant issue namely whether the CMS enjoys the right, as any other person, to enforce competition matters in the framework of the Competition Act.

Ultra vires the Competition Act

[19] The central plank of SAMA's argument is that the legislature, in adopting the Competition Act the legislature delegated the enforcement of the Act to the Commission. It argues that another organ of state cannot 'usurp' that function. The referral by the CMS, as an organ of state, to the Tribunal was therefore

[19] The CAC in paragraphs 37-38 of its decision in *CMS vs SAMA* expressed the view that granting a stay in circumstances where harm to consumers would continue due to contraventions of the Act was undesirable. The Act required the Tribunal to deal expeditiously with alleged anti-competitive conduct in the interests of consumers.
[20] Act 36 of 2005.

"ultra vires" under the Competition Act.[21] When it was pointed out that this would exclude state owned entities that compete in commercial markets with private entities such as the SAA and SABC,[22] SAMA amended its argument so as to exclude "organs of state that did not perform regulatory functions". SAMA conceded however that the CMS could provide information to the Commission but it itself could not enforce a complaint through a self-referral.

[20] Section 49B(2) provides that –

"Any person may -

(a) submit information concerning an alleged *prohibited practice* to the Competition Commission, in any manner or form; or

(b) submit a complaint against an alleged *prohibited practice* to the Competition Commission, in the *prescribed* form.

[21] The word "person" is not defined in the Act. However, in s1(1)(iv) the word "complainant" is defined to mean "a person who has submitted a complaint in terms of s49B(2)". The word "person" appears in a number of other provisions of the Act.[23] There is nothing in the Act which suggests that the word person in any of these sections is different from the person contemplated in s49B(2)(a) or (b). Nor is there any provision in the Act which suggests that the word person in 49B2(a) should be interpreted differently from the person contemplated in 49B(2)(b). Nor are there any other provisions in the Act which suggest that a contextual interpretation of "person" in s49B(2)(b) should be given the meaning argued by SAMA, namely to exclude regulatory bodies such as CMS. The only provisions that expressly contain a reference to a "regulatory authority" are s21(1)(h),(i) and (j) but these provisions relate to the functions of the Commission to negotiate agreements with other regulatory authorities,

[21] The argument that this would offend s239(b)(ii) of the Constitution which precluded different spheres of government has no relevance whatsoever because the CMS was not "a sphere of government" as contemplated in that section.
[22] SAA is the South African Airways and the SABC is the South African Broadcasting Corporation.
[23] See for example s 44, s45, s47, s48, s49, s49A, s53 of the Competition Act.

participate in the proceedings of any regulatory authority and advise and receive advice from any regulatory authority. These provisions cannot be extrapolated to exclude the participation of any other regulatory authority in the proceedings of the Commission or the Tribunal. We agree with the CMS that in the Competition Act, no such preclusion could be found and that the words "any person" in s49B(2) should be given its ordinary meaning namely to include any natural or juristic person.

[22] Moreover, it would be erroneous to assume that the intention of the Act was to prevent organs of the state or regulatory authorities other than the Commission from enforcing complaints under s51(1). Indeed given the complexity of competition law matters, it might be preferable in some instances for a regulatory body such as the CMS, with its expertise of its sector and the necessary resources to lodge and enforce complaints on behalf of its beneficiaries. In our view, in order to promote the objects of the Competition Act and interests of consumers in particular, the participation of such regulatory bodies ought to be encouraged rather than curtailed.

[23] The case law relied upon by SAMA is distinguished. [24] In those cases the distinction that was being considered was between the Commission as complainant and private complainants.

[24] This then leaves us to consider the last challenge put up by SAMA to the *vires* of the CMS under the MSA. [25]

Ultra vires the MSA

[25] SAMA argued that the CMS was acting *ultra vires* of its own legislation, the MSA, in persisting with a private complaint. The CMS is a creature of statute

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[24] See for example Supreme Court of Appeal (SCA") decision in *Competition Commission v Yara (SA) (Pty) Ltd and Others; case number: 2013 96) SA 404 (SCA) at para 3, Glaxo Welcome (Pty) Ltd v National Association of Pharmaceutical Wholesalers 15/CAC/Feb02 (21 October 2002; and Netstar (Pty) Ltd v Competition Commission 2011 (3) SA 171 (CAC) paragraph 26.*

[25] Many other ancillary Constitutional arguments were put by counsel on behalf of SAMA but we do not consider any of these having merit.

and the provisions of the MSA did not entitle it enforce the Competition Act in our proceedings. Section 7 of the MSA limited the CMS to protect the interests of beneficiaries of medical schemes *vis-à-vis* the schemes themselves and not against health service providers at large.

