

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: LM035Jun23

In the matter between:

Life Healthcare Group (Pty) Ltd

Primary Acquiring Firm

And

The Dialysis Services Business of Fresenius
Medical Care South Africa (Pty) Ltd

Primary Target Firm

Panel: L Mncube (Presiding Member)
A Ndoni (Tribunal Member)
I Valodia (Tribunal Member)

Heard on: 19 February 2024
Decided on: 20 February 2024

ORDER

Further to the recommendation of the Competition Commission in terms of section 14A(1)(b)(ii) of the Competition Act, 1998 ("the Act") the Competition Tribunal orders that–

1. the merger between the abovementioned parties be approved subject to the conditions set out in "**Annexure A**" in terms of section 16(2)(b) of the Act; and
2. a Merger Clearance Certificate be issued in terms of Competition Tribunal Rule 35(5)(a).

Signed by Liberty Mncube
Signed at 2024-02-20 18:42:41 +02:00
Reason: Witnessing Liberty Mncube

L. Mncube

Presiding Member
Prof. Liberty Mncube

20 February 2024

Date

Concurring: Ms Andiswa Ndoni and Prof. Imraan Valodia

Merger Clearance Certificate

Date : 20 February 2024

To : Herbert Smith Freehills Attorneys

Case Number: LM035Jun23

Life Healthcare Group (Pty) Ltd And The Dialysis Services
Business of Fresenius Medical Care South Africa (Pty) Ltd

Notice CT 10

About this Notice

This notice is issued in terms of section 16 of the Competition Act.

You may appeal against this decision to the Competition Appeal Court within 20 business days.

You applied to the Competition Commission on **09 June 2023** for merger approval in accordance with Chapter 3 of the Competition Act.

Your merger was referred to the Competition Tribunal in terms of section 14A of the Act or was the subject of a Request for consideration by the Tribunal in terms of section 16(1) of the Act.

After reviewing all relevant information, and the recommendation or decision of the Competition Commission, the Competition Tribunal approves the merger in terms of section 16(2) of the Act, for the reasons set out in the Reasons for Decision.

This approval is subject to:

no conditions.

the conditions listed on the attached sheet.

The Competition Tribunal has the authority in terms of section 16(3) of the Competition Act to revoke this approval if

- a) it was granted on the basis of incorrect information for which a party to the merger was responsible.
- b) the approval was obtained by deceit.
- c) a firm concerned has breached an obligation attached to this approval.

Contacting the Tribunal

The Competition Tribunal
Private Bag X24
Sunnyside
Pretoria 0132
Republic of South Africa
tel: 27 12 394 3300
fax: 27 12 394 0169
e-mail: ctsa@comptrib.co.za

The Registrar, Competition Tribunal

Tebogo Mporie

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ANNEXURE "A"

LIFE HEALTHCARE GROUP PROPRIETARY LIMITED

and

THE DIALYSIS SERVICES BUSINESS OF FRESENIUS MEDICAL CARE SOUTH AFRICA PROPRIETARY LIMITED

CC Case No: 2023JUN0013

CONFIDENTIAL CONDITIONS

1. DEFINITIONS

The following expressions shall bear the meanings assigned to them below and cognate expressions bear corresponding meanings -

- 1.1. **"Acquiring Firm"** means Life Healthcare Group Proprietary Limited;
- 1.2. **"Act"** means the Competition Act, No. 89 of 1998, as amended;
- 1.3. **"Affected Employees"** means not more than 10 (ten) employees employed by the Seller. Affected Employees will be individuals who hold professional support positions (e.g. in Human Resources, Legal, IT, Compliance, Finance & Procurement and Real Estate & Facilities Management) and require a degree or extensive work experience within their area of expertise and earn between approximately ZAR [REDACTED] ([REDACTED] rands) and ZAR [REDACTED] ([REDACTED] rands) per month (CTC) or have a Grade 12 level education and additional qualifications and earn between approximately ZAR [REDACTED] ([REDACTED] rands) and ZAR [REDACTED] ([REDACTED] rands) per month (CTC).
- 1.4. **"Approval Date"** means the date on which the Merger is approved by the Competition Tribunal;
- 1.5. **"Commission"** means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Competition Act;
- 1.6. **"Commission Rules"** means the Rules for the Conduct of Proceedings in the Commission;
- 1.7. **"Conditions"** means these conditions;

