REPUBLIC OF SOUTH AFRICA

IN THE COMPETITION APPEAL COURT
HELD AT CAPE TOWN

COUNCIL FOR MEDICAL SCHEMES	First Appellant
REGISTRAR OF MEDICAL SCHEMES	Second Appellant

And

SOUTH AFRICAN MEDICAL ASSOCIATION	First Respondent
SOUTH AFRICAN PAEDIATRIC ASSOCIATION	Second Respondent
SOCIETY FOR CARDIOTHORACIC SURGEONS	Third Respondent

J U D G M E N T

VICTOR, AJA, MOCUMIE, AJA (and DAVIS JP) concurring

[1] The appellant ('CMS') appeals the decision of the Competition Tribunal to grant the respondents ('SAMA') a stay of proceedings pending the outcome of review proceedings instituted in the Gauteng High Court.

[2] CMS lodged a complaint initially with the Competition Commission ('the Commission') alleging that SAMA had engaged in price fixing in relation to medical services provided to the public. It was alleged that this conduct contravened the prohibition against restrictive horizontal practices in terms of section 4(1)(b)(i) of the Competition Act No 89 of 1998 ('the Act'). CMS alleged that SAMA had adopted billing guidelines which had been approved by second and third respondents who were in horizontal relationships. CMS contends that this resulted in fixing purchase or selling prices to the public. The Commission issued a notice of non-referral. Thereafter CMS lodged the same complaint with the Tribunal.

[3] The Commission issued a notice of non-referral on the basis that it had embarked upon a Healthcare Market Inquiry to focus on the rising costs of health care in South Africa in general. The Commission indicated that the complaint gave rise to a likely contravention of s4 (1) (b) (i) of the Act. The Commission did not consider the merits but the usual proforma document indicated that CMS was free to exercise its rights in terms of s51 (1) of the Act[1] and self-refer the matter to the Tribunal, which it did.

[4] SAMA thereafter launched an application in the Gauteng Division of the High Court to review and set aside the decision made by CMS to submit complaints to the Commission and thereafter to self-refer the complaints to the Tribunal after the Commission issued a certificate of non-referral.

[5] SAMA applied to the Tribunal to stay the proceedings in respect of the complaints pending the outcome of the High Court review. The Tribunal granted the stay. It is this decision which is subject of this appeal.

[1] Section 51(1) of the Competition Act 89 of 1998 provides: If the Competition Commission issues a notice of non-referral in response to a complaint, the complainant concerned may refer the matter directly to the Competition Tribunal…'

The Tribunal

[6] In granting the stay the Tribunal considered the arguments raised in the review application: the decision by SAMA to enforce the competition matter was ultra vires the Medical Schemes Act 131 of 1998 (the Medical Schemes Act), that an organ of state could not be a complainant in terms of s1 (1) (iv) of the Act, the review action was in terms of PAJA alternatively the doctrine of legality. The Tribunal also considered the fact that the Commission had commenced an enquiry into the health sector. This was referred to as a *quasi lis pendens* issue. SAMA contends that no legitimate purpose would be served in proceeding with the complaints only to have them subsequently set aside by the High Court if the review succeeds.

[7] The Tribunal also considered the question of its own jurisdiction to interpret the Medical Schemes Act. Ultimately the Tribunal found that the review application traversed public law issues which were within the jurisdiction of the High Court and not the Tribunal. The Tribunal in deciding to grant a stay of the proceedings applied the three principles in *Novartis SA Pty Ltd and Others vs Main Street 2 (Pty) Ltd and Others* (CAC)[2001] ZACAC 2002 CPLR 74 CAC (14 June 2001) (*Novartis)*: (a) whether there are reasonable prospects of success in the High Court review, (b) whether it is in the interests of justice to stay the proceedings and (c) the balance of convenience. The Tribunal found that SAMA had satisfied all three requisites.

