COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case Number: 41/AM/Jun02

In the matter between:

Healthbridge (Pty) Ltd	**Applicant (intervenor)**
and	
Digital Healthcare Solutions (Pty) Ltd	**Respondent**

In re:

Digital Healthcare Solutions (Pty) Ltd	**Applicant**
and	
The Competition Commission	**1st Respondent**
Healthbridge (Pty) Ltd	**2nd Respondent (intervenor)**

Reasons on the scope of intervention

Introduction

This matter relates to an intervention application brought by Healthbridge to intervene in merger related proceedings ('the main application'), which we describe more fully below. Until the day of the hearing Digital Healthcare Solutions ('DHS') opposed the intervention application. On the day of the hearing it indicated it would no longer oppose the intervention application but sought limitations on Healthbridge's right to participate in the main application. DHS also raised certain in limine points, which we have to decide.

Factual Background

The dispute originates from the merger between DH-Switch[1], a subsidiary of Digital Healthcare Solutions (Pty) Ltd ("DHS") and Persetel's QEDI[2], which was approved by the Competition Commission on 30 April 2001 subject to the following conditions:

> *For a period of three years after the approval of this transaction by the Commission:*
>
> 1. *The merged entity shall, on reasonable written request by any healthcare switch entity, integrate the applicable latest versions of PMS packages which it owns or controls, with an API which enables an interface with the switching technology of the healthcare switch entity requesting such integration, in accordance with an agreement referred to in paragraph 2 below.*
>
> 2. *Pursuant to such reasonable written request, the merged entity shall use all reasonable endeavours to conclude a written agreement with the requesting healthcare switch entity concerned, within a period of 60 days after receiving such request, containing commercially, financially and technically reasonable terms.*
>
> 3. *The merged entity shall provide a quarterly report to the Commission, for a period of 12 months after the date of approval, detailing all requests by third party healthcare switch entities to integrate their API and functionality with the PMS packages owned or controlled by the merged entity, as well as detailing the agreements and time frames concluded with such third party healthcare switch entities in respect of the integration process.*

Subsequent to the merger Healthbridge, a competitor of DHS,[3] requested DHS to provide it with access to DHS' practice management software ("PMS").

---

1 Erroneously called Mediswitch by the Competition Commission in its papers

2 Persetel now called Comparex

3 DHS, the complainant, and Healthbridge, the intervenor, both provide an electronic switching mechanism, called a switch, through which claims of healthcare service providers are conveyed directly to the patient's medical aid.

However, despite ongoing negotiations over a period of 12 months, and way beyond the 60 day period stipulated by the Commission, the merged entity and Healthbridge could not conclude an integration agreement. Accordingly, the Competition Commission issued, on the 28th May 2002, a Notice of Apparent Breach to DHS alleging that DHS has failed to comply with the conditions. On 11 June 2002 DHS applied to the Tribunal to have this Notice reviewed in terms of the procedure set out in Rule 39(2)(b) of the Competition Commission's rules. This rule allows a firm that has been served with a notice of apparent breach to apply to the Tribunal to review the notice on the grounds that the firm has *"substantially complied with its obligations with respect to the approval or conditional approval of the merger".*

In its Rule 39(2)(b) application DHS requested the Tribunal for an order on the following terms:

1. *The Notice of Apparent Breach issued by the Respondent against the Applicant dated 28 May 2002 be set aside.*

2. *It is declared that the Applicant and its subsidiaries have complied, alternatively substantially complied, with the merger conditions set out in the Respondent's merger clearance certificate dated 4 April 2001.*

3. *It is declared that the Applicant and its subsidiaries are not obliged to continue to negotiate and conclude an agreement with Healthbridge (Pty) Ltd for the integration of the latest versions of practice management software packages which they own or control, with an application programme interface which enables an interface with the switching technology of Healthbridge (Pty) Ltd.*

