

competitiontribunal south africa

Form CT 6

Notice of Motion

About this Form

This Form is issued in terms of the Competition Tribunal Rules.

Please indicate in the space provided the nature of your motion, including specific reference to the relevant section of the Act or Tribunal Rules.

If this Notice of Motion concerns a matter being brought in terms of Division E of Part 4 of the Competition Tribunal Rules, it must comply with the requirements of Competition Tribunal Rule 42(3).

Contacting the Tribunal

The Competition Tribunal
Private Bag X28
Lynnwood Ridge
Pretoria 0040
Republic of South Africa
tel: 27 12 394 3300
fax: 27 12 394 0169
e-mail: ctsa@comptrib.co.za

Date: 13.03.06 File # 122/LM/DEC 05

To: The registrar of the Competition Tribunal

Concerning the matter between:

NETLIFE LIMITED (Applicant)

and

THE COMPETITION COMMISSION (Respondent)
AND OTHERS

Take notice that ~~the~~ THE APPLICANT
intends to apply to the Tribunal for the following order:

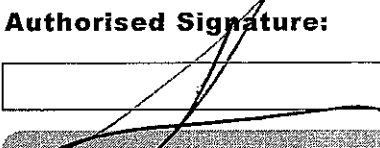
AS SET OUT IN THE NOTICE OF MOTION,
ATTACHED HERETO

Name and Title of person authorised to sign:

ANTHONY NORTON

Authorised Signature:

Date:



13.03.06

For Office
Use Only:

Tribunal file number:

Date filed:

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

Case number
122/LM/Dec05:

In the matter between:

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

NOTICE OF MOTION

BE PLEASED TO TAKE NOTICE THAT the Applicant intends applying to the Competition Tribunal for an order that:

- 1.1 The Applicant is recognized as a participant in the merger proceedings before the Tribunal in relation to the acquisition of control by Phodclinics over The Protector Group in terms of Section 53(c)(v) of the Competition Act;
- 1.2 The Applicant is permitted to participate in the hearing in relation to the following matters:
 - 1.2.1 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
 - 1.2.2 the factors that the Tribunal must take into account in respect of section 12A(3).
- 1.3 The Applicant is permitted to adduce oral and documentary evidence in relation to these matters in the course of making its representations to the Tribunal.
- 1.4 The Applicant's legal representatives are permitted access to the Commission's record which has been referred to the Tribunal.
- 1.5 The Respondents will ensure that the Applicant is provided with a non-confidential version of the Commission's record within 10 business days of this order.
- 1.6 A further pre-hearing is to be arranged with the Registrar on a date suitable to all parties once the Applicants have had a sufficient opportunity to consider the record which has been submitted to the Tribunal which will determine the scope of intervention and establish dates for the discovery of documents.

TAKE NOTICE FURTHER that the affidavit of **MR RICHARD TREISSMAN** annexed hereto will be used in support of this application.

TAKE NOTICE FURTHER that the Applicant has appointed Webber Wentzel Bowens, 10 Fricker Road, Illovo Boulevard, Illovo, Johannesburg

(reference: Mr A Norton) as the address at which they will accept notice and service of all process in these proceedings.

TAKE NOTICE FURTHER that, if you intend opposing this application, you are required:

- (a) to notify the Applicant's attorneys by telefax by a date determined by the Competition Tribunal; and
- (b) to file your answering affidavits, if any, and to serve same by a date determined by the Competition Tribunal.