[8] The Tribunal also considered that, should the review in the High Court fail and if the matter was to be remitted back to it. The investigation by the Commission be incomplete, the *quasi lis pendens* point would not necessarily prevent it from investigating the alleged harm to beneficiaries as that would be an ongoing problem.

The Appeal

[9] CMS submits that SAMA in launching the High Court review has embarked upon preliminary litigation which is to be discouraged. See *National Director of Public Prosecutions v King* 2010 (2) SACR 146 (SCA). CMS asserts that entities facing allegations of cartel behaviour have little inclination to cooperate in the process. Once cartel behaviour is investigated it is to the obvious advantage of hard pressed consumers that these cases be determined as expeditiously as possible.[2] In addition, CMS asserts that the review application does not go to the merits of the complaint against it but rather deals with technical aspects. In assessing whether SAMA has embarked on dilatory tactics and whether the High Court application will result in prejudice to consumers, it is necessary to consider the matter as a whole and within the context of the time line, so it contends.

[10] A timeline demonstrates that on 21 May 2012 CMS lodged two complaints with the Commission. One of the complaints also dealt with the conduct of the South African Paediatric Society, the second respondent, and the conduct of the Society for Cardiothoracic Surgeons, the third respondent. On 31 May 2013 the Commission issued a notice of non-referral in respect of both complaints. In early July 2013, although out of time, CMS referred both complaints directly to the Tribunal. On 11 December 2013 SAMA lodged the review application in the High Court to review and set aside the two decisions made by CMS. On 17 April 2014 SAMA launched the stay application to the Tribunal. On 1 December 2014 the Tribunal issued the order and reasons staying the investigation. On 9 December 2014 a notice of appeal was noted. Nothing *ex facie* that time line suggests of unnecessary delay on the part of SAMA.

[11] The central question to be addressed in this appeal is whether the Tribunal's decision is appealable to this court.

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[2] See *Woodlands Dairy (Pty) Ltd v Competition Commission* Case Number 88/CAC March 09.

[12] Section 37(1) of the Competition Act provides:

'*The Competition Appeal Court may –*

(a) review any decision of the Competition Tribunal; or

(b) consider an appeal arising from the Competition Tribunal in respect of:

(i) any of its final decisions other than a consent order made in terms of section 63; or

(ii) any of its interim or interlocutory decisions that may in terms of the Act be taken on appeal'.

[13] In *Allen's Meschco (Pty) Ltd and Others v Competition Commission and Others* (Case Number 135/CAC/January 15) this court held that the Tribunal's refusal of the stay is not a final decision as contemplated in s37(1)(b)(i), but an interim or interlocutory decision as that phrase is used in section 37(b)(ii). Rogers AJA held, in *Allen's Meschco, supra*, that an order refusing a postponement of proceedings did not have any of the attributes of a 'judgment or order' in that, upon further consideration, a judge might grant a postponement. The possibility of revisiting a stay was emphasised throughout the judgment of Rogers AJA

[14] CMS contends that *Allen's Meschco* did not make a determination on the converse, namely, whether the grant of a stay may be considered a final decision. In applying the principles in *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) Harms AJA stated 'A 'judgment or order' is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it

must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings'. In determining whether the grant of a stay is a final decision, the ambit of s37(1)(b) (ii) of the Competition Act must also be considered - *any of its interim or interlocutory decisions that may in terms of the Act be taken on appeal*.(Own emphasis)

[15] In applying the *Zweni* test to the facts of *Allen Mescho*, the court came to the decision that the facts did not support the test and as indicated the appeal failed.

[16] In *Clipsal Australia (Pty) Ltd and Others v Gap Distributors and Others* 2010 (2) SA 289 (SCA) the grant of a stay of contempt proceedings pending the outcome of review proceedings were found to be appealable. In this case the court held at para 15 that:

'It should be borne in mind that it is the application for a stay of the contempt application and not the contempt application itself which constitutes the main proceedings. The questions are whether the order by the court a quo is definitive of the rights of the parties in respect of the application to stay the contempt proceedings, and whether it disposes of at least a substantial portion of the relief claimed in that application. The answer to those two questions is clearly in the affirmative. It follows that the order by the court below is appealable.'