4. *As an alternative to prayer number 3, it is declared that the merger conditions set out in the Respondent's merger clearance certificate dated 4 April 2001 be amended to include the following sentence at the end of the second condition: "including, without limitation, that such other healthcare switch entity shall cancel any agreement which it may have with healthcare funders or administrators of the switching technology of such healthcare switch entity for the electronic conveyance of claims, whether by batch or in real time".*

5. *The Respondent is ordered to pay the Applicant's costs of this application on the attorney and own client scale, including the costs of two Counsel and provide further and/or alternative relief.*

On 23 August 2002 Healthbridge filed an application to intervene in the Rule 39(2)(b) application. Up until the date of the hearing of the intervention application DHS opposed Healthbridge's intervention application. However, at the hearing the intervenor's interest was conceded but the scope of its participation was not. It is our task to proceed to determine the extent of that participation. Before we do this we need to deal with certain *in limine* objections regarding the intervenor's application that DHS raised.

In Limine points

DHS argues that the intervention application is defective for the following reasons-

(1) The application is not properly before the Tribunal because it was not brought in the prescribed form CT 6;
(2) In the Notice of motion it is stated that the affidavit of Gerhardus Johannes van Zyl will be relied upon to support the application but in fact the affidavit attached is from Jerome Howard Sackstein;[4] and
(3) It does not contain a concise statement of the matters in respect of which the intervenor wishes to make representations as required by Tribunal Rule 46(1)(a).

The first two points are purely matters of form and DHS was unable to state that it had been prejudiced in anyway by this want of compliance with formality. The notice of motion accompanying the intervention application contains all the information required by the CT6 form and its deficiencies are purely cosmetic and warrant no further attention.[5] As to the second point, any confusion about the erroneous reference to the deponent did not prevent DHS comprehensively responding to the application.

Both points are devoid of substance and we find that the intervention application is properly before us.

4 The applicants said that it was a typing error and that they would submit a resolution to cure it. The respondent accepted this and we therefore do not need to address this issue.

5 In NAPW and Others v Glaxo Wellcome and Others the Competition Tribunal found that the Act does not impose any formalities on the form that a complaint should take. The forms are intended to be fact driven and user friendly. Note that in terms of Tribunal Rule 10(1) all that is required of initiating documents is that they are "substantially in the form of the annexure listed" in the Rules. There is no dispute that the intervention application as a whole meets the test of substantial compliance with the formal prerequisites of form CT 6. The only complaint would be that the order is set out in the body of the affidavit and not in the notice of motion.

The third point merits further discussion and so we deal with it separately.

Scope of the intervention

DHS argues that the intervention application does not contain a concise statement of the matters in respect of which the intervenor wishes to make representations as required by Tribunal Rule 46(1)(a).

In order to cure this DHS proposes that Healthbridge file an affidavit that addresses the order that is sought so that it knows precisely what it is that is challenged and, on the basis of that submission, could then ascertain what the scope of the intervention should be. The argument goes on to state that unless the above matters are set out precisely in the application, the Tribunal has nothing pertinent on which to base a decision as to the scope of participation and the question of whether the intervenor's interests are within the scope of the Act or are already represented.

Section 53 of the Act and Rule 46 of the Tribunal Rules, govern an intervenor's rights.

Section 53(1)(c)(v) provides that -

1) *The following persons may participate in a hearing, in person or through a representative, and may put questions to witnesses and inspect any books, documents or items presented at the hearing:*

   (c) if the hearing is in terms of Chapter 3 –

      (v) any other person whom the Competition Tribunal recognised as a participant.

It is common cause that this is the relevant section that deals with the rights of third parties to participate in hearings related to proceedings in terms of Chapter 3 of the Act, which would include Rule 39(2)(b) proceedings.

The Tribunal rules in addition regulate the rights of parties to intervene in proceedings in terms of Rule 46, which provides:

"Intervenors

(a) At any time after an initiating document is filed with the Tribunal, any person who has a material interest in the relevant matter may apply to intervene in the Tribunal proceedings by filing a Notice of Motion in Form CT 6, which must –

(i) include a concise statement of the nature of the person's interest in the proceedings, and the matters in respect of which the person will make representations; and

(b) be served on every other participant in the proceedings.