DATED at JOHANNESBURG on this the 13th day of **MARCH 2006**

WEBBER WENTZEL BOWENS

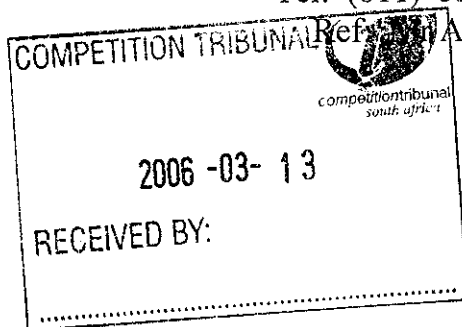
Applicant's Attorneys

10 Fricker Road

Illovo Boulevard, Illovo

Tel: (011) 530-5000

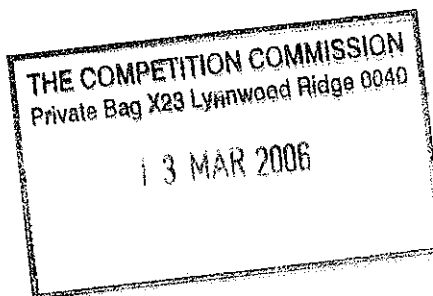
Ref: Mr A Norton



TO:
**THE REGISTRAR OF THE
COMPETITION TRIBUNAL**
Block C, DTI Campus
77 Meintjies Street
Sunnyside, PRETORIA
Fax: 012 394 0169

Received a copy hereof on this the
day of

AND TO:
**THE REGISTRAR OF THE
COMPETITION COMMISSION**
Block C, DTI Campus
77 Meintjies Street
Sunnyside, PRETORIA
Fax: 012 394 0169

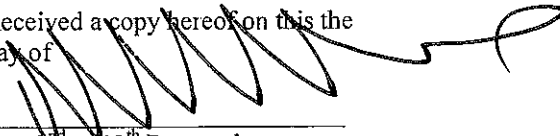


Received a copy hereof on this the
day of

For: 1st Respondent

AND TO:
JAN S DE VILLIERS
18TH Floor,
One Thibault Square
Cape Town
Fax: 021 4055200
Ref: Ms P Krusche

Received a copy hereof on this the
day of


For: 2ND to 13TH Respondents

13/3/2006

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IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

Case number
122/LM/Dec05:

In the matter between:

Network Healthcare Holdings Limited

Applicant

and

The Competition Commission

First Respondent

Phodiclincs (Pty) Limited

Second Respondent

DJH Defty (Pty) Limited

Third Respondent

New Protector Group Holdings (Pty) Limited (In Liquidation)

Fourth Respondent

Protector Group Medical Services (Pty) Limited

Fifth Respondent

President Pharmacy (Pty) Limited

Sixth Respondent

Capstone 177 (Pty) Limited

Seventh Respondent

Blue Dot Properties 446 (Pty) Limited

Eighth Respondent

Limosa Investments 93 (Pty) Limited

Ninth Respondent

Capensis Investments 403 (Pty) Limited

Tenth Respondent

Medi-Clinic Corporation Limited

Eleventh Respondent

Phodiso Clinics (Pty) Limited

Twelfth Respondent

Phodiso Holdings Limited

Thirteenth Respondent

**FOUNDING AFFIDAVIT IN SUPPORT OF INTERVENTION APPLICATION
IN TERMS OF RULE 46, ALTERNATIVELY RULE 42 READ WITH SECTION
53(c)(v)**

2.

I, the undersigned,

RICHARD TREISMAN

do hereby declare upon oath as follows:

1. DEPONENT AND AUTHORITY

1.1 I am the Group Legal ^{Advisor} Director of the Applicant. I am duly authorised to depose to this affidavit on behalf of the Applicant in this matter.

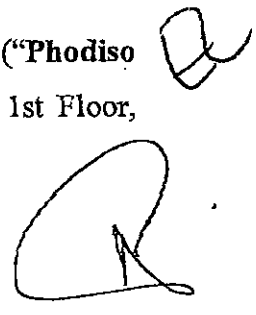
1.2 Save where otherwise stated, or where the contrary appears from the context, the facts contained in this affidavit are within my personal knowledge and are, to the best of my belief, true and correct. Where I make submissions of a legal nature, I do so on the advice of the Applicant's legal representatives, Webber Wentzel Bowens ("WWB").

