**COMPETITION TRIBUNAL**
**REPUBLIC OF SOUTH AFRICA**

**Case No: 122/LM/Dec05**

**In the matter between:**

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| **Supreme Health Administrators (Pty) Ltd** | **First Applicant** |
| **Network Healthcare Holdings Limited** | **Second Applicant** |
| **Council for Medical Schemes** | **Third Applicant** |
| and | |
| **The Competition Commission** | **First Respondent** |
| **Phodiclinics (Pty) Ltd** | **Second Respondent** |
| **DJH Defty (Pty) Ltd** | **Third Respondent** |
| **New Protector Group Holdings (Pty) Ltd (in liquidation)** | **Fourth Respondent** |
| **Protector Group Medical Services (Pty) Ltd (in liquidation)** | **Fifth Respondent** |
| **President Pharmacy (Pty) Ltd** | **Sixth Respondent** |
| **Capstone 177 (Pty) Ltd** | **Seventh Respondent** |
| **Blue Dot Properties 446 (Pty) Ltd** | **Eighth Respondent** |
| **Limosa Investments 93 (Pty) Ltd** | **Ninth Respondent** |
| **Capensis Investments 403 (Pty) Ltd** | **Tenth Respondent** |
| **Medi-Clinic Corporation Limited** | **Eleventh Respondent** |
| **Phodiso Clinics (Pty) Ltd** | **Twelfth Respondent** |
| **Phodiso Holdings Limited** | **Thirteenth Respondent** |

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## Reasons for decision

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## Introduction

1. On 20 April 2006 the Competition Tribunal ('the Tribunal') granted the application brought by the first, second and third applicants in terms of the provisions of section 53(1)(c)(v) of the Competition Act No. 89 of 1998 ('the Act') for leave to be recognised as participants in the proceedings before the Tribunal concerning the proposed merger between Phodiclinics (Pty) Ltd and Protector Group Medical Services (Pty) Ltd ('the merger').

2. The merger was referred to the Tribunal by the Commission in terms of section 14A of the Competition Act, 1998. The Commission has recommended unconditional approval of the merger.

3. On 13 March 2006 Supreme Health Administrators (Pty) Ltd ("Supreme Health") and Network Healthcare Holdings Limited ("Netcare") filed an application in terms of section 53(1)(v) of the Act to be recognized by the Tribunal as participants in the merger proceedings and to be allowed the full scope of the intervention. On 12 April 2006 the Council for Medical Schemes ("CMS") brought its application to be recognized as a participant in the merger proceedings before the Tribunal in terms of section 53(1)(v) of the Act.

4. Phodiclinics (Pty) Ltd ("Phodiclinics") is a joint venture between Medi-Clinic and Phodiso Clinics ("Pty) Ltd ("Phodiso Clinics"). Phodiso Clinics holds 49% of the issued shares in Phodiclinics while Medi-Clinic holds 51%. Phodiclinics purchased the Protector Group[1] on 21 December 2004.[2] The Protector Group was placed in liquidation on 2 September 2004 and the liquidator, together with IDC, the major creditor, accepted Phodiclinics' offer. The Protector Group has among other business divisions four private hospitals namely, Medivaal Hospital located in Vanderbijlpark, Maraphong Hospital in Ellisras (Lephalala), Kathu Hospital in the Kalahari region in the Northern Cape and the Kingsley Day Theatre in Pretoria. The most contentious hospital is by far the Medivaal hospital, located in Vanderbijlpark. The Commission has recommended that the merger be approved without conditions. The applicants dispute the findings of the Commission.

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1 The interveners have submitted that New Protector Group Holdings (Pty) Ltd, the fourth respondent is the holding company of the fifth to the tenth respondens. These companies are collectively called the "Protector Group". The Protector Group is the primary target firm in the proposed merger. However, the liquidator has argued that though the fourth respondent assumed control and acquired the businesses of the relevant companies as a going concern, transfer of the relevant shares never took place because of a variety of reasons. See page 158 of the Supreme Health record.

2 This was the date on which the offer by Phodiclinics was accepted by the liquidator.

5. The hearing of the application took place on 19 April 2006. It was agreed by all parties that, to expedite the proceedings, the Tribunal could issue an order separately from providing reasons. On 24 April 2006, the Tribunal granted all three applicants the right to participate in the merger proceedings. The reasons for the decision follow.

