

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

(HELD IN PRETORIA)

CT Case No:

CC Case No: 2010OCT5392/2012FEB5781

In the matter between

THE COMPETITION COMMISSION

and

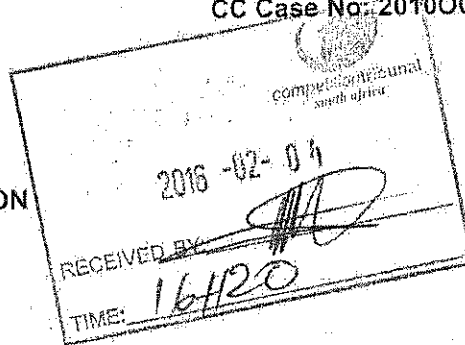
LIFE HEALTHCARE GROUP (PROPRIETARY) LIMITED

JOINT MEDICAL HOLDINGS LIMITED

Applicant

First Respondent

Second Respondent



FILING NOTICE

TAKE NOTICE THAT the applicant herewith files the following:

1. CT 6 Notice of Motion; and
2. Consent Agreement between the Competition Commission and Life Healthcare Group (Proprietary) Limited and Joint Medical Holdings Limited.

Dated at Pretoria on this 04 day of February 2016.

COMPETITION COMMISSION

DTI Campus

77 Meintjies Street

Sunnyside

Pretoria

Tel: 012 394 3335

Ref: K. Ayayee

E-mail: korkoia@compcom.co.za

To: **THE REGISTRAR**

Competition Tribunal

3rd Floor, Mulayo

The DTI Campus

77 Meintjies Street

Sunnyside

Pretoria

Tel: (012) 394-3300/55

E-mail address: Leratom@comptrib.co.za

And to: **WEBBER WENTZEL**

Respondents' Attorneys

10 Fricker Road

Illovo Boulevard

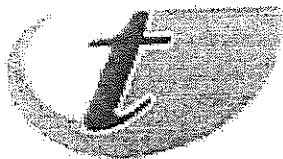
Johannesburg

2196

Tel: 011 530 5756/5250

Ref: Mr Robert Wilson

E-mail: robert.wilson@webberwentzel.com



competitiontribunal south africa

Form CT 6

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 X24
Sunnyside
0132
Republic of South Africa
tel: 27 12 394 3300
fax: 27 12 394 0169
e-mail: ctsa@comptrib.co.za

Notice of Motion

Date: 4-Feb-2016 File #

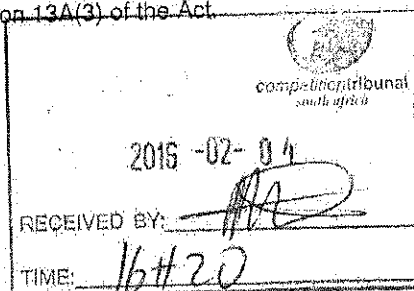
To: The registrar of the Competition Tribunal

Concerning the matter between:

COMPETITION COMMISSION (Applicant)
and LIFE HEALTHCARE GROUP (PTY) LTD & JOINT MEDICAL HOLDINGS LTD (Respondent)

Take notice that the Applicant
intends to apply to the Tribunal for the following order:

Confirmation of the attached consent agreement between the Applicant and the Respondents, as an order of the Competition Tribunal in terms of section 49D, read with section 58(1)(b) and section 59(1)(d)(i) and (iv) of the Competition Act 89 of 1998 as amended ("the Act") in respect of a contravention of section 13A(3) of the Act.



Name and Title of person authorised to sign:

Chief Legal Counsel: Bukhosibakhe Majenge

Authorised Signature:

Date:

[Signature]

04/02/2016

For Office
Use Only:

Tribunal file number:

Date filed:

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

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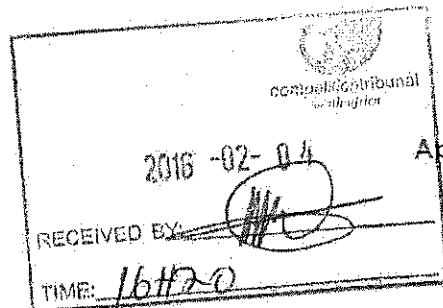
In the matter between

