

SOUTH AFRICA / JUDGMENT

# Competition Commission v Mediclinic Southern Africa (Proprietary) Limited and Others (020743) [2015] ZACT 23 (18 March 2015)

[2015] ZACT 23

## COURT

Competition Tribunal

## BEFORE

A Roskam, I Valodia, F Tregenna

## CASE / FILE NUMBER

020743

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## COMPETITION TRIBUNAL

## REPUBLIC OF SOUTH AFRICA

Case No: 020743

In the matter between:

The Competition Commission.....Applicant

And

Mediclinic Southern Africa (Proprietary) Limited

Victoria Hospital (Proprietary) Limited

Newcastle Private Hospital (Proprietary) Limited

Mediclinic Tzaneen (Proprietary) Limited

Howick Private Hospital Holdings (Proprietary) Limited

Mediclinic Upington (Proprietary) Limited

Mediclinic Hermanus (Proprietary) Limited.....Respondents

Panel: A Roskam (Presiding Member)

I Valodia (Tribunal Member)

F Tregenna (Tribunal Member)

Heard on: 18 March 2015

Decided on: 18 March 2015

Order

The Tribunal hereby confirms the consent agreement as agreed to and proposed by the Competition Commission and Mediclinic Southern Africa (Proprietary) Ltd; Victoria Hospital (Proprietary) Ltd; Newcastle Private Hospital (Proprietary) Ltd; Mediclinic Tzaneen (Proprietary) Ltd; Howick Private Hospital Holdings (Proprietary) Ltd; Mediclinic Upington (Proprietary) Ltd; Mediclinic Hermanus (Proprietary) Ltd , annexed hereto marked “A”.

18 March 2015

Date

Presiding Member

Mr. A Roskam

Concurring: Prof. I Valodia and Prof. F Tregenna

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

HELD IN PRETORIA

CC Case No: 2010Oct5392/2012Feb5781/2013Feb0083

and

Mediclinic Southern Africa Proprietary Limited.....1st Respondent

Victoria Hospital Proprietary Limited.....2nd Respondent

Newcastle Private Hospital Proprietary Limited.....3rd Respondent

Mediclinic Tzaneen Proprietary Limited.....4th Respondent

Howick Private Hospital Holdings Proprietary Limited.....5th Respondent

Mediclinic Upington Proprietary Limited.....6th Respondent

Mediclinic Hermanus Proprietary Limited.....7th Respondent

CONSENT AGREEMENT IN TERMS OF SECTION 490, READ WITH SECTION 58(1 )(b) OF THE COMPETITION ACT, NO. 89 OF 1998 AS AMENDED, BETWEEN THE COMPETITION COMMISSION, MEDICLINIC SOUTHERN AFRICA PROPRIETARY LIMITED AND THE MANAGED HOSPITALS, IN REGARD TO ALLEGED CONTRAVENTIONS OF SECTION 4(1 )(b) OF THE COMPETITION ACT

The Commission and Mediclinic together with the Managed Hospitals hereby agree that application be made to the Tribunal for the confirmation of this Consent Agreement as an order of the Tribunal in terms of section 49D read with section 58(1 )(b) of the Act, on the terms set out below.

## 1 Definitions

1.1 "Act" means the Competition Act 89 of 1998, as amended;

1.2 "Commission" means the Competition Commission, a statutory body established in terms of section 19 of the Act, with its principal place of business at 1st Floor, Mulayo Building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria;

1.3 "Confirmation Date" means the date upon which the Tribunal confirms this Consent Agreement as a consent order in terms of section 49D, read with section 58(1)(b) of the Act;

1.4 "Consent Agreement" means the agreement as set out herein, reached between the parties hereto, that will be referred to the Tribunal for confirmation;

1.5 "Hermanus" means Medidinic Hermanus Proprietary Limited (registration number 1995/008998/07), with its principal place of business at Hospital Street, Hermanus;

1.6 "Howick" means Howjck Private Hospital Holdings Proprietary Limited (registration number 2002/013282/07), with its principal place of business at 107 Main Street, Howick;