**Submissions by the Council**

6. CMS submitted that its application should be granted for a number of reasons which amounted to two broad grounds. CMS is mandated in terms of the Medical Schemes Act 131, 1998 ("the MSA") to protect the interests of members of medical schemes at all times.[3]

7. First, CMS argued that the merger will lead to a higher degree of concentration in the healthcare industry and will negatively impact on medical schemes' ability to price-compete. In this regard CMS stated that it intended to argue and lead evidence to show that the healthcare industry is already highly concentrated, being dominated by three large players. These three large chains are in the process of buying up independent hospitals such as those of the target firm. The merger will lead to an even higher degree of concentration and market power in the hands of the three main players. This will negatively impact on medical schemes' ability to price-compete by impacting on their ability to negotiate competitive prices and product choices for their members. The merger will also undermine the efforts by government to provide incentives for medical schemes to price-compete through the implementation of the Risk Equalisation Fund (REF), which will be housed within CMS.

8. Secondly, CMS stated that it would challenge the Commission's approval of the transaction on the merging parties' argument that Protector was a failing firm, and CMS would lead evidence and argument in relation to this issue.

**Submissions by Supreme Health**

9. Supreme Health submitted that two of its directors were the directors of Tradeworx (Pty) Ltd, a BEE company that used to own 51% of the issued shares in the Protector Health Group, prior to its liquidation. It further

3 See submissions on page 7 CMS's paginated bundle. Section 7 of the MSA mandates CMS to protect the interests of its members at all times and to "collect and disseminate information about private health care.

asserted that it has knowledge of the private health sector being both a small participant in the Healthcare market in SA as well as being a BEE participant in this market. Supreme Health regards this knowledge as of direct relevance to the assessment of competition law issues arising from this merger.[4] Supreme Health further challenges the failing firm defence advanced by the merging parties and the Commission.[5] It submitted that the failing firm defence should not be upheld because there are less anti-competitive options available to the Tribunal[6] and that it itself was willing to purchase the hospitals should the Tribunal accept a less anti-competitive route.[7] It also wished to lead evidence on offers that were made to the liquidator by parties other than Phodiclinics in the course of the sale negotiations.

**Submissions by Netcare**

10. Netcare made similar submissions to those advanced by Supreme Health. In addition, Netcare stated that it should be allowed to intervene because, as a large competitor of Medi-Clinic (the ultimate acquiring firm), it has wide knowledge of the private healthcare industry from a perspective different to that of CMS or Supreme Health. It could assist the Tribunal in understanding competitive conditions and the relevant market on a national level and in the Vaal Triangle. Netcare submitted that it had a small operation in the Vaal triangle called Vaalpark Hospital, which had established a pattern of patient referral to the Protector facilities at Medivaal. Hence it was specifically concerned about the impact of the merger on its operations at Vaalpark. In its view the merger will lead to an increase in concentration levels in the Vaal Triangle and that such imbalance of market power in favour of Medi-Clinic will result in the latter engaging in anticompetitive behaviour.[8]

**Submissions by the merging parties**

11. The merging parties indicated that they did not oppose the application by

4 On page 16 of the founding affidavit Mr. Wotshela stated that he was involved in the restructuring plan for the Protector Group. He later provided a copy of the New Protector Group Holdings Restructuring Plan in his replying affidavit. See page 220 of the Supreme Health record.
5 See page 23 of the Supreme Health record.
6 See page 23 of the Supreme Health record.
7 On page 206 of the Supreme Health record Mr. Wotshela states that Supreme Health, or its shareholders wish to acquire assets in the Protector Group should the Tribunal decide on a less competitive route. In this regard Supreme Health is exploring funding opportunities from the National Empowerment Fund.
8 See page 16 of the Netcare record.

