COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 07/CR/Feb05

In the matter between:

The Competition Commission Applicant
and
The Board of Healthcare Funders of Southern Africa First Respondent

Order

Further to the application of the Competition Commission in terms of Section 49D, in the above matter -

The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondent.

D'Lewis

03 March 2005
Date

Concurring: N Manoim, Y Carrim
IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

HELD AT PRETORIA

In the matter between

COMPETITION COMMISSION

Applicant

and

THE BOARD OF HEALTHCARE FUNDERS

OF SOUTHERN AFRICA

Respondent


WHEREAS THE COMPETITION COMMISSIONER OF SOUTH AFRICA, THE APPLICANT HEREIN, INITIATED A COMPLAINT AGAINST THE RESPONDENT AND,

HAVING REGARD to the Competition Act, 1998 (Act No. 89 of 1998), as amended by the Competition Second Amendment Act, 2000 (Act No. 39 of 2000), and in particular Chapter 2 and Chapter 5 thereof,
HAVING REGARD to the Form CC1 Complaint lodged by the Complainant and issued pursuant to Section 49B of the Competition Act, 1998 (Act No. 89 of 1998) as amended,

HAVING REGARD to the Rules for the Conduct of Proceedings in the Competition Commission pursuant to Government Notice 20384 in Government Gazette No. 22025 (Vol. 410 of 1999), and

HAVING REGARD to the parties hereto having agreed to be bound by the provisions of this Settlement Agreement to resolve all possible disputes arising out of the aforementioned complaint initiated by the Complainant herein;

NOW, THEREFORE, before the taking of any testimony, and without trial or adjudication of any issue of fact or law, and upon agreement between the Competition Commission and the Respondent, it is hereby agreed as follows:

1. DEFINITIONS

For the purposes of this settlement agreement the following definitions shall apply:


2. "Section 4(1)(b)(i)" means section 4(1)(b)(i) of the Act which states, inter alia, that:
“(1) An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if—

(b) it involves any of the following restrictive horizontal practices:

(i) directly or indirectly fixing a purchase or selling price or any other trading condition.”

3. “Benchmark tariffs” means the recommended scale of benefits published by the Respondent.

4. “Person” includes any natural person, corporation, association, firm, partnership, or other business or legal entity.

5. The “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 Mulayo Building, The DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

6. The “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 Mulayo Building, The DTI Campus, 77 Meintjies Street, Sunnyside, Gauteng.
7. The "Complaint" means the complaint initiated by the Complainant in terms of Section 49B(1) of the Act and filed with the Commission under case number 2002AUG164.

8. The "Complainant" means the Competition Commissioner of the Commission.

9. The "Respondent" means the Board of Healthcare Funders of Southern Africa, a company duly registered and incorporated in terms of section 21 of the Companies Act, No. 61 of 1973 (Registration No. 2001/03387/08) with its principal place of business at 37 Bath Avenue, Rosebank, Johannesburg;

10. "Service Provider" means, collectively, the providers of relevant health services as defined in the Medical Schemes Act.

11. The "Parties" means collectively the Commission and the Respondent, and includes an individual reference to any one or more of them, as the context may require.

12. The "Settlement Agreement" means this agreement in its duly signed form by the Commission and the Respondent.


2.

APPLICABILITY

This Settlement Agreement applies to the Respondent.
3.

ALLEGATION OF CONTRAVENTION OF THE ACT

In its complaint initiation submission, the Complainant made the allegation that the Respondent is an association of medical aid schemes, which determines, recommends and publishes benchmark tariffs for healthcare services on an annual basis. These recommended tariffs are embodied in various annual publications entitled Board of Healthcare Funders of Southern Africa, Benchmark Tariffs.

4.

COMMISSION'S INVESTIGATION

4.1 Following the initiation of the Complaint, the Commission undertook an investigation into the alleged prohibited practices of the Respondent.