2) No more than 10 business days after receiving a motion to intervene, a member of the Tribunal assigned by the Chairperson must either –

i.make an order allowing the applicant to intervene, subject to any limitations –

1. *necessary to ensure that the proceedings will be orderly and expeditious; or*
2. *on the matters with respect to which the person may participate, or the form of their participation; or*

(b) deny the application, if the member concludes that the interests of the person are not within the scope of the Act, or are already represented by another participant in the proceeding.

(b) Upon making an order in terms of sub-rule (2), the assigned member may make an appropriate order as to costs.

(4) If an application to intervene is granted –

(i) the registrar must send to the intervenor a list of all documents filed in the proceedings prior to the day on which the request for leave to intervene was granted; and

(b) access by an intervenor to a document filed or received in evidence is subject to any outstanding order of the Tribunal restricting access to the document."

DHS relied on the language of paragraph 1(a) of Rule 46 to supports its contention that the application is deficient in its present form.

The ambit of rule 46 is open to considerable doubt since the recent decision of the Competition Appeal Court in Anglo South Africa Capital (Pty) Ltd and others v IDC and one other. [6]

In that matter the Court dealt with the issue of intervention in merger proceedings and, in particular, what the threshold requirement was for the right to intervene, given the fact that the requirements in section 53 are less onerous than those found in Rule 46. The Court held that the language of section 53(1)(c)(v) was clear, and that there is no reference to the requirement of 'interest' with regard to intervention in merger proceedings. The Court went on to state that the Rules couldn't introduce a threshold, which the legislature never introduced in the Act. Therefore, in the absence of specified criteria for participation the Court would be reluctant to read in a test such as "substantial and material interest". The mere requirement in the Act is that "a party must be recognized by the Tribunal as a participant". The Court held that even if it were to be argued that a party must have some interest such an interest is not qualified.

The Court did state, however, that although leave to intervene is discretionary the Tribunal's discretion is not unfettered and must be exercised according to the rules of reason and justice.[7]

It was not necessary for the Court in the Anglo case to consider whether Rule 46(1) raised any other threshold for participation not contemplated in the Act, as the Court was chiefly concerned with the requirement of a *'material interest'* set out in Rule 46(1). It did not deal with the other requirement in the Rule that the intervenor must set out the matters in respect of which the person will make representations, which we will refer to as the scope requirement.

It is arguable either; that the scope requirement sets out an additional threshold not mandated by the Act, or that it is no more than a guide to the Tribunal's discretion and thus not inconsistent with the requirement that our discretion be exercised judiciously.

6 see Competition Appeal Court Case No: 26/CAC/Dec02
7 Page 25 of the judgement.

We do not need to decide that point as we are of the view that the application meets the requirement of Rule 46 in any event and that Healthbridge has properly set out the scope of its intervention.

The intervenor has stated in its Founding affidavit in paragraphs 32, 33 34 and 36 what relief it seeks and in what matters it seeks to make representation. We therefore find that intervenor has complied substantially with Rule 46 and that the application is properly before us.

Scope of intervenor's participation

According to Healthbridge it is uniquely placed, as the party with whom Digital Healthcare failed to conclude an agreement, to provide evidence to the Tribunal regarding the failure of negotiations. The Commission wasn't part of this process.

Healthbridge also avers that it has a clear and direct personal and private interest in the main proceedings that is not represented by the Commission.

It also contends that it is incompetent for DHS even to pursue the alternative relief that it seeks in the main application. It submits that in terms of Commission Rule 39(2)(b), DHS is limited to requesting the Tribunal to review the Commission's Notice on the grounds that it has "substantially complied" with its obligations in terms of the merger clearance certificate, and cannot in terms thereof seek an amendment of the Commission's conditions. The Commission has not taken this jurisdictional objection to the main proceedings and it accordingly lies in the hands of Healthbridge to make submissions in that regard.

