IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CASE NO CAC 75/CAC/Apr08

In the matter between :

NETCARE HOSPITAL GROUP (PROPRIETARY) LIMITED	First Applicant
COMMUNITY HOSPITAL GROUP (PROPRIETARY) LIMITED	Second Applicant
and	
NORMAN MANOIM NO	First Respondent
URMILA BHOOLA NO	Second Respondent
YASMIN CARRIM NO	Third Respondent
THE COMPETITION TRIBUNAL	Fourth Respondent
THE COMPETITION COMMISSION	Fifth Respondent

Delivered
2008

LEVINSOHN AJA :

[1] For ease of reference I shall refer to the first and second applicants as "Netcare" and "CHG" respectively. The fourth and fifth respondents will be referred to as the "Tribunal" and the "Commission" respectively.

[2] On 10th March 2008 the Tribunal issued a written decision in terms of which it refused to approve a settlement agreement concluded between Netcare and CHG on the one hand and the Commission on the other. Both Netcare and CHG seek to review and appeal against this decision.

[4] Before getting to grips with the essential issues that arise in these proceedings it is necessary to set out in broad outline the relevant factual background which emerges from the affidavit in support of the review application.

[5] In 1999 the Macmed Group of hospitals was placed into liquidation. This also precipitated the liquidation of the Malasela Hospital Group ("MHG"). The latter group was an empowerment consortium which had acquired ownership of hospitals in the Macmed Group. After its formation MHG was funded by Macmed.

[7] Following the liquidation of MHG efforts were made to rescue the hospitals in the group from liquidation. At that time Netcare was in fact looking for a black empowerment partner. It concluded an agreement with the Malasela Hospital

Group in terms of which it was to provide that group with various forms of financial assistance including guarantees, loans, bridging finance and working capital. In consideration for this Netcare would become a 43,75% shareholder in a new company, namely CHG. The shareholding in question was transferred to Netcare in September 2002. At present CHG consists of five hospitals, namely Montana and Bougainville in Pretoria, N17 in Springs, UCT and Kuils River in Cape Town.

[8] In addition to the financial assistance Netcare also undertook to install information technology equipment at CHG's hospitals. A certain financial institution had made the provision of this IT equipment as a prerequisite to obtain additional funding.

[9] Netcare in its founding papers concedes that the funding and the provision of various forms of assistance resulted in Netcare acquiring *de facto* control over CHG for the purposes of section 12(2)(g) of the Competition Act and Netcare has made the point throughout the proceedings that this control was

acquired incrementally over a period and it was difficult to say with any certainty precisely when the obligation to notify the Competition authorities arose.

[10] After the formation of CHG there was a dramatic change in the manner in which private hospitals negotiated tariffs with the various medical schemes. Whereas previously medical schemes negotiated with industry associations which represented their members – a type of collective bargaining – the Commission determined that this form of negotiations constituted price fixing within the meaning of the Competition Act. Thus this tariff negotiation in this manner came to an end. It was now incumbent on the various individual private hospitals to negotiate tariffs with various medical schemes. The larger groups negotiated tariffs on behalf of all the hospitals within their respective groups. This included CHG which was regarded by Netcare as an associated hospital. In fact in its annual reports from 2002 onwards Netcare reflected its investment in CHG as being an investment in an "associated company."

[11] Netcare accepts that its acquisition of *de facto* control over CHG was not notified nor was it approved by the Commission as required by sections 13A(1) and (3) of the Competition Act. In the premises the prior implementation without consent constituted a contravention of section 13A(3) of the Competition Act.

[12] In August 2006 Netcare did indeed notify the Commission in regard to its assumption of *de facto* control over CHG and its subsequent acquisition of the remaining shares in CHG. The Commission declined to support their merger but the Tribunal after a hearing which lasted 11 days approved the merger on 2nd August 2007 without conditions.

[13] It is common cause that in the period prior to the merger hearing before the Tribunal Netcare and CHG were engaged in negotiations with the Commission. As indicated above Netcare and CHG accepted that there had been prior implementation of a merger without notification and therefore it was liable to pay a penalty for this contravention.

[14] It appears that in addition to this issue the parties debated whether Netcare and CHG had engaged in price fixing in contravention of section 4(1)(b)(i) of the Competition Act. This arose as a result of Netcare negotiating tariffs on behalf of CHG with the various medical aid schemes as mentioned above. The basic hypothesis appears to have been that since the two entities had not lawfully merged they therefore theoretically stood in a horizontal competitive relationship with each other and their actions in negotiating tariffs amounted to price fixing.