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- 1.8. **“CTC”** means ‘cost to company’;
- 1.9. **“Day”** means any calendar day which is not a Saturday, a Sunday or an official public holiday in South Africa;
- 1.10. **“Employees”** means the employees employed by the Target Business or the dialysis services business of the Acquiring Firm but does not include any other employee of the Acquiring Firm or any Affected Employees;
- 1.11. **“ERD”** means East Rand Dialysis Inc wherein Life exercises management control.
- 1.12. **“Implementation Date”** means the date, occurring after the Approval Date, on which the Merger is implemented by the Merger Parties;
- 1.13. **“LRA”** means the Labour Relations Act No. 66 of 1995 (as amended);
- 1.14. **“Merged Entity”** means collectively, the Acquiring Firm and the Target Business, subject to the control of the Acquiring Firm;
- 1.15. **“Merger”** means the acquisition of control by the Acquiring Firm over the Target Business;
- 1.16. **“Merger Parties”** means collectively, the Acquiring Firm and the Target Business;
- 1.17. **“Moratorium Period”** means a period of three (3) years from the Implementation Date and includes the period between the Approval Date and the Implementation Date;
- 1.18. **“Sale of Business Agreement”** means the sale agreement entered into between the Seller, the Acquiring Firm and Fresenius Medical Care AG & CO. KGAA;
- 1.19. **“Seller”** means Fresenius Medical Care South Africa Proprietary Limited;
- 1.20. **“Target Business”** means the dialysis service part of the business conducted by the Seller, as defined in the Sale of Business Agreement;
- 1.21. **“Target Employees”** means the Target Business employees who will be transferred to the Acquiring Firm as per section 197 of the LRA upon implementation of the Merger;
- 1.22. **“Tribunal”** means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Act; and

1.23. **“Tribunal Rules”** means the Rules for the Conduct of Proceedings in the Tribunal.

2. EMPLOYMENT

2.1. The Seller shall not effect any retrenchments other than of the Affected Employees.

2.2. For avoidance of doubt, Affected Employees exclude any person (i) who does not have an educational or skills qualification above a matric certificate, and (ii) who earns less than ZAR [REDACTED] ([REDACTED] rands) per month on a CTC basis.

2.3. The Seller will offer Affected Employees preferential reemployment opportunities, should any vacancies arise which the Affected Employees are qualified to fill, within 6 (six) months of the Implementation Date.

2.4. This condition does not affect the right of the Seller to continue to implement the Fresenius Group global reorganization programme, in accordance with all applicable labour laws in South Africa.

2.5. The Merged Entity shall not retrench any Employees as a result of the Merger, for the duration of the Moratorium Period.

2.6. For the sake of clarity, retrenchments do not include (i) voluntary separation arrangements, (ii) voluntary early retirement packages, (iii) unreasonable refusals to be redeployed in accordance with the provisions of the LRA, (iv) resignations or retirements in the ordinary course of business, (v) retrenchments lawfully effected for operational requirements unrelated to the Merger, (vi) terminations in the ordinary course of business, including but not limited to, dismissals as a result of misconduct or poor performance, and (vii) any decision not to renew or extend a contract of a contract worker.

3. CAPITAL EXPENDITURE TO EXPAND DIALYSIS SERVICES

3.1. The Acquiring Firm shall commit capital expenditure on the Target Business of ZAR [REDACTED] ([REDACTED] rands) over 5 (five) years. However, this sum does not denote the amount of capital expenditure to be spent on the expansion of the Target Business, and it may be deployed to ensure that the existing capacity of the Target Business is efficiently utilised. This sum includes the amount spent by the Acquiring Firm

on maintaining existing dialysis equipment in order to offer consistently high-quality healthcare services.

4. EXPAND TREATMENT TO PUBLIC SECTOR PATIENTS

4.1. The Acquiring Firm shall offer the relevant provincial health departments in each province in which the Merged Entity provides dialysis services a maximum of 8,350 (eight thousand three hundred and fifty) chronic haemodialysis treatments for public sector patients, in aggregate, at approximately ZAR [REDACTED] ([REDACTED] [REDACTED] rands) per treatment for a period of 5 (five) years following the implementation of the Proposed Transaction. This represents a total value of ZAR [REDACTED], ([REDACTED] [REDACTED] rands) and matches the [REDACTED] [REDACTED] rands) for treatments provided at [REDACTED] facilities.