CMS. [9] However, they were opposed to the applications brought by Supreme Health and Netcare on three broad grounds. Firstly, the merging parties argued that the interveners do not have adequate substantive information to aid the Tribunal in its truth-seeking function save on a purely generic level. Secondly, that the interveners will unnecessarily cause prejudice to the merging parties by lengthening the time of the hearing. This will add to the merging parties' costs. Such prejudice is said to outweigh the benefits of allowing the intervention. Lastly, the merger does not raise serious competition concerns since it results in Medi- Clinic raising its market share by 1%on a national basis through the acquisition of four hospitals spread throughout the whole of South Africa, from Kathu in the Kalahari to Ellisras, to Vanderbijlpark to Pretoria.[10]

12. The merging parties further argued that Supreme Health as a juristic person did not have any interest in this matter because it had no knowledge of the healthcare industry or the history of the transaction. It was only its directors, Mr Wotshela and Dr Clarence Mini, in their personal capacities by virtue of their association with Tradeworx who had the relevant knowledge and information. Accordingly the Tribunal ought to dismiss Supreme Health's application.

**Decision**

13. Section 53(1)(c) deals with participation in merger proceedings. Section 53(1)(c)(v) and rule 46 specifically regulate an applicant's rights to participate in these proceedings. Rule 46 requires that a participant have a material interest in the proceedings. The test for this Tribunal in deciding whether parties, such as the applicants, should be permitted to participate in a merger has been set out by the Competition Appeal Court in *Anglo SA Capital (Pty) Ltd and Industrial Development Corporation of South Africa & Another*[11] ("*Anglo/Kumba* case").

14. In that case the Court held that the language of section 53(1)(c)(v) was clear in that it did not require a participant to have an interest in the merger proceedings. Rule 46 could not be used to interpret or restrict the express provisions of section 53(1)(c)(v) since the Minister of Trade and Industry and not the legislature drafted it. The Minister of Trade and Industry was only empowered by section 27(2) to make rules relating to the manner, form and procedures for participation and not in respect of thresholds for such

9 See page 4 of the transcript where Mr. Van der Linde indicated that the merging parties will not oppose the application brought by CMS.
10 In Gauteng the merging parties submitted that the market share will increase by 1.3%. See page 44 of the Supreme Health record and page 34 of the Netcare record.
11 2004 (6) SA 196 (CAC) at 16.

participation. Furthermore the common law test for *locus standi* is not applicable to merger proceedings of the Tribunal as these are not adversarial in nature and not like ordinary litigation. Accordingly the Court held that the Tribunal had a discretion to grant an application to participate in merger proceedings since no grounds of participation were required in terms of section 53(1)(c)(v). However such discretion had to be exercised judicially. It held further that where a party is able to demonstrate that it has a material and substantial interest then such party would fall into a class of parties who may be admitted upon the exercise of the judicial discretion by the Tribunal. A party who is unable to show a material and substantial interest may well be admitted if it is able to provide evidence of its ability to assist the Tribunal in "its consideration of the application of the various purposes of the Act as contained in section 1 thereof to the relevant merger transaction."[12] The position in the *Anglo/Kumba* case is reiterated in the *Community Healthcare Holdings (Pty) Ltd and Another and The Competition Tribunal and Others*[13] (at paragraph 28).

15. The Tribunal's discretion, while being exercised judicially must serve to promote the legislature's policy of encouraging participation in the deliberations of the Tribunal. In the case of *The Competition Commission and Others v American Natural Soda Ash Corp and Others*[14] it was stated that

> *"The legislature's policy… seems to be to encourage as much participation in deliberations as this is considered to be healthy for arriving at optimal decisions. To understand what happens in a market one must hear from its participants – customers, suppliers, competitors, etc. To come to conclusions about market behaviour without their participation can only impoverish the process of adjudication"*

16. There is no basis for the Tribunal to deviate from this rationale when considering whether the applicants should be permitted to intervene in the present case.

17. CMS' application to intervene was not opposed by the merging parties and is accordingly granted. Even if it had been opposed CMS has a clear material and substantial interest in the matter, as mandated by the MSA. The relief granted to CMS is as contained in its notice of motion and in paragraph 24 below.

18. In relation to Netcare, the Tribunal is of the view that Netcare, as a major

12 *Anglo/Kumba* page 1-18.
13 44 CAC Feb05 at page 11.
14 Case Number 49/CRApr00 and 87/CR/Sep00, decision of 30 November 2001.

competitor of the ultimate acquiring firm Medi-Clinic, both at the national level and in the Vaal Triangle has demonstrated that it has a material and substantial interest in the outcome of this hearing. It was argued by the merging parties that the founding papers of Netcare did not reveal any specific concerns but were rather framed in a generic manner. At the hearing Mr Norton explained that the application for intervention had been filed before his client or its client's legal representatives had had sight of the Commission's record. In the circumstances, he said, Netcare was unable at the relevant time to provide more details in relation to the areas of concerns identified in its founding affidavit.