[15] Netcare and CHG took the view that when the impugned conduct took place the two entities *de facto* were no longer in competition with each other and therefore could not have engaged in price fixing.

[16] Notwithstanding that these disparate views could not be reconciled Netcare and CHG reached a compromise with the Commission. A written agreement was entered into which provided that both Netcare and CHG would submit to a consent order in terms of section 49D of the Act. The proposed order recorded that both Netcare and CHG conceded contraventions of

sections 13A(3) and 4(1)(b)(i) of the Act. They agreed to pay an administrative penalty in the amount of R6 million rand to the Commission.

[17] The proposed consent order was placed before the Tribunal and it deferred its deliberations until the merger proceedings had been finalised. Accordingly the consent order hearing took place on 5th December 2007. Subsequently on 10th March 2008 the Tribunal delivered a written ruling. It refused to make the consent agreement an order of the Tribunal.

[18] The Tribunal furnished detailed reasons for this decision. It focused principally on whether Netcare and CHG had given the Commission a satisfactory explanation for its failure to notify the merger. It concluded that in fact a satisfactory explanation had not been forthcoming and that ought to have operated as an aggravating factor as far as the assessment of the penalty was concerned. The Tribunal observes as follows : -

> "No explanation for the failure to notify is made in the papers nor was one given to the Commission during negotiations in respect of the present consent agreement. We can only

> surmise from the record in the merger hearings that due to the limping manner in which the group was reconstituted, no 'crystalline moment', to quote Netcare's counsel, emerged during the period prior to the conclusion of the shareholders agreement at which it appeared that joint control had arrived and hence animated the shareholders attention sufficiently to consider notification. Even if one gives the merging parties the benefit of the doubt due to the murky nature of legal relationships during this embryonic period, no explanation is given to account for the period after the conclusion of that agreement, when clarity as to the parties' legal relationship must at last have crystallised."

[19] In the course of its reasoning on this part of the case the Tribunal referred to certain evidence that had been given by one Dempers in his capacity as the chief executive officer of CHG at an intervention hearing concerning the Afrox Group. During the course of cross-examination Dempers made reference to the fact that Netcare owned 43,75% of the shares in CHG. He went on to say "Netcare has got no control

over Community Hospital Group. It has got one board representative out of six members." He opined that because of its board representation it had much less influence than its other co-shareholder, namely Community Health Care Holdings, in CHG.

[20] In paragraph 13 of its reasons the Tribunal observed : -

> "There has been no change in the *de jure* or *de facto* relationship between Netcare and CHG, that is on record, that would reconcile the evidence of Dempers in Afrox Healthcare and the respondents' version in the present proceedings. In the absence of such an explanation it would appear that Netcare's role as a shareholder has been finessed to suit the legal exigencies of the moment."

[21] In paragraphs 14 and 15 the Tribunal made what I conceive to be its most crucial findings on this part of the case : -

> **"It may well be that such an explanation is possible. But it is a material issue in assessing the extent of the penalty** in respect of non-notification as it is relevant to the consideration of whether the parties **have 'co-**

operated with the Commission and Tribunal" **(section 59(3)(f))** and an assessment of 'the behaviour of the respondents' (**59(3)(c).** In other words, even though the respondents may have come clean when confronted at the time of the **Commission's non-notification investigation, the Commission is entitled and indeed ought to have had regard to the history of inconsistent explanations on the same issues before the Competition Authorities to assess properly the firms' behaviour and degree of co-operation. If one or both of the respondent had been less than frank on this issue with the competition authorities this should be taken into account as an aggravating factor in assessing an appropriate quantum for the penalty. In our view, the Commission by failing to seek a satisfactory explanation on this aspect has given no consideration or insufficient weight to this issue in considering an appropriate penalty.**"

(My emphasis).

[22] These quoted passages in my view show clearly that the Tribunal was heavily influenced by what it regarded as contradictory and unsatisfactory

explanations given by both Netcare and CHG in regard to their relationship. The evidence of Dempers played a crucial rôle in that reasoning. Manifestly the Tribunal viewed the conduct of the two hospital groups with a measure of suspicion.