THE COMPETITION COMMISSION

and

LIFE HEALTHCARE GROUP (PROPRIETARY) LIMITED

JOINT MEDICAL HOLDINGS LIMITED



Applicant

First Respondent

Second Respondent

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND LIFE HEALTHCARE GROUP (PTY) LTD AND JOINT MEDICAL HOLDINGS LIMITED IN RESPECT OF AN ALLEGED CONTRAVENTION OF SECTION 13A(3) OF THE COMPETITION ACT NO. 89 OF 1998, AS AMENDED

Preamble

The Commission and the Respondents hereby agree that application be made to the Competition Tribunal for the confirmation of this Consent Agreement as an order of the Competition Tribunal in terms of section 49D read with section 58(1)(b) and section 59(1)(d)(i) and (iv) of the Act on the terms set out below:

1. Definitions

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

- 1.1 "Act" means the Competition Act, 1998 (Act No. 89 of 1998), as amended;
- 1.2 "Afrox" means African Oxygen Limited;

- 1.3 "AHL" means Afrox Healthcare Limited;
- 1.4 "Amahosp" means Amalgamated Hospitals Limited;
- 1.5 "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 (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;
- 1.6 "Commissioner" means the Commissioner of the Competition Commission, appointed in terms of section 22 of the Act;
- 1.7 "Complaints" mean the complaint submitted by the NHN in terms of section 49B(2)(b) of the Act under case number 2010Oct5392 and the complaint initiated by the Commissioner in terms of section 49B(1) of the Act under case number 2012Feb5781;
- 1.8 ~~"Consent Agreement" means this agreement duly signed and concluded between the Commission, LHG and JMH;~~
- 1.9 "JMH" means Joint Medical Holdings Limited;
- 1.10 "LHG" means Life Healthcare Group (Proprietary) Limited;
- 1.11 "NHN" means the National Hospital Network;
- 1.12 "Parties" means the Commission, LHG and JMH;
- 1.13 "Presmed" means President Medical Investments Limited;
- 1.14 "Respondents" mean LHG and JMH; and
- 1.15 "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 (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;

2. Background

On 11 October 2010 the Commission received a complaint from the NHN in terms of 49B(2)(b) of the Act. In this complaint the NHN stated, *inter alia*, that it is concerned with the LHG shareholding in JMH and the latter's use of the LHG tariffs. On 10 February 2012 the Commission initiated a complaint in terms of section 49B(1) of the Act. The Commission alleged, *inter alia*, that LHG and JMH, being parties in a horizontal relationship, contravened section 4(1)(b)(i) of the Act in that LHG and JMH agreed that LHG will negotiate on JMH's behalf the tariffs charged by JMH to various medical schemes. The background to these complaints is as follows:

- 2.1 During October or November 1997, Presmed (LHG's predecessor) acquired a 25% shareholding in JMH. In 1999, the healthcare interests of Afrox were merged into Presmed through a reverse listing which resulted in Afrox holding 70% of the issued share capital of Presmed (whose assets then included its 25% investment in JMH). This transaction was notified to the predecessor of the Commission, the Competition Board, which provided Presmed with its decision not to pursue the investigation. Pursuant to this reverse listing and in October 1999, Presmed changed its name to AHL.
- 2.2 On 23 July 2001, AHL and Amahosp notified the Commission of AHL's intention to acquire control of Amahosp's business. In the schedules to the Forms CC4(1) and CC4(2) of this notification, AHL and Amahosp did not identify JMH as a firm that was controlled by AHL. The AHL and Afrox 2000 annual reports that were included in this notification did cite JMH as an associate of the AHL group, as well as AHL's 25% interest in JMH. AHL's and Amahosp's merger report in this notification, the Commission's referral report and the Tribunal's reasons for approving the merger were assessed on the basis that JMH was a competitor of AHL and Amahosp in the greater Durban area.
- 2.3 In 2002, Afrox sought to increase its shareholding in JMH from 25% to 49% by acquiring an additional 24% shareholding. AHL's attorneys at the time wrote to the Commission on 22 April 2002 requesting an advisory opinion. In this request, AHL's attorneys advised the Commission that AHL sought to acquire a 49% shareholding in JMH but that AHL would not be able to control JMH at board or general meeting level and asked if for this reason AHL would be required to notify the transaction.

The request did not mention that AHL already had a 25% shareholding in JMH since 1997, nor did it include the shareholders agreement that had been concluded in 1997. The Commission took the view that this acquisition of shares could lead to *de facto* control and advised AHL's attorneys to notify the transaction. AHL chose not to proceed with the transaction and a notification did not occur.