19. In our view, Netcare, in its founding papers has sufficiently outlined a material and direct interest as a large competitor of Medi-Clinic at the national and the regional level and will be able to assist the Tribunal in its truth-seeking functions.

20. In relation to Supreme Health, the Tribunal is of the view that both Mr Wotshela and Dr Mini would be able to assist it in understanding the Protector Group's operations and its decline into liquidation. They would also be able to assist the Tribunal in understanding the competitive landscape of the industry from the perspective of a smaller competitor. The interests of Dr Mini and Mr Wotshela are not identical to those of Netcare or CMS. The Tribunal is of the view that Dr Mini's and Mr Wotshela's interests would be better represented and relevant issues would be more fully ventilated in the proceedings if they participated under the banner of Supreme Health rather than being summoned as witnesses by either of the other parties or this Tribunal. However it is acknowledged that Supreme Health may not have any direct interest in the proceedings beyond those of Dr Mini and Mr Wotshela. Hence the Tribunal grants the application of Supreme Health to participate in the proceedings for as long as Dr Mini and Mr Wotshela remain directors and/or shareholders of Supreme Health.[15]

**Scope of the intervention**

21. The respondents contended that the intervention should be limited to the issues expressly stated in the papers of the applicants. The applicants, in their papers, were especially concerned about the possible anticompetitive effects of the transaction, in the Vaal Triangle region. A similar argument was advanced in the *Anglo/Kumba* case. In that case the appellants wanted the intervention of the respondents to be limited because, allegedly, the respondents had shown no interest in other markets, which had been referred to in the draft order.[16] The Competition Appeal Court stated that:

15 See paragraph 7 of the order, a copy of which is attached to these reasons as Annexure A.
16 See page 27 of the Anglo/Kumba case.

*Furthermore, the purpose of the participation in the hearings is to assist the Tribunal in its investigation. The Tribunal will consider all the factors listed in Section 12A(2) and 12A(3) of the Act. If that is the case, then I cannot see any 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.*[17]

22. It is certainly problematic to limit in advance the participation of applicants, in a matter when it is unclear what evidence will be led by the merging parties in relation to any number of issues. In this particular transaction, CMS has indicated that it intends opposing the merger on a number of grounds. The Tribunal, in its truth-seeking function, can only benefit from hearing the view of the competitors of the merging parties, large and small, on a number of aspects such as the relevant market, impact of the merger on the industry in general and in the Vaal Triangle specifically, and on more competitive alternatives. Moreover, setting limits on the extent of a party's participation could lead to further delays if parties in the proceedings differed in their interpretation of the limits set by the Tribunal. To limit the participation of the applicants is not appropriate in the circumstances of this matter. At the hearing of the merger, there is no doubt that the parties will concentrate on issues that are of primary concern to them and are not common to the industry. In addition, the Tribunal will ensure, as it has always done, that unnecessary duplication is avoided by requiring the participants to co-ordinate their evidence and the cross-examination of witnesses as far as this is possible.

**Confidentiality**

23. The intervening parties have asked to be provided with a non-confidential version of the Commission's recommendation. They have further asked for their legal counsel to be provided with the confidential version of the Commission's recommendation. The Tribunal is guided by the decision of the Competition Appeal Court in the case of *Competition Commission v Unilever plc & others* (the *"Unilever"* case*)*.[18] In the light the principle established in the *Unilever case*, we grant the interveners' legal experts access to the confidential version of the Commission's recommendations subject to the provision of the appropriate confidentiality undertakings.[19]

17 Page 28 of the Anglo Kumba case.

18 CAC 13/CAC/Jan02,14.2.2.2002.

19 In the *Unilever* case the Competition Appeal Court held that the applicants' legal experts should be given access to the confidential information, subject to adequate confidentiality undertakings, to enable them to advise their clients fully and protect their rights.

**Conclusion**

24. We allow the intervention by Supreme Health, Netcare and the Council for Medical Schemes in the merger proceedings before the Tribunal. The intervention is allowed without any limitation to the scope of the intervention. The relevant orders are attached hereto as appendix A and appendix B.