2. PARTIES

2.1 The Applicant is Network Healthcare Holdings Limited ("Netcare"), which has its principal place of business at 76 Maude Street, corner West Street, Sandown, Sandton, 2196.

2.2 The first respondent is the Competition Commission, an administrative body established in terms of section 19(1) of the Competition Act, 1998 ("the Competition Act"), which conducts its various functions from its offices at Block C, Mulayo Mapungubwe Building, The DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria ("the Commission").

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- 2.3 The second respondent is Phodiclincs Pty Limited ("Phodiclincs"), a joint venture between Medi-Clinic Corporation Limited and Phodiso Clinics (Pty) Limited, and which I am advised is represented by attorneys Jan S De Villiers in these proceedings.
- 2.4 The third respondent is DJH Defty (Pty) Limited, and which I am advised is represented by attorneys Jan S De Villiers in these proceedings.
- 2.5 The fourth respondent is New Protector Group Holdings (Pty) Limited ("New Protector Holdings"), which has its registered office c/o D&T Trust, 2nd Floor, 5 Girton Road, Parktown, Johannesburg.
- 2.6 New Protector Holdings is the holding company of the fifth to tenth respondents, being Protector Group Medical Services (Pty) Limited, President Pharmacy (Pty) Limited, Capstone 177 (Pty) Limited, Blue Dot Properties 446 (Pty) Limited, Limosa Investments 93 (Pty) Limited, Capensis Investments 403 (Pty) Limited (collectively "The Protector Group"). The Protector Group is the primary target firm.
- 2.7 The eleventh respondent is Medi-Clinic Corporation Limited ("Medi-Clinic"), which has its principal place of business at Strand Road, Trumali, Stellenbosch.
- 2.8 The twelfth respondent is Phodiso Clinics (Pty) Limited ("Phodiso Clinics"), which has its principal place of business at 1st Floor, Curator Building, 421 Pretorius Street, Pretoria.
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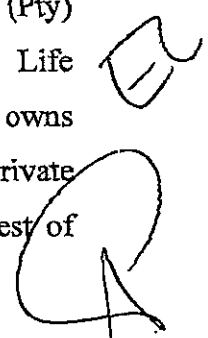
- 2.9 The thirteenth respondent is Phodiso Holdings Limited ("Phodiso"), the holding company of Phodiso Clinics, which has its principal place of business at 1st Floor, Curator Building, 421 Pretorius Street, Pretoria.

3. THE MERGING PARTIES

- 3.1 In October 2005, the second to eight respondents notified a merger to the Commission, in terms of which Phodisclinics, a joint venture between Medi-Clinic and Phodiso Clinics, will be acquiring the business assets and operational subsidiaries of the Protector Group (the "proposed transaction").

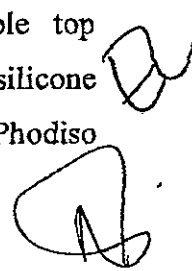
- 3.2 Medi-Clinic is a private healthcare service provider currently listed on the JSE Securities Exchange (the "JSE"). Medi-Clinic operates 43 private hospitals in South Africa and 3 in Namibia. Medi-Clinic is one of three major private hospital groups in South Africa and accounts for a significant proportion of the South African private hospital market.

- 3.3 Phodiso is the holding company for a number of operational subsidiaries which provide a range of healthcare services and products throughout the healthcare industry. In particular:

- 3.3.1 Phodiso clinics provides private healthcare services. It has as its major asset, a 67% interest in Phodiso Health Services (Pty) Ltd trading as Legae Private Clinic ("Legae"). Life Healthcare Limited (formerly Afrox Healthcare Limited) owns the remaining 33% stake in Legae. Legae provides private healthcare services within the Mabopane area, north-west of
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Pretoria Legae also draws patients from countries like Swaziland, Botswana and Zambia. Phodiso Clinics has also acquired a 20,4% share of Curamed Holdings Limited ("**Curamed**"). Curamed is a group of Pretoria based hospitals controlled by Medi-Clinic. Phodiso Clinics recently acquired a 49% stake in Phodiclinics for the purposes of acquiring the business assets of the Protector Group. Medi-Clinic holds the remaining 51% in Phodiclinics;