1.7 "Managed Hospitals" means collectively Victoria, Newcastle, Tzaneen, Howick, Upington and Hermanus;

1.8 "Mediclinic" means Mediclinic Southern Africa Proprietary Limited (registration number 2008/004849/07), with its principal place of business at Strand Road, Stellenbosch, 7600;

1.9 "Newcastle" means Newcastle Private Hospital Proprietary Limited (registration number 1995/011368/07), with its principal place of business at corner Hospital and Bird Street, Newcastle;

1.10 "Respondents" means Mediclinic and the Managed Hospitals;

1.11 "Tribunal" means the Competition Tribunal, a statutory body established in terms of section 26 of the Act, with its principal place of business at Zrú Floor, Mulayo Building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria;

1.12 "Tzaneen" means Mediclinic Tzaneen Proprietary Limited (registration number 2001/021422/07), with its principal place of business at Wolkberg Avenue R71, Tzaneen;

1.13 "Upington" means Mediclinic Upington Proprietary Limited (registration number 1996/001943/07), with its principal place of business at corner 4th Avenue and Du Toit Street, Upington;

1.14 "Victoria" means Victoria Hospital Proprietary Limited (registration number 1984/003424/07), with its principal place of business at 35 High Street, Tongaat;

1.15 "Victoria Merger" means the Commission's unconditional approval of Mediclinic's acquisition of control of Victoria dated 17 October 2003 under Commission case number 20030ct668;

1.16 "WDGMC" means Wits University Donald Gordon Medical Centre Proprietary Limited (registration number 1998/004532/07), with its principal place of business at 21 Eton Road, Parktown, Johannesburg; and

1.17 "Wits University" means the University of the Witwatersrand, Johannesburg.

## 2 Background

2.1 Mediclinic is primarily involved in the financial and operational management of private hospitals- Mediclinic currently operates and manages 49 (forty nine) private hospitals throughout South Africa, which it either wholly owns, owns as to a majority share or owns as to a minority share.

2.2 Currently, Mediclinic's direct or indirect shareholding In the Managed Hospitals is as follows;

2.2.1 Hermanus - 34.9% (thirty four point nine percent);

2.2.2 Howick - 49.1% (forty nine point one percent);

2.2.3 Newcastle - 15.1% (fifteen point one percent);

2.2.4 Tzaneen - 49,4% (forty nine point four percent);

2.2.5 Upington - 40.8% (forty point eight percent); and

2.2.6 Victoria - 33.7% (thirty three point seven percent).

2.3 in the case of each of the Managed Hospitals, the remaining shareholding is widely dispersed amongst individual shareholders\* none of whom are individually able to exercise control over the hospital, as meant by section 12(2) of the Act,

2.4 Mediclinic commenced negotiating and determining tariffs on behalf of each of the Managed Hospitals after entering into management agreements, coupled with its shareholding interests (which the Respondents contend is a form of control over the Managed Hospitals as meant by section 12(2) of the Act). Specifically:

2.4.1 Mediclinic acquired its shareholding and entered into management agreements in respect of Hermanus, Upington and Newcastle on 1 July 1998. This did not require merger notification because it pre-dated the Act, There was no retrospective obligation to obtain merger approval.

2.4.2 Tzaneen and Howick were new "greenfield" developments, started by Mediclinic and the other shareholders, which similarly did not attract any obligation to be notified as mergers under the Act.