Furthermore, it argues that since it is the company with which DHS has failed to conclude an integration agreement, it will be affected by DHS' request that it be relieved from the obligation to continue its negotiations. If DHS is allowed to amend the terms of the integration agreements Healthbridge will be uniquely affected since this condition is specifically aimed at forcing Discovery Health and Medscheme to allow DHS unfettered access to their claims processing systems on the same terms as they have agreed with Healthbridge.[8] Should the review inquiry ever reach any substantive questions of competition law dealing with the relationship Healthbridge would also have to traverse matters relating to the relationship and the effect it may have on competition.

In addition, it alleges in par 36.1 of its affidavit, that the representatives of Healthbridge will be able to assist the Tribunal in:

8 See par 33 the two medical scheme administrators are also shareholders of Healthbridge

Ensuring that all written and oral evidence is placed before it pertaining to:

1. *DHS' failure to comply with the merger conditions imposed on it;*
2. *the effect of DHS' conduct on Healthbridge, and on competition more generally;*
3. *addressing DHS' allegations that it and its subsidiaries have complied or substantially complied with the Commission's merger conditions; and*
4. *addressing legal argument on the merits of DHS' application.*

DHS argues that it cannot find the paragraphs that address the question of scope pertinently in Healthbridge's affidavit, and those that do refer to scope are too broad to be of any use. Because of this the DHS is unable to deal with it.[9]

We do not agree. Healthbridge has identified its interest and the scope of its participation. If DHS had wanted to frame a proposed order that would have narrowed the scope of intervention it should have done so either in its papers or at the hearing. Delaying the matter for further filings on this point would serve no purpose and in any event the issues in dispute are pertinently addressed in Healthbridge's papers. In our view the scope of intervention sought is by no means overbroad and furthermore contemplates issues on which Healthbridge is in a position to be of assistance to us.

DHS's difficulties in this regard have been occasioned by its last minute change in stance to concede the intervenor's interest, when it had till the hearing disputed this point, and not by any deficiency in Healthbridges application for intervention. If DHS considered the application's scope to wide in ambit, having conceded its interest, it was for DHS to suggest what it considered a more appropriate delimitation. Its failure to do so cannot be ascribed to any fault on behalf of the intervenor.

One must not lose sight of the primary purpose of an intervention for our proceedings. Jali JA in the Anglo states on page 27 of his judgement that:

> *"…The main focus of the hearing before the Tribunal is the truth finding process."*

and later on, on page 28:

"*the purpose of participation in hearings is to assist the Tribunal in its*

9 Yet it is able to identify and argue the scope in its answering affidavit on page 804 of the record.

investigations. … I cannot see the logic in this Court limiting the basis upon which the first respondent may participate. It is for the Tribunal to decide as it deems fit. It is within the Tribunal's discretion."

From the above it is clear that the Competition Appeal Court favours a wide scope of intervention. Moreover, it is within the discretion of the Tribunal to decide the extent of those rights, to limit or widen it, as it deems fit in order to fulfil its mandate in accordance with the provisions of the Act.

The Main application concerns merger conditions imposed upon the merger to the effect that the merged entity should, upon receiving a reasonable request from a competing switch entity use reasonable endeavours to conclude an API integration agreement relating to PMA packages which it controls, upon commercially, financially and technically reasonable terms. Healthbridge is such a competing switch entity that made a request for API integration. Because DHS allegedly could not meet the conditions the Commission issued a Notice of Apparent Breach after Healthbridge complained to the Commission.

This is a highly technical matter. In order to understand whether or not there was a breach of the merger conditions, i.e. whether or not DHS did substantially comply with the conditions, the Tribunal needs to understand the approach and measures taken by both parties in trying to come to an agreement. Moreover, the Tribunal needs to know from each side why and how the commercial dispute developed that led to a breakdown in negotiations. The Commission was not a party to this process and can therefore only give hearsay evidence.