[23] Apart from the above aspect the Tribunal recorded further reasons for refusing to approve the agreement and these were notably the Tribunal's view that the penalty agreed was inappropriate. It also criticised the Commission for entering into the agreement before it had concluded its investigation into the merger.

[24] Counsel for Netcare and CHG has launched a wide-ranging attack on the Tribunal's findings and in support of their submissions have submitted comprehensive and detailed heads of argument.

[25] Before considering these it is I think convenient to construe the provisions of section 49D. At the outset in my view counsel was perfectly correct in drawing an analogy between the present section and plea bargaining in the context of the criminal law. They both have much in common. The process is

intended to bring about expeditious conclusion of cases, avoid protracted hearings and conserve resources. The aims and objectives of public policy are adequately served by the plea-bargaining procedure in both fields of law.

[26] However in terms of section 49D it is obvious that the Tribunal enjoys a discretion. It may indeed refuse to confirm the agreement. Section 49D(i) envisages that the Tribunal "without hearing any evidence" may confirm the agreement. To my mind that appears to envisage that the Tribunal will not embark on its own independent inquiry, that is to say, it will not hear the evidence of witnesses to determine the suitability or otherwise of the agreement. In the criminal law context, a presiding officer would be entitled to call evidence before approving of a bargain between the State and the accused. (See section 105A(7) of Act 51 of 1977).

[28] The consent agreement between the Commission and the particular respondent represents the culmination of detailed investigation of the complaint over a period of time. Armed with the information at

its disposal the Commission is well positioned to evaluate the true extent and seriousness of respondents' misdemeanours. When it concludes an agreement of this nature it does not do so lightly but considers its appropriateness against the background of all its investigations. In my opinion counsel is perfectly correct when he submits that the Tribunal should accord due deference to the views of the Commission.

[29] What then are the circumstances under which the Tribunal can interfere? As indicated above it is not a mere rubberstamp. It is not a court of appeal in the sense that it can embark on a re-hearing of the matter and substitute its own views for that of the Commission. The Tribunal of course plays a most important rôle in the Competition hierarchy. In exercising its discretion whether to approve a consent order it must obviously be satisfied that the objectives of the Competition Act, together with the public interest, are served by the agreement. An agreement which imposes an inordinately low penalty for a serious contravention will obviously bring the

objects of the Competition Act into disrepute and will be against public policy. It seems to me that the true inquiry before the Tribunal in this context is whether the agreement is a rational one, whether it meets the objectives set out above and is not so shockingly inappropriate that it will bring the Competition authorities into disrepute. As indicated the Tribunal cannot hear any evidence but it can surely make such inquiries at the hearing as it deems fit in order to satisfy itself that the abovementioned objectives are properly met. If thereafter the Tribunal forms the view that it ought not to approve the agreement for various reasons, particularly those not canvassed during the consent hearing, in my opinion, the dictates of natural justice require that it apprise the parties of its difficulties and afford them an opportunity to deal with same.

[30] The above is a fairly trite principle of procedural fairness and natural justice. Corbett J (as he then was) in ***Kannenberg v Gird*** 1966 (4) SA 173 (C) approved of a *dictum* in an English case ***Société***

Franco-Tunisienne D'Armement – Tunis v Government of Ceylon (1959) 3 All ER 25 and said the following : -

> "In the *Société Franco-Tunisienne* case, *supra*, the Court of Appeal stressed that the point which occurred to the umpire and upon which he based his award was a new one and one that brought about a 'dramatic development' of the case. The Court held that, in the circumstances, before making his award, the umpire ought to have communicated its import to the parties to enable them, and more particularly the shipowners, to make submissions to him in regard thereto. The umpire's failure to do so created an 'unsatisfactory' position and a 'grave risk of injustice'. The Court accordingly ordered the matter to be remitted to the umpire to enable him, *inter alia*, to reconsider the question of demurrage.
>
> To my mind, similar considerations arise in the present case. The interpretation of clause 12 which the umpire made the basis of his award also constituted a 'dramatic development' in the case. It was an interpretation which had occurred to neither of the parties or their arbitrators. It made a very substantial practical difference to respondent's position : in fact it rendered him liable to applicant in a sum over R4,700 in excess of what the applicant

> originally claimed. That this should have occurred without respondent having been previously apprised of what the umpire had in mind and been given an opportunity to lead evidence or make representations in regard thereto is, in my view, an unsatisfactory position and one which carries with it the risk of injustice. Had the opportunity been given, I have no doubt that respondent or his arbitrator would have sought to persuade the umpire that his interpretation was incorrect."