- 3.3.2 Phodiso Home and Hospital Services (Pty) Ltd ("**PHHS**") is a licensed pharmaceutical wholesaler established in 2001. PHHS trades in pharmaceuticals, medical equipment and disposables;
- 3.3.3 Phodiso Medical Management Services (Pty) Ltd ("**PMMS**") provides medical Funding, Managed Care and Medical Education through electronic media. PMMS houses Phodiso's investments in Faranani Health Solutions (Pty) Ltd (34%) and Spesnet (5%) which comprise national networks of general practitioners and specialists respectively;
- 3.3.4 Phodiso Medical Manufacturing (Pty) Ltd ("**Phodimed**") holds Phodiso's interest in the manufacturing industry and is based in Cape Town. Phodimed is involved in the manufacture of niche medical products;
- 3.3.5 Trojan Medical acts as an agent providing medical equipment and supplies to the healthcare industry including operating lights, electric and hydraulic operating tables, table top autoclave sterilisers, theatre & mobile suctions, silicone resuscitators and various disposables for hospital use. Phodiso owns 30% of Trojan; and
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- 3.3.6 Phodiso Telehealth provides information technology to support the medical industry and provides technical and logistical support for software that assists in the rollout of Antiretroviral medication.¹
- 3.4 As set out above, Phodiclinics is a joint venture between Medi-Clinic and Phodiso Clinics. Phodiso Clinics holds 49% of the shares in Phodiclinics while Medi-Clinic holds the remaining 51%. Accordingly, in terms of the *Ethos* decision, Medi-Clinic would be deemed to exercise sole control over the joint-venture.
- 3.5 The Protector Group, on the other hand, has a number of hospital assets, being primarily 4 established hospitals, including the MediVaal Hospital in Vanderbijlpark, Marapong Hospital in Ellisras (Lephalala), Kathu Hospital in the Kalahari region in the Northern Cape (near Sishen) and the Kingsley Day Theatre in Pretoria. The Protector Group also has a 51% investment interest in Thabazimbi Hospital and a 51% interest in PGMS Occupational Health (Pty) Limited.
- 3.6 The Protector Group was recently placed into liquidation as a result of financial difficulties which I understand were not related to their hospital operations. The reason for the group's liquidation is currently the subject of investigation by a number of regulatory authorities, but related to the activities of previous management who have subsequently left the group.
- 3.7 This transaction constitutes a "large merger" in terms of section 11(5)(c) of the Competition Act read with Government Notice 254 of 2001 and must, therefore, be approved by the Competition

¹ See further details at <http://www.phodiso.co.za>



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Tribunal before it can be implemented.

3.8 Between October 2005 and February 2006, the Commission conducted an investigation into the merger. On or about 28 February 2006, the Commission recommended that the merger should be approved and forwarded its written recommendations, in terms of section 14A(1)(b), to the Competition Tribunal.

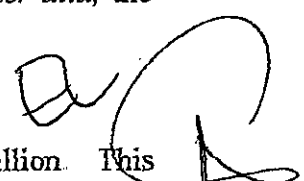
3.9 The merger notification now stands to be adjudicated upon by the Competition Tribunal in terms of section 16 of the Competition Act. Netcare is a competitor of Medi-Clinic, Phodiso Clinics and the Protector Group for the provision of private healthcare services, particularly private hospital services.

4. BACKGROUND

4.1 By way of background, Tradeworx (Pty) Limited ("Tradeworx"), a BEE entity, was the beneficial owner of 51% of the issued share capital of the Protector Group. When the Protector Group recently encountered financial difficulties, I am advised that Tradeworx as the majority shareholder and BEE partner in the business, was advised by the Industrial Development Corporation ("IDC"), as the Groups' major Creditor, to accept liquidation of the Protector Group as the only viable way of restructuring and saving the group.