2.4 On 6 May 2003 a new firm of attorneys acting on behalf of AHL wrote to the Commission requesting an advisory opinion as to whether a similar transaction would constitute a merger as defined in section 12 of the Act. In this request the 25% shareholding in JMH was disclosed as well as certain terms of the shareholders agreement. AHL's attorneys asserted that AHL's 25% shareholding in JMH did not give it control of JMH and that a further 24% shareholding would not place it in a position to control the policy of JMH within the meaning of section 12(2)(g) of the Competition Act. Accordingly, the transaction did not need to be notified to the Commission in the prescribed manner and form.

2.5 In its advisory opinion of 20 May 2003, the Commission stated, *inter alia*, that the terms of the JMH shareholders agreement did not merely afford AHL minority protection rights, but vested it with some form of joint control in JMH. Accordingly, the acquisition of the additional 24% shareholding would not change the matrix of control, especially as it would not result in *de jure* control or sole control of JMH by AHL. AHL had already acquired control over JMH through its 25% shareholding together with the rights in the shareholders agreement. In the result, Afrox increased its shareholding in JMH to 49% and did not notify this transaction to the Commission.

2.6 In 2005, the shareholding in AHL was restructured and AHL changed its name to LHG. AHL was then delisted from the JSE following the acquisition of the majority of its shareholding by a BEE consortium and certain funders. This was notified to the Commission as a large merger on 14 December 2004 and was approved by the Tribunal on 9 March 2005. On 10 June 2010, Life Healthcare Group Holdings Limited, LHG's holding company, was listed on the main board of the JSE in the health care providers sector.

2.7 In August 2011, LHG and JMH notified the Commission of LHG's intention to acquire up to 21% of the issued share capital of JMH, thereby increasing LHG's

shareholding from approximately 49% up to 70%. In this notification, during the Commission's investigation of the proposed merger and at the Tribunal's hearing of the proposed merger, LHG asserted that it already controlled JMH in terms of section 12(2)(g) of the Act through its significant shareholding in JMH and its say over certain strategic and financial decisions of JMH. The proposed transaction was simply notified due to the fact that the "bright line" in section 12(2)(a) of the Act would be crossed.

2.8 In its reasons for approving the merger, the Tribunal noted that LHG's submission that it already controlled LHG was inconsistent with AHL's stance in the Amahosp merger notification as well as when requesting an advisory opinion from the Commission in May 2003. The Tribunal further stated that for the purposes of the counterfactual it had to decide whether LHG had no control over JMH, an attenuated form of joint control or unvarying sole *de facto* control. On the evidence, the Tribunal found that LHG or its predecessors had *de facto* sole control of JMH since 1997.

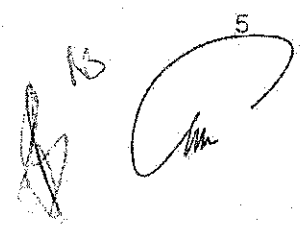
2.9 Notwithstanding that the Tribunal unconditionally approved LHG increasing its shareholding in JMH from approximately 49% up to 70%, for commercial reasons the merger was never implemented.

3. Commission's investigation and finding

3.1 During the course of the Commission's investigation of the Complaints and the JMH merger notification, the Commission found that since 2004, LHG and JMH agreed that all their prices would be set jointly. To this end, all price negotiations, including designated service provider network arrangements, would be conducted by LHG on its own behalf and on behalf of JMH. The Commission is of the view that this conduct contravenes section 4(1)(b)(i) of the Act. In addition, since at least 2006, no major decision regarding the business of JMH, including its budget, the appointment of key employees and items of major capital expenditure, would be taken unless it carried LHG's approval.

3.2 The Commission found that these changes in the quality of LHG's control over JMH constituted a merger in terms of section 12(1) of the Act. The Commission also found that the threshold for a large merger as defined in section 11(5)(c) of the Act

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as read with section 11(1) of the Act and the then applicable Notice 253 of 2001 was met in respect of such further acquisition of control. The Commission therefore found that LHG and JMH failed to give notice of the merger as required by Chapter 3 of the Act and proceeded to implement the merger without the approval of the Tribunal as required by the Act.