[31] In the present case the application of this principle comes pertinently to the fore. As indicated above the Tribunal laid great stress on the unsatisfactory nature of the explanations which were tendered by both Netcare and CHG. The evidence given by Dempers at another, and unrelated, hearing featured prominently in its reasoning. It ought to have afforded the parties affected by this evidence an opportunity to deal with same. Presumably they would have submitted that the Tribunal was not entitled having regard to the provisions of section 49D to introduce extraneous evidence in support of its reasoning. Nor would it have been entitled to take account of evidence given in unrelated proceedings.

Secondly, even assuming that it was entitled to do so, both Netcare and CHG would have been in a position to explain Dempers's evidence and put it into a proper context. The deponent to the founding affidavit dealt with this issue as follows : -

> "68. The answer that would have been provided, had an opportunity been offered to the applicants, is a simple one :
>
> 68.1 Dempers' statement regarding the absence of control exercised by Netcare over CHG was made in the specific context of the relative presence of Netcare members, as compared to Community Healthcare Holdings (("CHH") members, on the board of directors of CHG.
>
> 68.2 Notwithstanding the parity of their respective shareholdings, Netcare had only one board member as compared to CHH's five board members.
>
> 68.3 It was in the context of that comparison that Dempers contended that Netcare did not exercise control over CHG.
>
> 68.4 It was therefore, in the light of the comparison between respective board members, that the Dempers' statement was made and must, appropriately, be construed."

The result of all this would have been to negate the inference that the Tribunal sought to draw in regard to the issue of contradictory explanations.

[32] I must perforce hold that reviewable irregularities occurred in the proceedings before the Tribunal in two fundamental respects. Firstly, it introduced both the evidence of Dempers and that given in the merger proceedings in its deliberations. On a proper construction of section 49D it was not entitled to do so. Secondly, and on the assumption that it could introduce Dempers's evidence and consider same, it ought to have apprised the parties of this. I am satisfied that on this ground alone the review ought to succeed and the decision of the Tribunal falls to be set aside. I therefore find it unnecessary to traverse the other grounds of review and appeal which were canvassed in counsel's heads of argument

[33]. The question now arises as to whether this Court, as the reviewing Court, ought to substitute its own decision for that of the Tribunal. In **Commissioner, *Competition Commission v General Council of the Bar of South Africa and Others*** 2002 (6) SCA

606, para [14] Hefer AP set forth the principle applicable to that inquiry : -

> "[14] It is not necessary to deal at length with a reviewing Court's power to substitute its own decision for that of an administrative authority. Suffice it to say that the remark in *Johannesburg City Council v Administrator, Transvaal, and Another* that 'the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary' does not tell the whole story. For, in order to give full effect to the right which everyone has to lawful, reasonable and procedurally fair administrative action, considerations of fairness also enter the picture. There will accordingly be no remittal to the administrative authority in cases where such a step will operate procedurally unfairly to both parties. As Holmes AJA observed in *Livestock and Meat Industries Control Board v Garda*
> '. . . the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and . . . although the matter will be sent back if there is no reason for not doing so, in essence it is a question of fairness to both sides'."

[34] In my opinion this Court is in as good a position as the Tribunal to approve the consent order.

Applying the principles set out earlier in this judgment there is more than enough material in the papers before us to decide the fate of the application. In the first place, this Court accords great weight to the views of the Commission which engaged in a detailed investigation of the issues. In its opposing affidavit its deponent states the following : -

> "In its assessment of the facts, the Commission was satisfied that the agreed penalty was appropriate, taking into account the factors in section 59(3) and :
>
> - the Tribunal's previous decisions on penalties imposed against parties for prior implementation of mergers;
> - the application of the concept of 'affected line of commerce' in determining appropriate penalties in terms of section 59 of the act; and
> - the admission of liability, which would, in the Commission's view, entitle medical schemes that suffered harm, or their administrators, to pursue claims for damages without having to first obtain a declaratory order that the conduct complained of contravened the Act."