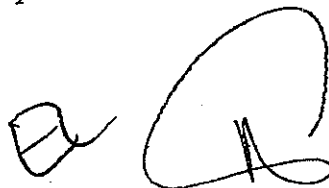
4.2 I am advised that during discussions between Tradeworx and the IDC, it was agreed that, following liquidation, the Protector Group would be reconstructed and Tradeworx would remain the BEE partner in the Protector Group.

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- 4.3 On the basis of these discussions Tradeworx agreed to the liquidation of the Protector Group. On 2 September 2004 provisional liquidation papers were served and the Protector Group was placed under a provisional liquidation order. Mr Theo van den Heever was appointed as one of the liquidators. Following the provisional liquidation order, various parties which had indicated an interest in the assets of the Protector Group were presented with information packs, which would enable them to make offers for the purchase of the Protector Group.
- 4.4 I am advised that Tradeworx submitted an offer, in its own right, to the liquidators on 15 November 2004. Tradeworx was however advised by the liquidators that the offer was substantially below an offer that was '*currently under consideration*' by the IDC and was ultimately rejected.
- 4.5 On 10 December 2004, the liquidators informed all interested parties that they had been mandated by the IDC to dispose of the operational businesses of the Protector Group and that the deal would be finalised by 14 December 2004. The liquidators called for any further offers to be submitted by 13 December 2004.
- 4.6 In response, on 10 December 2004, Nulane Investments 0006 (Pty) Limited ("Nulane Investments"), BEE Consortium consisting of Community Health (Pty) Limited, Tradeworx, Netcare and some independent Doctors, submitted an offer to acquire, *inter alia*, the claims of the IDC against the Protector Group.
- 4.7 Nulane's original offer was for an amount of R90 Million. This offer was increased to R95 Million on 20 December 2004.
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- 4.8 During December 2004 and the beginning of 2005, Tradeworx submitted representations to the IDC board of directors, expressing its concerns at the manner in which the proposed sale of the Protector Group had been conducted.
- 4.9 As a result of these representations, I am informed that Tradeworx received correspondence from the IDC on 4 February 2005, requesting that Tradeworx, its co-shareholders and any financiers submit final offers for the proposed acquisition of the Protector Group, by Friday 25 February 2005.
- 4.10 Subsequent to these discussions, I am informed that Tradeworx participated in a consortium under the name of Grand Bridge Trading 130 (Pty) Limited ("**Grand Bridge**"), which submitted a final proposal to the liquidators. It was intended that Tradeworx was to hold a majority stake in Grand Bridge, with Netcare holding a minority interest and providing financial guarantees.
- 4.11 On 11 February 2005, a meeting was held between representatives of Grand Bridge and Mr van den Heever, to enable Grand Bridge to submit final proposals for the acquisition of the Protector Group.
- 4.12 During the meeting Mr van den Heever confirmed that the IDC had consulted with him on the original Nulane Investment offer, set out above, and that he had advised the IDC against those proposals. Furthermore, Mr van den Heever indicated to representatives of Grand Bridge, that the IDC had already accepted a R120 million offer submitted by Medi-Clinic.

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- 4.13 Notwithstanding Mr van den Heever's assertions, Grand Bridge submitted a reconstituted offer, in the amount of R130 million, on 25 February 2005.
- 4.14 The offer was considered by Grand Bridge to be no less advantageous to the IDC than the offer submitted by Medi-Clinic, and was predicated on the basis that Tradeworx would be re-established as the Protector Group's majority BEE shareholder.
- 4.15 On 1 April 2005, notwithstanding the higher offer submitted by Grand Bridge, the liquidators, under the mandate from the IDC, rejected the revised offer and informed Grand Bridge that the IDC had accepted the offer submitted by Medi-Clinic. Grand Bridge was not given the opportunity of discussing the proposed offer with either the IDC or the Liquidators.