[26] Section 7 of the MSA provides as follows:

"The functions of the Council shall be to—

(a) protect the interests of the members at all times;

(b) control and coordinate the functioning of medical schemes in a manner that is

complementary with the national health policy;

(c) make recommendations to the Minister on criteria for the measurement of quality and

outcomes of the relevant health services provided for by medical schemes, and such other services as

the Council may from time to time determine;

(d) investigate complaints and settle disputes in relation to the affairs of medical schemes as

provided for in this Act;

(e) collect and disseminate information about private health care;

(f) make rules, not inconsistent with the provisions of this Act for the purpose of the

performance of its functions and the exercise of its powers".

[27] CMS submitted that s7 of the MSA, which provided CMS with the function of protecting the interests of its members which are beneficiaries of medical aid schemes ("the beneficiaries") at all times, authorises the CMS to protect the interests of its beneficiaries in any number of ways.

[28] This issue has already been considered by the CAC. In paragraph 27 of *CMS vs SAMA* the CAC expressed the view that s7 of the MSA was a wide provision and could conceivably include price fixing amongst health service providers which would adversely affect the interests of the beneficiaries:

[28.1] *"Section 7 of the Medical Schemes Act provides that one of the functions of CMS is to protect the interests of the beneficiaries at all times. The Tribunal, in considering whether CMS' conduct is ultra vires the Medical Schemes Act, needed to consider whether this point has any prospects of success in the High Court without pre-empting any decision by the High Court. In my view, the ambit of s7 is extremely wide. It is difficult to understand how allegations of price fixing in contravention of s 4(1)(b)(i) of the Act do not affect the interest of beneficiaries. For this reason, there is, in my view, little prospect of success of an application for review on an argument that CMS acted outside its designated powers."*

[29] Based on the views expressed by the CAC, we need not address this issue any further.

[30] Accordingly we find that SAMA's points *in limine* are without merit and the application is dismissed.

Exception & Amendment Applications

[31] SAMA's exception applications are in relation to both the SAPA and SOCTSA complaint referrals.

[32] SAMA alleges that the referrals are vague and embarrassing and do not disclose a cause of action in terms of s4(1)(b) because CMS has failed to identify --

[32.1] how SAMA and SOCTSA/SAPA are in a horizontal relationship;

[32.2] whether it relies on an agreement(oral /written), a decision or a concerted practice; and

[32.3] the relevant product market .[26]

[26] See paragraphs 24-25 of SAMA's founding affidavit in the SAPA exception application and paragraphs 23-24 in the SOCTSA exception application.

[33] Furthermore, it challenged the relief sought against SAMA on the basis that it was not supported by the alleged facts because –

[33.1] the referrals seem to suggest SOCTSA/SAPA published the billing guidelines and not SAMA;

[33.2] it was not clear which billing guide is being referred to and how SAMA was part of the determination and publication if it is only accused of approving the billing guideline; [27] and

[33.3] the relief sought was copied and pasted from the complaint lodged at Commission and was not competent at the Tribunal. [28]

[34] As far as CMS's allegation that SAMA was in breach of a consent order concluded with the Commission and confirmed by the Tribunal in 2004,[29] CMS could not now raise this allegation because this had not been raised in its complaint to the Commission. In any event SAMA failed to see how such alleged breach was relevant to the conduct of SOCTSA/SAPA.[30]

[35] SAMA concluded by submitting that requiring it to file an answering affidavit to such a complaint referral, and waste resources and unnecessary time, would be unfair. The allegations are contradictory and loosely formulated to such an extent that SAMA is unable to answer properly.

[36] Instead of filing answers to the exception applications CMS took the unusual step of filing an amendment application for each referral in which it sought to substitute the entire founding affidavit with a 'new' affidavit.

[37] CMS requested that the Tribunal substitute the referral affidavits with these new affidavits ("the substitute affidavits") which effectively sought to amend the referral in response to the objections raised by SAMA.

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[27] See SAMA's founding affidavit in the SAPA exception application, and paragraph 56 of SAMA's founding affidavit in the SOCTSA exception application.
[28] See paragraphs 61-72 of SAMA's founding affidavit in the SAPA exception application, and paragraphs 50-59 of SAMA's founding affidavit in the SOCTSA exception application.
[29] *The Competition Commission and The South African Medical Association & Other; case number; 23/CR/Apr04.*
[30] See paragraphs 82-88 of SAMA's founding affidavit in the SAPA exception application, and paragraphs 60-65 of SAMA's founding affidavit in the SOCTSA exception application.