4.2 Pursuant to the Investigation, the Commission was of the view that:

4.2.1 The Respondent is an association incorporated not for gain in terms of the company laws of South Africa, representing approximately eighty five per cent (85%) of medical aid schemes in South Africa. The Respondent’s activities deal with both the professional and business aspects of its members’ businesses.
4.2.2 The purpose of the Respondent is to promote the interests of member schemes with a view to promoting the effective and efficient access, of their subscribing members, to healthcare benefits. Its objectives are furthermore to promote the viability of the healthcare industry through, inter alia, facilitation of communication between members and various stakeholders in the healthcare funding industry.

4.2.3 As part of its activities, the Respondent, inter alia, determines, recommends and publishes benchmark tariffs. The Respondent provides these services to some one hundred and fifty one (151) medical aid schemes in South Africa. These recommended tariffs are embodied in various annual publications entitled Board of Healthcare Funders of Southern Africa, Benchmark Tariffs.

4.2.4 In the Commission's view, the conduct described in clause 4.2.3 hereof constitutes a contravention of section 4(1)(b)(i) in that:

4.2.4.1 the Respondent is an association of firms;

4.2.4.2 that determines, recommends and publishes tariffs to and/or for its members;

4.2.4.3 which recommendation has the effect of fixing a purchase price.

5.

SETTLEMENT

5.1 The Parties have reached agreement on the resolution of the Complaint on specified terms and agree that all issues pertaining to the investigation shall be resolved on the basis of this settlement agreement.
5.2 The settlement agreement is entered into in full and final settlement of any and all disputes, concerns, issues and matters of whatsoever nature and howsoever arising between the Parties in respect of or pursuant to the Complaint.

6.

AGREEMENT CONCERNING CONDUCT

6.1 The Respondent hereby undertakes to cease publishing a tariff, recommended scale of benefits or other form of price guideline for services rendered in the private healthcare industry.

6.2 Without limiting or derogating from the foregoing, the Respondent will be entitled to convert information that exists in the public domain into an alternative format for use by medical schemes.

6.3 It is recorded that the Respondent has sent a letter to each of its members informing them that the Respondent shall no longer determine, recommend or publish tariffs for the provision of medical services (a copy of which is annexed hereto as Annexure A).

6.4 It is further recorded that the Respondent has advised its members of the competition concerns that arise from deciding to jointly utilise the Reference
Price List as published by the Council for Medical Schemes (CMS). In this regard, the Respondent has impressed upon its members not to engage in collusive activity with another medical scheme.

6.6 All undertakings contemplated in this clause 6 shall be without any admission of guilt or wrongdoing by the Respondent.

6.7 Without limiting or derogating from the provisions of clause 6.6 above, the Respondent, on 15 September 2004, paid to the Competition Commission (for on-payment into the National Revenue Fund), as set out in clause 7 hereof, a settlement payment in the amount of R500 000,00 (five hundred thousand rand) in consideration for the finalisation of this matter.

6.8 It is recorded that the Respondent is unable to undertake to significantly influence its members to adopt the policies and standpoints outlined herein.

7.

SETTLEMENT FEE

7.1 It is recorded that the Respondent, on 15 September 2004, paid the settlement payment of R500 000,00 (five hundred thousand rand) contemplated in clause 6.7 hereof to the Competition Commission for on-payment into the National Revenue Fund.

7.2 This settlement agreement is entered into in full and final settlement of any and all disputes, concerns, issues and matters of whatsoever nature between the Commission and the Respondent in respect of conduct referred to in clause 4 hereof.
The Commission shall refer the complaint to the Tribunal but advise the Tribunal that it shall not continue with the prosecution.

9.

VARIATION OF THE SETTLEMENT AGREEMENT

Any variation of this settlement agreement shall have no legal effect and shall not be binding on the Parties unless reduced to writing and signed by or on behalf of the Parties.

10.