5. [REDACTED]

5.1. The Merger Parties undertake to reduce the relevant [REDACTED] period, as described in clause [REDACTED] of the Sale of Business Agreement from [REDACTED] to [REDACTED] prior to the Implementation Date.

6. OPEN ACCESS

6.1. The Merging Parties shall continue to permit third-party, dialysis services providers reasonable access to the Acquiring Firm's hospitals on a mobile basis for a period of at least 5 (five) years for the purposes of administering acute renal, mobile chronic or any other form of inpatient renal dialysis treatment and/or extracorporeal blood related treatment, per the referral or request of a doctor, subject to such providers (i) having been requested to administer such treatment by a referring nephrologist or physician, and (ii) adhering to the Acquiring Firm's infection control, security and other reasonable protocols as set from time to time

7. REFERRAL

7.1. The Acquiring Firm submit that, in compliance with the legislative standards set out in the Health Professions Act, No. 56 of 1974 and the rules and regulations promulgated thereunder, the Acquiring Firm does not, and is not lawfully permitted to, interfere with

the clinical discretion of nephrologists resident in its hospitals to refer patients to whichever dialysis services provider they deem appropriate, including by (i) using financial inducement, or (ii) making the terms of nephrologists' residency contingent on them referring patients to the dialysis services business of the Acquiring Firm. The Acquiring Firm shall continue to adhere to its obligations under the Health Professions Act, No. 56 of 1974 and the rules and regulations promulgated thereunder by refraining from interfering with the clinical discretion of nephrologists resident in its hospitals and will at all times continue to refrain from offering any form of pecuniary or non-pecuniary incentive to nephrologists in exchange, or as a reward, for referrals of patients to its dialysis services business.

8.

8.1. The Acquiring Firm will ensure, for [REDACTED] from the Implementation Date, that for self-paying / uninsured patients it will maintain [REDACTED] and the [REDACTED]. The [REDACTED] shall be subject to annual increase, on the anniversary of the Implementation Date, by an amount that may not exceed the change in Consumer Price Index.

9. MONITORING OF COMPLIANCE WITH THE CONDITIONS

- 9.1. The Acquiring Firm shall circulate a copy of the Conditions to all Employees including but not limited to the trade union(s) and/or employee representatives notified of the Merger within 5 (five) Days of the Approval Date.
- 9.2. The Acquiring Firm shall circulate the condition contained in clause 7 of the Conditions to all its resident nephrologists within 5 (five) Days of the Approval Date.
- 9.3. As proof of compliance with clauses 9.1 and 9.2 above, the Acquiring Firm shall within 10 (ten) Days of circulating the Conditions, submit an affidavit to the Commission attesting to the circulation of the Conditions and provide copies of such notification.
- 9.4. The Merger Parties will inform the Commission in writing of the Implementation Date within 5 (five) Days of the Implementation Date.
- 9.5. The Acquiring Firm will, in writing, provide the Commission with a compliance report within 30 (thirty) Days of the anniversary of the Implementation Date for a duration of

five (5) years. This compliance report will set out details of the Merger Parties' compliance with the Conditions.

9.6. The report referred to in clause 9.5 above shall be accompanied by an affidavit attested to by a senior officer within the Acquiring Firm or Merged Entity confirming the accuracy of the compliance report.

9.7. The Commission may at any time request additional information from the Merger Parties, which the Commission may reasonably deem necessary for the purposes of monitoring the extent of compliance with the Conditions.

10. APPARENT BREACH

Should the Commission receive any complaint in relation to non-compliance with the above Conditions, or otherwise determine that there has been an apparent breach by the Merger Parties of these Conditions, the breach shall be dealt with in terms of Rule 39 of the Commission Rules, read together with Rule 37 of the Tribunal Rules.

11. VARIATION

The Merger Parties and/or the Seller may at any time, on good cause shown, apply to the Commission for the Conditions to be lifted, revised, or amended. Should a dispute arise in relation to the variation of the Conditions, the Merger Parties and/or the Seller may apply to the Tribunal, on good cause shown, for the Conditions to be lifted, revised, or amended.

12. GENERAL

All correspondence in relation to the Conditions must be submitted to the following e-mail addresses: mergerconditions@compcom.co.za and ministry@thedtic.gov.za.