4. Admission

The Respondents admit that the conduct referred to in clause 3.1 above constituted a notifiable large merger as defined in section 11(5)(c) of the Act. The Respondents further admit that they failed to give notice of the merger as required by Chapter 3 of the Act and proceeded to implement the merger without the approval of the Tribunal as required by the Act.

5. Disinvestment from JMH

In anticipation of the conclusion and confirmation of this Consent Agreement, the Respondents have agreed that LHG would disinvest from JMH and that JMH would acquire nearly all of LHG's shareholding by way of a share buy-back arrangement and that some existing doctor shareholders would acquire the balance of LHG's shareholding. This transaction would result in the termination of the current shareholders agreement between JMH and its shareholders. The remaining shareholders of JMH (namely the shareholders other than LHG) will, for the most part, each proportionately increase their shareholding in JMH. There are a large number of remaining shareholders and no shareholder beneficially owns more than one half of the issued share capital of JMH. There is no shareholders agreement between JMH and the remaining shareholders that would not afford any remaining shareholder or group of shareholders the ability to materially influence the policy of JMH in a manner comparable to an otherwise controlling shareholder. Accordingly, the transaction would not result in one or more firms acquiring or establishing control of JMH and would therefore not constitute a merger. The transaction was completed on 26 February 2014.

6. Future conduct of the Respondents

- 6.1 The Respondents agree and undertake to notify the Commission of a transaction that constitutes a merger as defined in section 12(1) of the Act and which meets the thresholds in section 11(5)(b) or (c) of the Act. The Respondents furthermore agree

and undertake to not implement any such transaction without first obtaining approval from the competition authorities.

6.2 The Respondents also agree and undertake to develop, implement and monitor a competition law compliance programme as part of its corporate governance policy, which is designed to ensure that its employees, management, directors and agents do not engage in future contraventions of the Act. In particular, such compliance programme will include mechanisms for the identification, prevention, detection and monitoring of any contravention of the Act.

6.3 The Respondents furthermore agree and undertake to submit a copy of such compliance programme to the Commission within 60 days of the date of confirmation of this Consent Agreement as an order by the Tribunal.

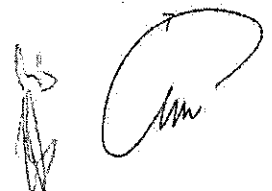
7. Administrative Penalty

7.1 Having regard to the provisions of sections 59(1)(d), 59(2) and 59(3) of the Act, the Respondents agree and undertake to pay an administrative penalty for the contravention of section 13A(3) of the Act.

7.2 The Respondents agree that they are jointly and severally liable to pay an administrative penalty of R10 000 000.00 (ten million Rand, only), one paying in full, the other to be absolved.

7.3 The Respondents will pay the administrative penalty to the Commission within three months from the date of confirmation of this Consent Agreement as an order by the Tribunal.

7.4 The Respondents will pay the administrative penalty into the Commission's bank account, which is as follows:



NAME: THE COMPETITION COMMISSION FEE ACCOUNT
BANK: ABSA BANK, PRETORIA
ACCOUNT NUMBER: 4050778576
BRANCH CODE: 323 345
Reference: 2010OCT5392/ LGH/ JMH

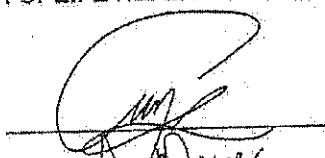
- 7.5 The Commission will pay over the administrative penalty to the National Revenue Fund in accordance with the provisions of section 59(4) of the Act.

8. Full and Final Settlement

This Consent Agreement, upon confirmation thereof 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 the admitted contravention and the conduct that is the subject of the Complaints.

Dated and signed at New Delhi on this 3rd day of February 2016

For LIFE HEALTHCARE GROUP (PROPRIETARY) LIMITED


Name: A. Meyer
Office: CEO

Dated and signed at DURBAN on this 2 day of FEBRUARY 2016

For JOINT MEDICAL HOLDINGS LIMITED

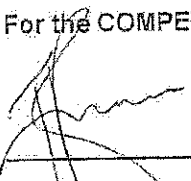


Dr R L Bhoola (duly authorised)

Chairman

Dated and signed at PRETORIA on this 5th day of FEBRUARY 2016

For the COMPETITION COMMISSION



Tembinkosi Bonakele

Competition Commissioner