[35] As indicated above the Tribunal ought to defer to the views of the Commission. It has obviously made investigations and pursued detailed inquiries and has concluded that the agreement is an appropriate one. Looking at the matter from the vantage point of the Tribunal I would have been very hesitant to conclude that the agreed penalty is a glaringly inappropriate one. The concession by Netcare and CHG that they were guilty of a contravention of section 4(1)(b)(i) of the Act is a very significant one. As pointed out by the Commission it would entitle competing medical schemes to sue for damages if they could show that they suffered harm as a result of this conduct.

[36] A further important feature which I think the Commission in the present proceedings has misconstrued, is Netcare and CHG's contention that it could not indeed have committed at the same time the offences of prior implementation and price fixing. The Tribunal expressed what I regard as a strong *prima facie* view that these contraventions could be penalised separately. For purposes of this judgment

it is unnecessary for me to express any views on the issue save only to indicate that Netcare and CHG's views are not without substance. Counsel in their heads of argument have put up very compelling submissions on this part of the case. In the context of the consent order it boils down to this. Had there not been the concession and the compromise the Tribunal would have been faced with a possibly lengthy, complex and protracted hearing.

[37] Insofar as the quantum of the penalty is concerned I am satisfied having regard to all the circumstances, that the Commission's approach was the correct one. During the consent order hearing Ms *Mkhwanazi*, on behalf of the Commission, made the following important statement : -

> "This consent agreement Chair is the result of protracted negotiation an agreement between the Commission and the respondents. The respondents move from a position where they tendered a sum less than two million Rand without an admission of liability to figures and other terms agreed to in the consent agreement that's before you. In arriving at this penalty the Commission took into account the

Tribunal's practice in previous cases that of taking into account the affected line of business **and in this case this was the CHG turnover which is where benefit of the price fixing was derived and the annual turnover of CHG in the preceding final year** that is to say the year ended March 2006 wasn't the year of … in the sum of sorry two hundred and ninety six million, two hundred and eighty six thousand and three hundred and thirty seven Rand. That figures appear from the financial statements which are annexed to these papers.

The Commission was of the view that the Netcare turnover should not be taken into account bearing in mind firstly that the CHG hospitals did not lightly add to Netcare's ability to set prices at the levels that it did and secondly that to take into account that turnover would result in punishing Netcare twice firstly as a shareholder in the Community Hospital Group and secondly its own revenues which are independent of its arrangements with CHG. The penalty that was finally agreed to amounted to 2.01% of CHG's turnover for the year ended March 2006.

The Commission further took into account the parties' cooperation with the Commission, the fact that they had entered into settlement agreement with the complainant, the parties' submission as to the extent

> of the benefit derived from the agreement and the admission of liability. I wish to point out that at the time the Commission had adopted a policy that it is important for firms when concluding a settlement agreement that there be admissions of liability.
>
> **It was the Commission's view at the time that this penalty is appropriate in relation to both the contraventions which in essence flowed from the same conduct the non-notified acquisition of control in Community Hospital Group.**"
>
> (My own emphasis).

[38] I agree with these views. It would be incorrect and indeed would result in an injustice if Netcare's turnover was taken into account. As counsel for Netcare points out if this exercise is performed Netcare's revenues in areas where there are no CHG hospitals would be implicated. I also take into account the important observation made by the Commission's representative that this method of calculation was in line with the Tribunal's previous practice of taking into account the "affected line of business."

[39] It follows therefore that I am of the opinion that the consent order is a rational one, it does not

offend against any of the objectives of the Competition Act inasmuch as the penalty imposed and the unequivocal admission of liability adequately serves the interests of public policy. I conclude therefore that this Court ought to approve the consent agreement and an appropriate order should issue.

[40] In the result the following order is made : -

> The order of the Tribunal issued on 10th March 2008 is hereby reviewed and set aside and there is substituted therefor the following order : -
>
> The agreement concluded between the first and second applicants on the one hand and the fifth respondent on the other is hereby confirmed as a consent order in terms of section 49A(1) read with section 58(1)(b) of the Competition Act, No 89 of 1998.

LEVINSOHN AJA :

DAVIS JP :

PATEL JA :

DATE OF JUDGMENT :	
DATE OF HEARING :	27 OCTOBER 2008
COUNSEL FOR THE APPLICANTS:	MR D. UNTERHALTER SC with him MR J. WILSON
INSTRUCTED BY :	WEBBER WENTZEL, JOHANNESBURG
COUNSEL FOR THE FIFTH RESPONDENT :	MS N. H. MAENETJE
INSTRUCTED BY :	COMPETITION COMMISION