[17] In *Law Society of the Cape of Good Hope v Randall* 2013 (3) SA 437 (SCA) at [34] the court held:

'Before concluding, I would like to refer to a further point made by the respondent's counsel during argument. Counsel submitted that the application for a stay of the striking-off proceedings was interlocutory and therefore not appealable. The argument is without merit. The order by Smith J to stay the application to strike off was final in effect, in that it disposed of all the issues relevant to the said application.'

[18] See also *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) at para 24-25 where the 'interests of justice' are emphasised as extremely important in the determination of whether an interim order is appealable.

[19] In considering the appealability of an interim or interlocutory decision in terms of the Competition Act, the test in *Zweni* has to be considered against a further jurisdictional fact set out in s37 (1) (b)(ii) of the Act .i.e the context and purpose of the Act. This follows upon account being taken of the Competition Act which provides that when considering *an appeal arising from the Competition Tribunal in respect of any of its interim or interlocutory decisions that may, in terms of the Act, be taken on appeal,* the enquiry becomes wider than that required in *Zweni.*

[20] The grant of a stay sought by CMS pending the outcome of the High Court review means that a potential restrictive horizontal practice relating to fixing purchase or selling prices of medical services to the public may continue while the High Court and possible further appeal procedures on the point may take years to complete. Appealability must also be considered within the context and framework of s2 (b) of the Competition Act which provides: 'the purpose of the Act is to promote and maintain competition in the Republic in order to provide consumers with competitive prices and product choices.' The effect of granting a stay may well have the effect of undermining the purpose of the Act. It is thus evident that, in determining the question of appealability, the context and purpose of the Act must be one of the jurisdictional features. It is these considerations that dictate that the decision in *Allen Mescho* supra is not applicable to the present dispute.

[21] The *Zweni* test relates to the question whether the Tribunal will be able to revisit the question of the stay of proceedings. In the reasons given by the

Tribunal, this question was foreshadowed by the reference that, should the review application fail, CMS may seek to pursue its case for investigation by the Tribunal, notwithstanding the *quasi lis pendens* issue of the Commission's enquiry into the Health Care industry. However, it could never re-visit the stay proceedings as they appear presently. In my view, upon a proper application of the principles in *Zweni* and considering the appeal within the context of the Competition Act, the grant of a stay in these circumstances is final in effect and disposes of the stay matter in its entirety. Should the review application fail and the matter come before the Tribunal for a further stay an entirely different set of facts will arise.

[22] It follows that when this court considers its jurisdictional powers in terms of s37 (1) (b) (ii) of the Act, a fact sensitive enquiry is necessary. All the above considerations are necessary. For these reasons I find that the grant of a stay application is therefore appealable. Once that is so, then the merits of the appeal need to be considered.

Was the stay correctly granted?

[23] It is necessary to consider whether the Tribunal applied the three principles in the *Novartis* test as set out above correctly. The Tribunal found that a grant of stay was the appropriate order. CMS submits that the Tribunal failed to properly address the prospects of success test and addressed the interests of justice and the balance of convenience test as a single enquiry.

[24] In the enquiry, prospects of success in the review application become a central consideration. CMS contends that, in considering the review grounds SAMA raised, there are no reasonable prospects of success. SAMA employed several arguments in the review application relating to the decisions by CMS to refer the complaints as being ultra vires the Competition Act and

the Medical Schemes Act, a violation of s41 (1) (g) of the Constitution and being procedurally unfair.