COSTS

Each party agrees to pay its own legal costs in respect of this settlement agreement and in respect of the Complaint.

11.

EFFECTIVE DATE OF THE SETTLEMENT AGREEMENT

This settlement agreement shall come into force on the date on which it is confirmed by the Competition Tribunal.

12.

BREACH

The parties agree that where either party is in breach of this agreement, the Competition Tribunal and Competition Appeal Court shall have exclusive jurisdiction to deal therewith.
13.

DOMICILIJUM CITANDI ET EXECUTANDI

13.1 The Parties choose as their *domicilia citandi et executandi* for all purposes under this agreement, whether in respect of court process, notices or other documents or communications of whatsoever nature (including the exercise of any option), the following addresses:

13.1.1 THE RESPONDENT:

Physical: 37 Bath Avenue
Rosebank
2196

Postal: PO Box 2324
Parklands
2121

Telefax: (011) 880-8798

E-mail: bhf@bhfglobal.com

13.1.2 THE COMMISSION:

Physical: Mulayo Building
The DTI Campus
77 Meintjies Street
Sunnyside
Pretoria

Postal: Private Bag X 23
Lynnwood Ridge
0040

Telefax: 012 394 4200

E-mail: ccsa@compcom.co.za
13.2 Any notice or communication required or permitted to be given in terms of this agreement shall be valid and effective only if in writing but it shall be competent to give notice by telefax or e-mail.

13.3 Either party may by notice to the other party change the physical address chosen as its domicilium citandi et executandi to another physical address where postal delivery occurs or its postal address or its telefax number or e-mail address, provided that the change shall become effective on the 10th (tenth) business day from the deemed receipt of the notice by the other party.

13.4 Any notice to a party —

13.4.1 sent by prepaid registered post (by airmail if appropriate) in a correctly addressed envelope to it at an address chosen as its domicilium citandi et executandi to which post is delivered shall be deemed to have been received on the 10th (tenth) business day after posting (unless the contrary is proved);

13.4.2 delivered by hand to a responsible person during ordinary business hours at the physical address chosen as its domicilium citandi et executandi shall be deemed to have been received on the day of delivery; or

13.4.3 sent by telefax to its chosen telefax number, shall be deemed to have been received on the date of despatch (unless the contrary is proved); or

13.4.4 sent by e-mail to its chosen e-mail address, shall be deemed to have been received on the date of despatch (unless the contrary is proved).
14. WHOLE AGREEMENT, NO AMENDMENT

14.1 This settlement agreement constitutes the whole agreement between the Parties relating to the subject matter hereof.

14.2 No amendment or consensual cancellation of this settlement agreement or any provision or term thereof or of any agreement, or other document issued or executed pursuant to or in terms of this settlement agreement and no settlement of any disputes arising under this settlement agreement and no extension of time, waiver or relaxation or suspension of any of the provisions or terms of this settlement agreement or of any agreement, or other document issued pursuant to or in terms of this settlement agreement shall be binding unless recorded in a written document signed by the Parties. Any such extension, waiver or relaxation or suspension which is so given or made shall be strictly construed as relating strictly to the matter in respect whereof it was made or given.

14.3 No extension of time or waiver or relaxation of any of the provisions or terms of this settlement agreement or any agreement, or other document issued or executed pursuant to or in terms of this settlement agreement, shall operate as an estoppel against any party in respect of its rights under this settlement
agreement, nor shall it operate so as to preclude such party thereafter from exercising its rights strictly in accordance with this settlement agreement.

14.4 No party shall be bound by any express or implied term, representation, warranty, promise or the like not recorded herein, whether it induced the contract and/or whether it was negligent or not.

Thus done and signed by the Parties here below.

PARTIES

[Signature]
COMPETITION COMMISSIONER
ON BEHALF OF APPLICANT

08/12/05
DATE

[Signature]
THE BOARD OF HEALTHCARE FUNDERS

01/02/2005
DATE