

SOUTH AFRICA / JUDGMENT

Competition Commission v Hosanna Medical & Disposables CC (016717)

[2013] ZACT 44 (5 June 2013)

[2013] ZACT 44

COURT

Competition Tribunal

BEFORE

N Manoim, M Mazwai, A Ndoni

CASE / FILE NUMBER

016717

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COMPETITION TRIBUNAL

REPUBLIC OF SOUTH AFRICA

Case No: 016717

In the matter between:

The Competition CommissionApplicant
and

Hosanna Medical & Disposables CCRespondent

Panel: N Manoim (Presiding Member), M Mazwai (Tribunal Member) and A Ndoni (Tribunal Member)

Heard on: 05 June 2013

Decided on: 05 June 2013

Order

The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondent, annexed hereto marked “A”.

Presiding Member

N Manoim

Concurring: M Mazwai and N Ndoni

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

HELD IN PRETORIA

CT CASE NO. 016295

CC CASE NO. 2011NOV0370

THE COMPETITION COMMISSIONApplicant

HOSANNA MEDICAL & DISPOSABLES CCRespondent

In re:

SHEKINAH MEDICAL & DISPOSABLES CCRespondent

SETTLEMENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND HOSANNA MEDICAL & DISPOSABLES CC (“HOSANNA”) IN REGARD TO ALLEGED CONTRAVENTION OF SECTION 4(1)(b)(iii) OF THE COMPETITION ACT 89 OF 1998, AS AMENDED.

The Commission and Hosanna hereby agree that application be made to the Tribunal for the confirmation of this Settlement Agreement as an order of the Tribunal in terms of section 49D as read with section 58(1)(b) and 59(1)(a) of the Act on the terms set out below.

1. DEFINITIONS

For the purposes of this Settlement Agreement the following definitions shall apply:

1.1. “Act” means the Competition Act, 1998 (Act No. 89 of 1998), as amended;

1.2. “Commission” means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Act, with its principal

place of business at Building C, Mulayo Building, the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, South Africa;

1.3. ‘Commissioner means the Commissioner of the Competition Commission appointed in terms of section 22 of the Act;

1.4. “Complaint means the complaint lodged by the National Treasury of South Africa (“the National Treasury”) in terms of section 49B of the Act under case number:2011NC)V0370. The national Treasury is a government Department that is responsible for, inter alia, the national budget, supporting efficient and sustainable public financial management, and good governance. The National Treasury is governed by the Public Finance Management Act (“PFMA”) 1 of 1999, and has its principal place of business at 40 Church Square, Pretoria.

1.5. “Settlement Agreement” means this settlement agreement duly signed and concluded between the Commission and Hosanna;

1.6. "Hosanna" means Hosanna Medical & Disposables CC, a close corporation duly registered and incorporated in terms of the Close Corporation Act, 69 of 1984, with its main place of business at 32 Muzafar Crescent, Azaadville, Krugersdorp, Gauteng Province.

1.7. "Parties" mean the Commission and Hosanna;

1.8. "Tribunal" means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Act, with its principal place of business at Building C, Mulayo Building, the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, South Africa.

1.9. "Respondents" means all the firms that are cited as the respondents in the Commission's complaint referral filed under Competition Tribunal Case number: 016295 respectively, namely: Shekinah Medical & Disposables CC and Hosanna Medical & Disposables CC.

2. THE COMMISSION'S INVESTIGATIONS AND FINDINGS

2.1. On 21 November 2011, the Commission received a complaint from the National Treasury in terms of which Shekinah and Hosanna were alleged to have contravened section 4(1)(b)(iii) of the Act, in that being competitors in the market for the supply and delivery of screening and confirmatory rapid HIV test kits, they met to discuss prices and shared commercially sensitive information relating to the Tender RT41-2011ME, being a tender which was advertised on the 10th of December 2010 on behalf of the National Department of Health ("NDoH").

2.2. The Commission investigated the alleged conduct and found that in deed, the respondents had multiple contacts with each other regarding the tender as follows;

2.2.1. On or about November 2010, Garson Naidoo ("Naidoo53") representing Hosanna held a meeting with Shannon Abboy ("Abboy"), representing Shekinah in terms of which Naidoo requested an undertaking from Abboy that Shekinah would supply Hosanna with HIV test kits to fulfil the requirements of the tender.