[25] The Tribunal's adjudicative role is emphasized in *Simelane and Others NNO v Seven-Eleven Corporation SA (Pty) Ltd and Another 2003 (3) SA 64 (SCA)* where the court held:

'[12] Both the commission and the tribunal are creatures of statute, the statute being the Act. Both bodies must exercise their functions in accordance with the Act (s 19(1) *(c)* and s 26(1) *(d)*). The commission consists of a Commissioner and one or more Deputy Commissioners as may be necessary, appointed by the Minister of Trade and Industry (s 19(2)). It must be independent and impartial and must perform its functions without fear, favour, or prejudice (s 20(1)). Among its functions are the investigation and evaluation of alleged contraventions of chap 2 (in which is contained ss 4 to 9) and the referral, where appropriate, of complaints to the tribunal (ss 21(1) *(c)* and *(g)*).'

[26] This means that in assessing the grant of a stay application, the Tribunal should not avoid considering the prospects of success because it believes it cannot deal with public law issues. All it has to do is consider whether SAMA has reasonable prospects of success on the public law issues. In so doing, it is not usurping the High Court jurisdiction or making a final determination on the public law issues. This assessment, which is part of the requisite threshold enquiry, should nevertheless be an integral part of its consideration when adjudicating the question of a stay.

[27] 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 based on an argument that CMS acted outside its designated powers.

[28] The Tribunal, within the context of considering the stay application, was not precluded from considering the prospects of success of the cooperative governance issue. CMS submits that it did not breach principles of cooperative governance. Section 41(1) (g) of Chapter 3 of the Constitution states that all spheres of government and all organs of state within each sphere must – '*exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere.*"

[29] CMS contends that in making the complaint and self referral it could not encroach on geographical, functional or institutional integrity of government in another sphere. This encroachment must occur between different spheres of government. In *Premier Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC) where the principle of cooperative governance was dealt with by Chaskalson P with reference to s41 (1) (g) of the Constitution:

'*Although the circumstances in which section 41(1)(g) can be invoked to defeat the exercise of a lawful power are not entirely clear. The purpose of the section seems to be to prevent one sphere of government using its powers in ways which would undermine other spheres of government and prevent them from functioning effectively. The functional and institutional integrity of the different spheres of government must however be determined with due regard to their place in the constitutional order, their powers and functions under the Constitution, and the countervailing powers of other spheres of government.'*

[30] CMS argued that the Commission is an organ of state within the same national sphere of government and thus the provisions of s 41(1) (g) of the

Constitution do not apply. In addition CMS submits that the complaint to the Tribunal does not encroach on the functional integrity of the Commission. By self-referring its complaint to the Tribunal after the Commission issued a notice of non-referral, the Commission could still pursue its chosen approach of a market inquiry on private health.

[31] SAMA submits that organs of state cannot sue each other and, if the legislative scheme involves consultation, CMS should rather do this than become involved in litigation because one organ of government should not become embroiled in the legislative machinery of the other. By taking a further step to self-refer the matter to the Tribunal, SAMA contends that CMS is second guessing the Commission's decision as the designated regulator and intrudes on its domain. SAMA submits that upon a proper interpretation of s40 and 41 of the Constitution of the Republic of South Africa Act, 1996 (the Constitution) CMS cannot take the steps it did in lodging a complaint. It could not become a complainant because it is not a private person.

[32] CMS submits that *Government of South Africa supra* no longer remains good law as in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) it was held that *'The contention advanced on behalf of one of the objectors that litigation between organs of State is not competent … is clearly wrong'*. CMS submits further that s41(3) of the Constitution, while making provision for mechanisms and procedures for organs of state to settle disputes, the same organs of state may still turn to courts to resolve a dispute. CMS also makes the point that, in any event, the court in *Government of South Africa supra* did not preclude the right of an aggrieved organ of state to go to court to protect its interests.

[33] SAMA cites Woolman *et al Constitutional Law of South Africa Vol I* at 14-8 in support of its argument, presumably the following passage:

'One sphere of government or one organ of state may not use its powers in such a way as to undermine the effective functioning of another sphere or organ of state. The actual integrity of each sphere of government and organ of state must be understood in light of the powers and the purpose of that entity.'