[38] It argued that amendments sought via the filing of the substitute affidavits was to ensure that any uncertainty in its referrals is removed, therefore allowing for the merits of the matter to commence. In the alternative, CMS submitted that should the Tribunal not grant the amendment applications as sought, the Tribunal should order the CMS to bring a further amendment application to rectify its shortcomings of its self-referrals.

[39] In response, SAMA opposed the amendment applications on a number of grounds. First it argued that CMS' decision to file an amendment application in this manner was an irregular step and ought not to be condoned by the Tribunal because it had not been properly motivated by CMS. SAMA submitted that although CMS relies on Tribunal Rule 18(1) for its decision to do so, that Tribunal Rule 18(1) clearly refers to an amendment in the form of a supplementary affidavit and not the replacement or substitution of an affidavit sought by the CMS. In addition to this, CMS did not even attempt to explain to the Tribunal why the Tribunal should exercise its jurisdiction and allow the amendment sought by CMS.

[40] In any event, it was argued that CMS's substitute affidavits still did not comply with the requirements under Tribunal Rule 15(1), as SAMA still does not know what case is being brought against it. The substitute affidavits in CMS's amendment applications still do not plead with precision what exactly the allegations against SAMA are in both the SAPA and SOCTSA referrals or what conduct on the part of SAMA was in breach of s4(1)(b). Furthermore, the alleged horizontal relationship between SAMA and SAPA and SOCTSA was not adequately explained by CMS. Finally SAMA submitted that the relief sought by CMS in its amendment applications is not competent as it is vague, embarrassing and very broad. For example, SAMA pointed out that CMS uses terminology such as 'similar conduct' by the respondents (i.e. SAMA and SAPA/ SAMA and SOCTSA), when it is not explained what similar conduct CMS is referring to in its relief sought.

[41] Furthermore it pointed out the allegations contained in the substitute affidavits differed materially from the allegations lodged by CMS with the Commission in its initial complaints lodged. This broadening of the complaint was

impermissible for a private complainant in terms of the principles established in *Glaxo*,[31] commonly referred to as the "referral" rule".

[42] Lastly, SAMA submitted that because CMS chose not to file an answering affidavit to SAMA's exception applications, both CMS's complaint referrals should be dismissed entirely.

[43] CMS denied that it was seeking to widen the scope of its referrals or attempting to retract previous factual statements. Instead, it submitted that CMS brought its amendment applications so as to expeditiously and comprehensively resolve the complaints in SAMA's exception applications.

CMS's case against SAMA

[44] In both referrals the CMS alleges that s 4(1)(b)(i) has been contravened.

[45] In relation to SAPA it explains that the SAPA executive committee had adopted the SAMA Modifier 0019 tariff code. Thereafter SAMA had published it in the Doctor's Billing Manual.[32] According to the CMS it is this act of publication by SAMA that constitutes "directly or indirectly fixing a purchase or selling price or any other trading condition", as contemplated and prohibited by s 4(1)(b)(i) of the Act.

[46] Similarly in relation to SOCTSA it is alleged that the billing guidelines were adopted by the SOCTSA executive committee[33] and that the act of publication by SAMA of the SOCTSA billing guidelines constituted a contravention of s 4(1)(b)(i) of the Act because it involved "directly or indirectly fixing a purchase or selling price or any other trading condition".[34]

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[31] *Glaxo Welcome (Pty) Ltd v National Association of Pharmaceutical Wholesalers* 15/CAC/Feb02 (21 October 2002; *and Netstar (Pty) Ltd v Competition Commission* 2011 (3) SA 171 (CAC).
[32] See page 101 of the SAPA amendment application trial bundle.
[33] See page 91 0f the SOCTSA amendment application trial bundle.
[34] See paragraphs 9, 26 and 31 of CMS's new affidavit in the SOCTSA amendment application trial bundle.

[47] While describing the role of SAPA and SOCTSA in these alleged contraventions of the Act, CMS only seeks relief against SAMA and not against SAPA and SOCTSA.

[48] Section 4(1)(b)(i) contemplates an agreement or concerted practice of parties in a horizontal arrangement, or a decision by an association of firms, but the relationship between SAMA and SAPA/SOCTSA is not explained adequately by CMS in its referrals to enable us to discern a nexus between these associations for purposes of s 4(1)(b). In the first instance it is unclear how the mere act of SAMA publishing the guidelines renders it liable for price fixing under s 4(1)(b(i). On CMS's current formulation of the complaint the mere act of publication of the guidelines by any entity, whether it be a newspaper or magazine, would constitute a contravention of s 4(1)(b)(i).