In our view the scope of the intervenors application as set out below will assist us to resolve this question.

Order

In light of the above we make the following order:

1. The applicant's scope of participation should be in respect of the following:

    1.1 To place before the Tribunal any evidence regarding the failure of DHS to substantially comply with its merger conditions for purposes of Competition Commission Rule 39(2)(b);
    1.2 Address DHS' allegations that it and its subsidiaries have complied with the Commission's merger conditions; and
    1.3 Argue the jurisdictional point taken in paragraph 34 of its

founding affidavit with regard to DHS' application to amend the Commission's conditions in terms of Competition Commission Rule 39(2)(b).

1.4 The effect of DHS' conduct on Healthbridge as a competitor in the market if the Commission's order is amended with regard to negotiating an integration agreement.

2. The intervenor must file its answering affidavit to the main application within 10 business days of this order and the respondent must file its reply within 10 business days of that.
3. The respondent (DHS) is to pay the intervenor's costs of the intervention application, which include the costs occasioned by the employment of two legal representatives.

Application to stay

In April 2002 DHS filed a complaint with the Competition Commission alleging that Healthbridge's exclusive arrangements with Discovery and Medscheme constitute restrictive practices because it was being denied so called 'back end access'.

On the 19th September 2002, which is a month after Healthbridge had filed its application for intervention in the main application,[10] DHS filed an application to stay the hearing of the main application pending the Tribunal's adjudication of the complaint referral, on the basis that the main application and the complaint dealt with essentially the same subject matter and the main application could not be adjudicated upon without the complaint being disposed of.[11]
Both the Commission and Healthbridge duly opposed this stay application. Both filed answering affidavits to which DHS replied.

The stay application was set down for hearing at the same time as the intervention application was heard.

At the hearing we were advised by counsel for DHS that they were applying to have the stay application postponed on the basis that if the intervention was allowed, the stay application was premature because issues may arise out of the intevenor's filings in the main application that could be relevant to the stay

10 Recall that the main application is the application brought by DHS to review the Commission 's notice of apparent breach.

11 At the time of the hearing the complaint had not yet been referred to the Tribunal nor has a notice of non-referral been issued.

application in the sense that the further filings might clarify the differences between the parties. According to DHS it had never intended to have the two applications heard simultaneously and the registrar had arranged the set-down.

Both Healthbridge and the Commission opposed the postponement. DHS informed us that if the postponement was not granted it would have no option but to withdraw the stay application.

Healthbridge argued that the application for stay should be dismissed and not postponed. Any prematurity in the stay application was of DHS 's own doing.

Counsel for DHS points out that, in the notice of motion in the stay, his client Healthbridge is cited as a party conditional on the outcome of the intervention application. The Commission however is cited as a respondent without any qualification and would have been one irrespective of the outcome of the intervention application. He argued that DHS necessarily contemplated the intervention application, because the latter had preceded the stay application, and further that it must have contemplated that the intervention application might prove successful. There was no basis for DHS then to argue that there had been some change in circumstances that had come as a surprise. As counsel eloquently expressed it, if it was premature now, this was because it had been brought prematurely and nothing since has happened to render premature that which was not premature at the outset.

Counsel for DHS in reply conceded that the application might have been better kept for launching at the moment when it was clear what the outcome was of the application to intervene, but that this should not preclude us from granting them the postponement.

In our view the contentions of Healthbridge are well founded and if the application for stay was ill conceived on the basis of its prematurity then the applicant must bear the consequences.

The application for the postponement is refused and given the applicant's stance to withdraw the application if the postponement is refused we award the wasted costs occasioned by the application to stay, as well as the application to postpone the stay, to Healthbridge, these costs to include the costs occasioned by the employment of two legal representatives.

15 May 2003

N. Manoim **Date**

Concurring: D Lewis,U Bhoola