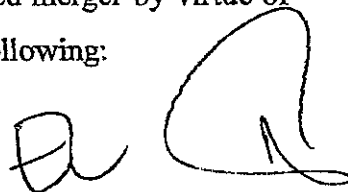
5. THE COMPETITION COMMISSION PROCESS

- 5.1 During its investigations, the Commission contacted Netcare's legal representatives in order to ascertain Netcare's views on the proposed transaction. As a result, representations (both oral and written) were made to the Competition Commission on Netcare's behalf.
- 5.2 Netcare concerns relate both to the factors which the Competition Authorities are required to consider in terms of section 12A(2) and to the public interest concerns which are to be considered in terms of section 12A(3).



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- 5.3 Netcare is a major participant in the private hospital industry and has a detailed knowledge and understanding of the private hospital industry in South Africa. Furthermore, Netcare has a relatively small operation in the Vaal Triangle Area, called Vaalpark, and therefore has detailed knowledge of the competitive conditions in the Vaal Triangle area.
- 5.4 Netcare's primary concern is that its Vaalpark operation in the Vaal Triangle area could be negatively affected by any significant change in the way in which the Protector Group's MediVaal hospital functions post-acquisition by Medi-Clinic of the hospitals belonging to the Protector Group. This arises from the fact that there are certain specialised facilities which Vaalpark does not have and it can refer its patients to Protector's facilities. In addition there are a large number of doctors who service both Vaalpark and MediVaal and any change to MediVaal's operations which could negatively affect the doctors, could also, consequently, impact on Netcare's operations.
- 5.5 In addition, Netcare is of the view that the proposed transaction will enable Medi-Clinic to dominate the Vaal Triangle region, which will lead to an increase in concentration levels in the affected markets in which these hospitals operate. This transaction will therefore enable Medi-Clinic to exercise market power in the relevant geographic markets impacted by the proposed transaction.
- 5.6 Netcare believes that its intervention in these proceedings will assist the Tribunal in its adjudication of the proposed merger by virtue of the factors set out above, which include the following:

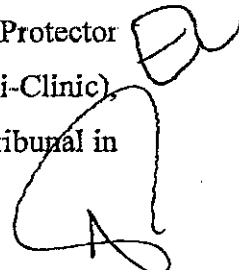
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- 5.6.1 its general industry knowledge and understanding of the private hospital industry; and
- 5.6.2 its in depth knowledge of the nature of competition in the geographic areas affected by the proposed transaction, particularly the Vaal Triangle area.

6. THE TEST FOR INTERVENTION

- 6.1 Section 53(1)(c)(v) of the Competition Act grants rights of participation to any person – other than those persons specified in section 53(1)(c) – who has sought and obtained recognition as a party from the Competition Tribunal.
- 6.2 Following the decision of the Competition Appeal Court in the Anglo American / Kumba Resources / IDC matter, it is not entirely clear whether an intervention application in merger proceedings needs to be brought in terms of Rule 42 or Rule 46 of the Tribunal Rules. However, from a substantive perspective, it does not matter whether the application is formally in terms of Rule 42 or 46 as the substantive requirements which a prospective intervenor have been extensively dealt with in the Anglo / Kumba / IDC intervention decisions.
- 6.3 As appears below, it is apparent that Netcare, would satisfy even the stringent test set out in Rule 46. Moreover, owing to the industry knowledge of Netcare as well as the knowledge which Netcare has of the operations of the target firm (the Protector Group) and also of one of the acquiring parties (Medi-Clinic), Netcare will be able to provide useful information to the Tribunal in



its "truth-seeking" function in determining the impact of the merger on competition in the relevant markets and on the relevant public interest factors.

6.4 The requirements of Rule 46 would be satisfied where Netcare is able to show:

6.4.1 a material interest in the matter;

6.4.2 that its disclosed interest is within the scope of the Competition Act; and

6.4.3 that its interest is not already represented by another participant in the proceedings.