Later in the same work, the learned authors submit that the so-called Chapter 9 institutions fall outside this principle (at 14-13). It is highly unlikely that the Commission should be treated differently. See, in this connection *IEC v Langeberg Municipality* 2001 (3) SA 925 (CC) at para 31 where, in referring to the *IEC* the court said:

'The very reason the Constitution created the Commission – and the other chap 9 bodies – was so that they should be and manifestly be seen to be outside government. The Commission is not an organ of State within the national sphere of government. The dispute between Stilbaai and the Commission cannot therefore be classified as an intergovernmental dispute.'

In my view, the same reasoning is applicable to the present dispute.

Does the laying of a complaint amount to the initiation of litigation?

[34] Against this background, the laying of a complaint to a statutory body such as the Commission does not amount to the initiation of litigation. Such a step is a preliminary or investigative step as described in *Telkom* above. The second step taken by CMS to self-refer the complaint to the Tribunal does also not amount to the initiation of litigation. CMS in self-referring a complaint to the Tribunal is requesting the Tribunal to investigate and consider whether SAMA has breached a potential restrictive horizontal practice relating to fixing purchase or selling prices of medical services to the public. The stage of the initiation of litigation has not been reached.

[35] The Tribunal is in a unique position as an adjudicatory structure .These elements 'specifically frees the Tribunal from some of the more constraining elements of high court rules as regards the preparation of pleadings and the admissibility of evidence,' which is intended to enhance the effectiveness, [3] of the Tribunal as an instrument of competition policy. This indicates that the investigative process of the Tribunal can never be regarded as the initiation of litigation. Section 49B specifically makes provision for the initiation of complaint. The section makes it clear that 'upon initiating or receiving a complaint in terms of this section, the Commissioner must direct an inspector to investigate the complaint as quickly as practicable.' There is no reference to this stage serving as an initiation of litigation or words to that effect.

[36] Lastly, for the sake of completeness, a consideration must be given to whether the PAJA argument can succeed. This argument can be disposed of by reference to have regard to the ratio in *Competition Commission of South Africa v Telkom* 2009 ZASCA 155 at para [10] where the court found that a decision of the Commission to refer a complaint to the tribunal does not constitute administrative action:

'*[10] Care must be taken here not to conflate two different aspects of the definition of administrative action in PAJA namely the requirement that a decision be one of an administrative nature and the separate requirements that it must have had the capacity to affect legal rights. The decision to refer is of an investigative nature and not an administrative act.*'

[37] Having considered all the relevant facts of this case, the approach expounded in *Zweni* as expanded in *Novartis* in the area of competition law and the additional jurisdictional factors provided for in s s37 (1)(b)(ii), I am

[3] Fourteen Years later: An assessment of the realisation of the objectives of the Competition Act no 89 of 1998. Jessica Staples associate at Bowman Gillfillan and Magali Masamba Bowman Gillfillan

ineluctably led to conclude the following: The Tribunal could have taken into consideration all these aspects when considering whether there were any prospects of success of the review application. In balancing the urgency of this type of complaint against the prolonged litigation in the High Court and the further appeal processes which might follow, it would be in the interests of justice and more convenient for all parties and the benefit of the public at large to have continued the process rather than grant a stay.

[38] The purpose of the Competition Act is that matters before the competition authorities should be resolved as expeditiously as possible. The CAC acknowledged this in *Woodlands*, where it commented that 'cartel conduct requires expedition as once it is investigated it is to the advantage of consumers that these cases be determined as soon as possible.' Prolonged disputes on procedural grounds prevent the speedy resolution of prohibited practice cases, delaying relief for consumers; which undoubtedly hampers the full realisation of the Competition Act's objectives.

In the result, the appeal succeeds and the following order is granted:

The appeal is upheld with costs including the costs of two counsel.

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M VICTOR
ACTING JUSTICE OF APPEAL
COMPETITION APPEAL COURT, CAPE TOWN

I concur:

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DENNIS DAVIS
JUDGE PRESIDENT
COMPETITION APPEAL COURT, CAPE TOWN

I concur:

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CONNIE MOCUMI
ACTING JUSTICE OF APPEAL
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