2.4.3 The Victoria Merger was unconditionally approved by the Commission (a copy of the merger clearance certificate is attached as Annexure 1) after disclosure that, upon implementation, Mediclinic would be negotiating tariffs with healthcare funders on behalf of Victoria,

The Commission did not regard Mediclinic's acquisition of control of Victoria as giving rise to substantially negative competition or public interest consequences. According to Mediclinic the Commission's unconditional approval of the Victoria Merger gave rise to an assumption by Mediclinic that the same conduct in respect of all the Managed Hospitals was lawful

2.5 Mediclinic negotiated tariffs on behalf of the Managed Hospitals since its acquisition of its shareholding and conclusion of management agreements in respect of the Managed Hospitals, referred to in paragraph 2.4 above. It has done so openly and with full knowledge of other industry players,

2.6 Since entering into the aforementioned management agreements, Mediclinic has regarded the Managed Hospitals as being fully operationally and financially integrated with it. For example, in all merger notifications submitted to the Commission by Mediclinic, it included

the number of beds at all hospitals within its group, including the Managed Hospitals in its market share calculations. The Commission

assessed Mediclinic's market share on this basis.

2.7 According to the Respondents, the Respondents do not regard each other as competitors.

2.8 The Respondents contend that they were bona fide in their intentions and actions,

### 3 Complaint Investigation and findings

3.1 On 11 October 2010 the Commission received a complaint from Mr Otto Wypkema, Chief Executive Officer of the National Hospital Network, alleging that Mediclinic was engaging in price fixing with Victoria and Newcastle because Mediclinic determines the tariffs applicable in respect of these two hospitals. On 10 February 2012 the Commission initiated its own investigation against Mediclinic, Victoria and Newcastle. On 26 February 2013 the Commission initiated a new price fixing investigation against Mediclinic and its respective relationship with Howick, Tzaneen, Hermanus and Upington, again on the basis that Mediclinic negotiates and determines tariffs on behalf of each of these hospitals.

3.2 The Commission conducted an investigation and formed the view that, despite Mediclinic and each of the Managed Hospitals being in a bona fide commercial relationship in view of Mediclinic's shareholding in and management agreements with each of the Managed Hospitals\* the parties were in a horizontal relationship because they did not, in the Commission's view, constitute a company and its wholly owned subsidiary or constituent firms within a single economic entity as provided for in section 4(5) of the Act.

3.3 Accordingly, the Commission views Mediclinic's tariff determination on behalf of the Managed Hospitals as a contravention of section 4(1)(b)(i) of the Act

### 4 Cessation of conduct

4.1 As mentioned in paragraph 3,3, the Commission views the Respondents' conduct as a contravention of section 4{1}{b}(S) of the Act. In response the Respondents have agreed to take prompt steps to bring an end to the conduct as a settlement undertaking, without admitting to the alleged contravention.

4.2 Mediclinic intends to obtain control, as defined in sections 12{2}(a)t

(b) and (c), over the Managed Hospitals so as to constitute a company and its wholly owned subsidiary or constituent firms within a single economic entity. In this regard:

4.2.1 Within 60 (sixty) business days of the Confirmation Date, Medidinic's acquisition of the aforementioned forms of control In respect of the Managed Hospitals will be notified to the Commission as separate mergers in the prescribed manner and form.

4.2.2 In the event that Mediclinic is unable to obtain the control referred to in paragraph 4,2 above over one or more Managed Hospitals, or should the competition authorities prohibit the acquisition of control in respect of one or more Managed Hospitals, or approve same subject to conditions unacceptable to the parties concerned, and Mediclinic has exhausted all appeal and review remedies ("Appeal and Review Exhaustion Date"), it will cease negotiating tariffs on behalf of the Managed Hospitals) concerned by a date no later than 24 (twenty four) months after the Appeal and Review Exhaustion Date, unless specifically authorised thereto by the Commission pursuant to an exemption application or other authority granted by the Commission in terms of the Act, The Respondents concerned will, within 80 (sixty) days after the Appeal and Review Exhaustion Date, provide the Commission with a written plan setting out the steps that will be taken to achieve the aforementioned, and the Commission will be apprised by the Respondents concerned of every step of this process.

4.3 WDGMC is a legitimate and bona fide public private partnership between Mediclinic and Wits University (a copy of the Tribunals unconditional approval of the merger between Mediclinic and WDGMC is attached as Annexure 2). The Commission and Mediclinic agree that Medtdinic's tariff determination on behalf of WDGMC does not amount to price fixing in terms of section 4{1}(b)(i) of the Act, despite Mediclinic's shareholding in WDGMC amounting to 49.9% (forty nine point nine percent).