[49] We are also not given insights into the nature of the relationship between SAMA and SAPA/SOCTSA in order to assess whether there are any agreements or protocols in place between them which might be relevant to the issue of billing guidelines, whether SAMA has a role other than the mere publication thereof in the making of the guidelines or whether there are terms and conditions of membership which might have a bearing on the issue of billing guidelines and whether such protocols or arrangements facilitate a contravention of s4(1)(b)(i). Nor are there any details given as to how the adoption of a billing guideline by one association of specialist doctors, when published by another association, would create liability for a contravention of s 4(1)(b)(i) only for the latter association.

[50] No explanation is provided as to why if SAMA and SAPA/SOCTSA are in a horizontal relationship how it is that only SAMA is alleged to have contravened the Act.

[51] It is evident from all of this that the alleged contravention by SAMA of s4(1)(b)(i) does indeed require some clarification by CMS.

[52] While we accept that the CMS may have sought to address the objections raised by SAMA in the exception applications expeditiously, we find its decision

to file the substitute affidavits in response thereto irregular. If it accepts, as it apparently has done by the filing of the substitute affidavits, that SAMA's exceptions have merit, it ought to have filed an answer thereto and sought leave to file supplementary affidavits in order to provide clarity to SAMA. By responding in general with a comprehensive new affidavit as opposed to addressing the specifics of the objections raised by SAMA, CMS has not placed SAMA in a position to assess whether an adequate answer to SAMA's objections has been provided. Fairness requires that CMS provide an answer that addresses the specific objections raised by SAMA with reference to the paragraphs in the referral affidavits in order to enable SAMA to understand the case it has to meet.[35]

[53] We find that SAMA is entitled to sufficient particularity from CMS in order to enable it to understand the case brought against it under s 4(1)(b)(i). At the same time, dismissing the complaint on the basis of CMS' irregular step or in response to SAMA's exception applications would not serve the public interest, particularly when the irregularity is capable of being cured by the filing of a supplementary affidavit and an order of costs. Accordingly CMS is provided with an opportunity to file a supplementary affidavit in each referral in specific response to the objections raised by SAMA as set out in our order below.

Conclusion

[54] The amendment applications by CMS in which it seeks to substitute its referral affidavits with new affidavits is dismissed. The exception applications by SAMA are granted. CMS is however provided an opportunity to amend its referral in response to SAMA"s exception through the filing of supplementary affidavits in accordance with our order set out below.

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[35] See *Rooibos Ltd v the Competition Commission: case number: 129/CR/Dec08, at paragraph 8 page 4*. This Tribunal has correctly emphasized in the Rooibos decision that fairness is not a one way street tested only by the impact of an approach on respondents. All parties have a right to fairness in conducting their case. What fairness dictates at another point in time in proceedings in the matter is again a question of context. See also in general the Tribunal's approach to exceptions in *Competition Commission & Others v American Natural Soda Ash Corp CHC Global (Pty) Ltd & Another, case number; 49/CR/Apr00* and *National Association of Pharmaceutical Wholesalers & Others v Glaxo Wellcome (Pty) Limited & Others; case number; 45//CR/Jul01.*

ORDER

1. SAMA's *In Limine* application filed under case number CRP065Jul13/PIL001Apr16 is hereby dismissed.

2. CMS's amendment applications filed under case numbers CRP066Jul13/AME023May16 and CRP065Jul13/AME022May16 are hereby dismissed.

3. SAMA's exception applications filed under case numbers CRP065Jul13/EXC263Mar16, CRP066Jul13/EXC262Mar16 are hereby granted.

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

    3.2 The supplementary affidavits must clearly stipulate SAMA's involvement by indicating the following:

        3.2.1 the nature of the alleged horizontal relationship between SAMA and SAPA and between SAMA and SOCTSA;

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

        3.2.3 the difference in liability between SAMA and SAPA and between SAMA and SOCTSA.

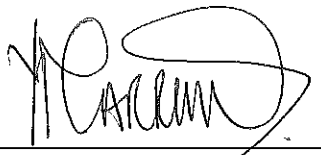
4. SAMA is required to file answering affidavits to the referrals read together with the supplementary affidavits contemplated in para 3 above within 20 business days of receipt thereof. CMS may if it so wishes file replies to SAMA's answering affidavits within 10 business days of receipt thereof.

Costs

[55] In relation to the *in Limine* application, SAMA is to pay the costs of CMS on a party and party scale, such costs to include the costs of two counsel.

[56] In relation to the exception applications CMS is to pay for the costs of SAMA on a party and party scale, such costs to include the costs of two counsel.

[57] In relation to the amendment applications, there is no order as to costs.



15 August 2016

Ms YASMIN CARRIM **Date**

Mr Anton Roskam 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