6.5 However, it is apparent from the Anglo / Kumba / IDC decisions that:

6.5.1 the words "*material interest*", must be "read down" in conformity with Section 53(c)(v) which does not provide any such constraint on the discretion of the Tribunal; and

6.5.2 secondly, there is no requirement to show that the interest is not already represented by another party (this test is, however, applicable to intervention applications in complaint proceedings).



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7. NETCARE'S INTEREST IN THE MERGER PROCEEDINGS

7.1 It is submitted that Netcare as a competitor of the Protector Group, Phodiso Clinics and Medi-Clinic, has a direct and substantial interest in the proceedings presently before the Tribunal. Thus, even in terms of the stricter test suggested by Rule 46 it is apparent that Netcare would meet these requirements and should therefore be granted the rights of intervention conferred by Section 53.

7.2 The Tribunal has already recognised the importance of submissions by competitors in *The Competition Commission and Others v American Natural Soda Ash Corp and Others* (Case Numbers 49/CR/Apr00 and 87/CR/Sep00, decision of 30 November 2001):

"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." (at page 39 and emphasis added)

7.3 There can be little doubt that the Competition Act was enacted to protect the interests of several classes of persons, including in particular customers, competitors, suppliers and consumers. All of these participants in a market affected by a merger have a *material interest* in the proceedings concerning that merger.

7.4 Moreover, during the course of the intervention applications in the Anglo American / Kumba Resources matter, it was stressed by the IDC and accepted by the Tribunal and CAC that the IDC was possessed of information which would be of great assistance to the

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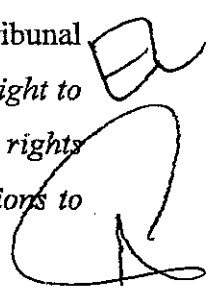
Tribunal in the performance of its statutory mandate and its *"truth seeking function"*.

- 7.5 It is clear that Netcare, as a direct participant in this industry and a competitor of Phodiso Clinics, Medi-Clinic and the Protector Group, is possessed of considerable information which can be presented to the Tribunal and would otherwise not be available to the Tribunal.

8. Scope of Applicant's Intervention

- 8.1 In the event that the Tribunal recognises the right of Netcare to be recognised as a participant in these merger proceedings in terms of section 53, Netcare's participation in these proceedings should follow the approach of the Tribunal and CAC to the scope of the intervention by the IDC in the Anglo American / Kumba matter.

- 8.2 In this matter, Mr Manoim remarked that *"if a person is allowed to intervene in merger proceedings, the Tribunal must ensure that its intervention is meaningful."*

- 8.3 It is apparent that once a party is recognised as a participant in terms of Section 53(c)(v) it has all the rights which section 53 confers upon a participant in the proceedings. Accordingly, such a participant 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". The Tribunal has previously held that *"once a party has been granted the right to participate in terms of section 53(1), such party has the rights mentioned in the said section, namely, the right to put questions to*
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witnesses and inspect any books, documents or items presented at the hearing. It would require very good reasons for the Tribunal to deprive that person of such rights or restrict them. We would suggest that the duty to persuade the Tribunal of the necessity to so deprive a recognised participant of, or restrict such rights belongs to the person seeking such deprivation or restriction.²" This was confirmed by the CAC.

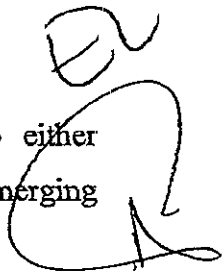
8.4 That such participation also includes the right to call witnesses (whether voluntary or by subpoena) was conceded during the opposition to the intervention application by the IDC in the Anglo American / Kumba matter. The CAC noted that "[w]hilst the proceedings in the Tribunal are inquisitorial, it does not mean that the Tribunal would not benefit from the assistance from a party in adducing evidence, cross-examining witnesses and calling witnesses. The main focus of the hearing before the Tribunal is the truth finding process. The appellants have submitted that they have no objection within the limits of materiality, to witnesses being called by the first respondent."