## 5 Future conduct

5.1 Given the Commission's view as recorded in paragraph 3.3 above, Mediclinic undertakes that it will not in future conduct tariff negotiations, or otherwise involve itself in tariff determination, on behalf of firms that are not its wholly owned subsidiary or constituent firms In a single economic entity with Mediclinic. This undertaking expressly excludes bona fide, legitimate joint ventures and public private partnerships or conduct which are otherwise authorised in terms of the Act. The Commission recognises that forbidding bona fide, legitimate joint ventures and public private partnerships between competitors could result in the loss of significant technological, efficiency, pro-competitive and/or public interest gains where the arrangements do not contravene section 4{1}{b}(i) of the Act.

5.2 Mediclinic has in place a regularly updated competition law compliance guideline, applicable in all the jurisdictions in which Mediclinic operates, including South Africa. Employees of Mediclinic, including the members of its funder relations and contracting department, are trained by external lawyers on compliance with the Act.

5.3 Subject to the remaining provisions of this paragraph 5.3, Mediclinic and the other Respondents confirm that they will continue with these existing compliance efforts, independent of the steps proposed for the cessation of the alleged conduct referred to In paragraph 4. In this regard the Respondents shall provide" the Commission with its competition law compliance training programme for the next 12 (twelve) months, including the broad outline of the topics that would form the subject matter of the training and the categories of employees that will be trained, within 60 (sixty) days of the Confirmation Date,

5.4 Within 80 (sixty days) of the end of the aforementioned 12 (twelve) month period, the Respondents shall provide the Commission with a report regarding the training given during that period, which report shall include the broad outline of the topics that formed the subject matter of the training, and the names and designation of all employees who attended the training and the dates of such

attendances.

#### 6 No payment of administrative penalty

The Commission and the Respondents have agreed that the payment of an administrative penalty will not be appropriate. This agreement was reached given, inter alia, the circumstances in which the Respondents conduct took place (as outlined in paragraph 2 above), and the sanctioning of the Victoria

Merger by the Commission.

#### 7 No admission of liability

The Respondents do not admit that they have contravened the Act and nothing in this Consent Agreement amounts to an admission of liability on their part,

#### 8 Co-operation

The Respondents cooperated fully with the Commission during the course of its investigation. The Respondents have also entered into a settlement agreement with the Commission prior to it referring the complaints to the Tribunal.

#### 9 Full and final settlement

This Consent Agreement upon confirmation as an order by the Tribunal, is entered into in full and final settlement and concludes all proceedings between the Commission and the Respondents relating to any alleged contravention of the Act that is the subject of the Commission's investigation under Commission Case Numbers 2010Oct5392, 2012Feb5781 and 2013Feb0083.

For Mediclinic and the Managed Hospitals:

Dated and signed Stellenbosch at on the 25 day of November 2014

Mediclini Southern Africa (Pty) Ltd

Abraham Jozua Joubert (duly authorised)

Director

Dated and signed at Stellenbosch on the 25 day of November 2014

Mediclinic Hermanus Proprietary Limited

Edmund Marais van Wyk (duly authorised)

Dated and signed at Stellenbosch on the 25th day of November 2014

Howick Private Hospital Holdings (Pty) Ltd

Willem Frederik Burger (duly authorised)

Dated and signed at Stellenbosch on the 27th day of November 2014

Newcastle Private Hospital (Pty) Ltd

Dated and signed at Stellenbosch on the 25th day of November 2014

Mediclinic Tzaneen (Pty) Ltd

Gerrit Johann Geertsema (duly authorised)

Dated and signed at Stellenbosch on the 25 day of November 2014

Mediclinic Upington (Pty) Ltd

Andre Danie Viljoen (duly authorised)

Victoria Hospital (Pty) Ltd

Dated and signed at Pretoria on the 3rd day of February 2015

For Competition Commission

Tembinkosi Bonakele

Competition Commissioner

### Source & reproduction note

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