

COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case Number: 41/AM/Jun02(2)

In the matter between:

The Competition Commission

Applicant

and

Digital Healthcare Solutions (Pty) Ltd

Respondent

In re:

Digital Healthcare Solutions (Pty) Ltd

Applicant

and

The Competition Commission

1st Respondent

Healthbridge (Pty) Ltd

2nd

Respondent

Decision on application to vary an order of the Competition Commission

Introduction

In this application the Competition Commission (“the Commission”) seeks an amendment of an order it made when conditionally approving a merger involving the respondent, Digital Healthcare Solutions (Pty) Ltd (“DHS”).

DHS opposes the application.

Background

On 4 February 2004 the Competition Tribunal ruled in Digital Healthcare Solutions (Pty) Ltd v The Competition Commission and Healthbridge (Pty) Ltd (“the breach case”)¹ that DHS had breached the conditions imposed by the Commission in its order approving the small merger between DHS’ subsidiary, Mediswitch, and a company named QEDI, which was at that time a subsidiary of a company named Persetel. The conditions that were breached by DHS read as follows:

For a period of three (3) years after the approval of this transaction by the Commission:

- 1. The merged entity shall, on reasonable written request by any healthcare switch entity, integrate the applicable latest versions of PMS packages which it owns or controls, with an API which enables an interface with the switching technology of the healthcare switch entity requesting such integration, in accordance with an agreement referred to in paragraph 2 below.*
- 2. Pursuant to such a reasonable written request, the merged entity shall use all reasonable endeavours to conclude a written agreement with the requesting healthcare switch entity concerned, within a period of 60 days after receiving such request, containing commercially, financially and technically reasonable terms.*
- 3. The merged entity shall provide a quarterly report to the Commission, for a period of 12 months after the date of approval, detailing all requests by third party healthcare*

¹ See Tribunal Case No: 41/AM/Jun04

switch entities to integrate their API and functionality with the PMS packages owned or controlled by the merged entity, as well as detailing the agreements and time frames concluded with such third party healthcare switch entities in respect of the integration process.”

After the Tribunal had issued its above-mentioned decision in the ‘breach case’, DHS filed a remedial plan with the Commission in terms of rule 39(2)(a) of the Commission’s rules. The remedial plan was filed on 20 February 2004. The Commission and DHS then engaged in negotiations regarding the proposed remedial plan.

The Commission considers that these negotiations may not be completed by 8 April 2004, when the three-year period stipulated in the above-stated conditions will expire. Because of this, the Commission has approached the Tribunal with this application to extend that period by one year, namely until 8 April 2005. DHS, in opposing the application, submits that the Tribunal does not have jurisdiction to make such an order.

Jurisdiction

The Commission submits that the Tribunal has jurisdiction to grant the application in terms of Rule 42 of the Tribunal’s rules. This rule lays down the procedure for the bringing of an application not otherwise provided for in terms of those rules.

We pointed out in our decision in the ‘breach case’ that Rule 42 is essentially procedural in nature and does not confer general powers on the Tribunal to review the Commission’s decisions.² Similarly, that rule does not vest the Tribunal with general powers to vary the Commission’s decisions.

The Commission was unable to refer us to any other provision in the Competition Act (“the Act”) or the rules that would give the Tribunal powers to amend a condition imposed by the Commission when approving a small

² See footnote 10 on page 7 of the decision in case no. [41/AMJun04](#).

merger in terms of s. 13(5)(b) of the Act.

We point out that the Tribunal's power to amend its own orders is expressly granted in terms of s. 66 of the Act. This power is limited to the circumstances referred to in that section, essentially cases of error or ambiguity.³

The Act does not give the Tribunal express power to vary orders of the Commission made under s. 13(5)(b) of the Act. Nor is it possible to infer such power from s. 27, the general provision setting out the Tribunal's functions and powers.

The Commission seems to regard the amendment as merely an extension of a time period. Whilst that might be the effect of the amendment, it does not alter its character – it amounts to a variation of an order of the Commission.

Even if we assume in the Commission's favour that what is sought is not the variation of an order but a mere extension, it does not assist the Commission.

Whilst in terms of s. 58(1)(c) we have powers to extend certain time periods which might otherwise apply, these are limited to time periods set out in the Act. In this application we are dealing with a time period set out in an order made by the Commission.

We have the power, in terms of s. 14A(2), to extend the period in which the Commission may investigate a large merger, but here too the power is expressly granted and for a specific and limited purpose.

In our view, given the Tribunal's express powers of extension (ss. 14A(2) and 58(1)(c)) and variation (s. 66) it follows that if the legislature had intended the Tribunal to have the power to amend an order of the Commission made under s. 13(5)(b), it would have provided for this expressly in the Act.

In our view DHS is correct in contending that we have no jurisdiction to grant the order sought. Accordingly, the application is dismissed.

There is no order as to costs.

16 April 2004

³ See Astral Foods Ltd v Competition Commission and Others, Competition Tribunal Case No: 69/AM/Dec01 and Mike's Chicken (Pty) Ltd and Others v Astral Foods Ltd and the Competition Commission, Competition Appeal Court Case No. 32/CAC/Sep03.

N. Manoim

Date

Concurring: D. Lewis and L Reyburn