8.5 Similarly, in this matter, it is submitted that Netcare is possessed of considerable knowledge relating to the private hospital market as well as the operations of both Phodiso Clinics and Medi-Clinic. Furthermore, Netcare will be able to provide useful information to the Tribunal relating to the state of concentration of ownership in this sector. Accordingly, it is submitted that Netcare should be permitted to tender witnesses to adduce this information before the Tribunal. The fact that these witnesses may also be subject to cross examination will also ensure that the Tribunal will be able to test

² IDC intervention application, Case No. 46/LM/Jun02.

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the veracity of the arguments which are adduced by both the parties to the merger and the intervenors.

- 8.6 It is apparent that Netcare's interest in these proceedings relates to the issues which the Tribunal is required to consider in terms of Section 12A(2) and 12A(3). Accordingly, as noted by the CAC *"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 limiting the basis upon which the first respondent may participate."* Thus the CAC confirmed the decision by the Tribunal to permit the IDC to participate in relation to the issues which the Tribunal was called upon to consider in terms of Sections 12A(2) and (3).
- 8.7 Netcare also has reason to believe that documents in the hands of the merging parties will confirm its view of the likely negative impact of the proposed merger. The Tribunal itself has acknowledged the role which a proper discovery process can play in contested mergers and Netcare is of the view that a full and proper discovery process will be of inestimable value to the Tribunal in exercising its truth-seeking function in relation to this merger.
- 8.8 Netcare therefore believes that it will be necessary to obtain (subpoena) further documents in terms of the Tribunal's powers to order the production of documents in terms of section 54.
- 8.9 To date neither Netcare nor WWB has had access to either confidential or non-confidential information filed by the merging
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parties, nor has Netcare or WWB been afforded the opportunity of review either the confidential or non-confidential version of the Commission's recommendations to the Tribunal.

8.10 As a result, neither Netcare nor its legal representatives have been able to consider the information which has been submitted to the Commission and to make representations in relation to the specific information which has been submitted to the Commission as well as the Tribunal.

8.11 WWB, Netcare's legal representatives in these proceedings, have also been engaged in direct negotiations with representatives of the merging parties and have requested access to information filed by the merging parties on a confidential basis.

8.12 Once Netcare is recognised as an intervenor, WWB should be provided with access to the entire record, on the precedent set in the Unilever and Anglo / Kumba matters. Furthermore, a non-confidential version of the record should be prepared urgently for Netcare, in order that it may consult fully with its legal representatives on the issues which are raised in the papers. In this regard due consideration should be given to Tribunal decisions on the fact that claims of confidentiality should be narrowly made.

9. Order

9.1 Netcare therefore requests that the Tribunal grant an order in the following terms:

"1 The Applicant is recognized as a participant in the merger proceedings before the Tribunal in relation



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to the acquisition of control by Phodclinics over The Protector Group in terms of Section 53(c)(v) of the Competition Act;

2 The Applicant is 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 Applicant is permitted to adduce oral and documentary evidence in relation to these matters in the course of making its representations to the Tribunal.

4 The Applicant's legal representatives are permitted access to the Commission's record which has been referred to the Tribunal.

5 The Respondents will ensure that the Applicant is provided with a non-confidential version of the Commission's record within 10 business days of this order.

6 A further pre-hearing to be arranged with the Registrar on a date suitable to all parties once the Applicants have had a sufficient opportunity to consider the record which has been submitted to the Tribunal in order to determine the scope of intervention and dates for the discovery of documents.


DEPONENT

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Thus SIGNED and SWORN to at Johannesburg on this the ^{BH} day of March 2006, the deponent having declared that he knows and understands the contents of this affidavit, that he has no objection to taking the oath and he regards the oath as binding on his conscience.

Lamprecht

Elze Lamprecht
82 Maude Street
Sandton
Commissioner of Oaths Ex Officio
Practising Attorney
Republic of South Africa

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