26 May 2006

**Y. Carrim** **Date**

**Concurring: M Mokuena and L Reyburn**

APPENDIX A: ORDER ISSUED ON 24 APRIL 2006

**Order in relation to Supreme Health and Netcare's Application**

ORDER

Further to the Applicants' submissions to intervene, the Tribunal makes the following order:

1. The Applicants are granted leave to intervene in the merger proceedings before the Tribunal in relation to the acquisition of control by Phodiclinics (Pty) Ltd and DJH Defty (Pty) Ltd of the Protector Group of companies under Case No: 122/LM/ Dec05, in terms of section 53(c)(v) of the Competition Act, 1998;

2. The Applicants are permitted to participate in the hearing in relation to the following matters:

2.1 the factors that the Tribunal must take into account in respect of section 12A(2) of the Act read with section 12A(1)(a)(i); and

2.2 the factors that the Tribunal must take into account in respect of section 12A(3).

3. The Applicants are permitted to adduce oral and documentary evidence and cross-examine witnesses in relation to these matters in the course of making their representations to the Tribunal.

4. The Applicants' legal representatives are permitted access to the Commission's record which has been referred to the Tribunal within 5 (five) business days hereof, subject to providing appropriate confidentiality undertakings.

5. The Respondents are to provide the Applicants with a non-confidential version of the Commission's record within 10 (ten) business days of date hereof.

6. A further pre-hearing is to be arranged with the Registrar on a date suitable to all parties after the Applicants have had sufficient opportunity to consider the record.

7. Furthermore, the intervention of Supreme Health Administrators (Pty) Ltd is subject to the following conditions:

7.1 That Supreme Health Administrators will participate in the merger proceedings before the Tribunal in terms of orders 1-6 above only as long as Dr Clarence Mini and Mr Kevin Wotshela continue to serve as directors and/or remain shareholders of that company; and

7.2 That Dr Clarence Mini and Mr Kevin Wotshela testify as witnesses at the instance of Supreme Health Administrators (Pty) Ltd in the merger proceedings before the Tribunal.

8. No order is made as to costs.

APPENDIX B: ORDER ISSUED ON 24 APRIL 2006

**Order in relation to the CMS application**

ORDER

Further to the Applicant's submissions to intervene, the Tribunal makes the following order:

9. The Applicant is granted leave to intervene, in terms of section 53(1)(c)(v) of the Competition Act, 1998, in the merger proceedings before the Tribunal in relation to the acquisition of control by Phodiclinics (Pty) Ltd and DJH Defty (Pty) Ltd of the Protector Group of companies under Case No: 122/LM/Dec05.

10. The Applicant is permitted to participate in the hearing in relation to the following matters:

10.1 the factors that the Tribunal must take into account in respect of section 12A(2) of the Act read with section 12A(1)(a)(i);

10.2 the factors that the Tribunal must take into account in respect of section 12A(3); and

10.3 the factors that the Tribunal should consider in either the prohibition of the merger or its approval with or without conditions.

11. The scope of the Applicant's participation in the hearing shall include, without limitation, the right:

11.1 to attend pre-hearing conferences;

11.2 to adduce oral and documentary evidence;

11.3 to present argument;

11.4 to request the Tribunal to direct, summon and/or order any person to appear at the hearing;

11.5 to cross-examine any of the witnesses led by any of the other participants in the hearing;

11.6 to inspect any books, documents and other items filed by any of the other participants in the merger proceedings, including inspection by Applicant's legal representatives, subject to appropriate confidentiality undertakings, of

any information filed by any participants subject to a claim of confidentiality;

11.7 to have access to the Commission's record that has been referred to the Tribunal in this matter, including access by the Applicant's legal representatives, subject to appropriate confidentiality undertakings, to any information contained in the record which is subject to a claim of confidentiality; and

11.8 to participate in any interlocutory proceedings related to the issues referred to in paragraph 2 above.

12. The Applicant's legal representatives are permitted access to the Commission's record that has been referred to the Tribunal within 10 (ten) business days hereof, subject to appropriate confidentiality undertakings.

13. The Respondents must provide the Applicant with a non-confidential version of the Commission's record within 10 (ten) business days of date hereof.

14. A further pre-hearing is to be arranged with the Registrar on a date suitable to all parties after the Applicant has had sufficient opportunity to consider the record.

15. No order is made as to costs.