2.2.2. Abboy offered to assist Naidoo, with the help of his Chinese-based supplier or agent, Grand Ocean, to secure a supplier with a different brand of products.

2.2.3. Subsequent to this meeting but before the tender closing date, Abboy met with Naidoo and they discussed the tender, inter alia, in respect of promotion of small business (section under SBD 6.2 of the tender documents), price qualification and contract price adjustment procedure, and specialist functions contract management

2.2.4. Shekinah and Hosanna submitted bids to the National Treasury which were similar in material respects.

3. THE COMMISSION'S REFERRAL

3.1. Following its investigation, the Commission concluded that the conduct by Hosanna and Shekinah constituted a contravention of section 4(1)(b)(iii) of the Act, in that they engaged in the conduct referred to in paragraph 2 above.

3.2. In light of its findings, the Commission decided to refer the complaint on 27 February 2013 to the Tribunal for determination.

4. AGREEMENT

4.1. Admission

4.1.1. Hosanna admits that its conduct amounts to a contravention of section 4(1)(b)(iii) of the Act.

4.2. Future Conduct

4.2.1. Hosanna agrees to fully cooperate, to the extent possible given due regard to the circumstances, with the Commission in relation to the prosecution of the other respondent which is the subject of its investigation and referral to the Tribunal. Without limiting the generality of the foregoing, Hosanna specifically agrees to:

4.2.1.1. Testify before the Tribunal regarding the conduct and events forming the factual basis of the Commission's referral affidavit and which are covered by this Settlement Agreement; and

4.2.1.2. To the extent that it is in existence, provide evidence, written or otherwise, which is in its possession or under its control, concerning the alleged contraventions set out in the Commission's referral affidavit.

4.2.1.3. Desist from engaging in the conduct complained of.

4.2.2. Hosanna agrees that it will in future refrain from participating in meeting(s) aimed at engaging in a cartel conduct which will lead to a contravention of section 4(1)(b) of the Act.

4.2.3. Hosanna agrees that its management and directors will attend a competition law compliance training programme incorporating corporate governance to be provided by the Commission and designed to ensure that Its employees, management, directors and agents do not engage in future contraventions of the Act.

4.2.4. Hosanna will ensure that such training materials will be made available to all the employees and agents of Hosanna.

4.2.5. Furthermore, Hosanna will update such training materials as often as it is reasonably possible to ensure, on an ongoing basis, that its employees, management, directors and agents do not engage in any future contraventions of the Act.

5. Administrative Penalty

5.1. In accordance with the provisions of section 58(1)(a)(iii) as read with 59(1)(a) and 59(2), Hosanna will pay an administrative penalty in the sum of R37 597.00 (Thirty Seven Thousand Five hundred and Ninety Seven Rand), which is equivalent to 5% of Its annual turnover for the financial year ending February 2012 (i.e R751 940.00-Seven Hundred and Fifty One Thousand Nine Hundred and Forty Rand).

5.2. This payment shall be made into the Commission's bank account, details of which are as follows:

Name: Competition Commission Fee Account

Bank: ABSA Bank, Pretoria

Account no: 4050778576

Branch code: 323 345

5.3. The Commission will pay this sum to the National Revenue Fund in terms of section 59(4) of the Act.

6. Terms of Payment

6.1. Payment of the amount referred to in paragraph 5.1 above will be made within three months of confirmation of this Agreement as an order of the Tribunal.

7. Full a net Final Settlement

This agreement, upon confirmation as an order by the Tribunal, is entered into in HiII and final settlement and concludes all proceedings between the Commission and Hosanna relating to any alleged contravention by Hosanna of the Act that is the subject of the Commission's investigation (CC Case no. 2011NOV0370),

Date and signed at HOSANNA MEDICAL on this the 9th day of MAY 2013

For Hosanna

Date and signed at PRETORIA on this the 14th day of MAY 2013

Shan Ramburuth

The Commissioner, Competition Commission

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