CONSTITUTIONAL COURT OF SOUTH AFRICA

Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Limited and Another

CCT 31/20

Date of hearing: 11 March 2021
Date of judgment: 15 October 2021

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Friday,15 October 2021 at 10h00, the Constitutional Court handed down a judgement in an application for leave to appeal against the judgment and order of the Competition Appeal Court in which that Court conditionally approved a merger between the respondents: Mediclinic Southern Africa (Pty) Limited (Mediclinic) and Matlosana Medical Health Services (Pty) Limited (Matlosana).

On 29 September 2016, the respondents as required by section 13(1) of the Act duly notified the Competition Commission of their intended merger. If approved, the merger would result in Mediclinic owning and managing hospitals (target hospitals) which pre-merger were owned and managed by Matlosana. The Commission accordingly investigated the proposed merger and on 28 June 2017, upon realising that it raises significant competition concerns, recommended to the Competition Tribunal that the proposed merger be prohibited because there was a reasonable possibility that it would substantially lessen competition in the private health sector and result in increased costs of healthcare services for both insured and uninsured patients.

Acting on that recommendation, on 22 March 2019, the Tribunal held that the proposed merger would take away the lower tariffs available to uninsured patients at the target hospitals, and given the significant differences in the tariffs, the merger would significantly affect uninsured patients by limiting their ability to negotiate and switch to cheaper hospitals in the form of target hospitals. And in the absence of remedies tendered by the

respondents which effectively addressed the established competition concerns, the Tribunal prohibited the proposed merger.

Aggrieved by the Tribunal's decision, the respondents appealed to the Competition Act Court. The majority of the Competition Appeal Court thereupon held that in the absence of evidence that substantial harm may eventuate if the merger were to be approved, the prohibition of the proposed merger by the Tribunal could not be justified. As such, the majority approved the merger with conditions. On the contrary, the minority confirmed the reasoning and conclusion of the Tribunal, that it would not be in the interest of the public to approve the merger since such would undermine the right to access to healthcare services in the relevant market, rather than advance it.

Unhappy with the decision of the Competition Appeal Court, the Commission sought leave to appeal the order and judgement of the Competition Appeal Court to the Constitutional Court. Before the Constitutional Court, the Commission contended that the Competition Appeal Court ignored sections 7(2) and 39(2) of the Constitution in its interpretation of section 12A(1)(a) and (2) of the Act (provision at issue). It further submitted that the changes in tariffs at the target hospitals would have an impact on the competitive behaviour of Mediclinic, as it would decrease the incentive of Mediclinic's competitors to charge lower tariffs. Additionally, it raised that a significant tariff increase would have substantial adverse effects on the affordability and access to private healthcare services by uninsured patients who sought private healthcare services in the North West province (the relevant market region), hence without doubt, the merger frustrated the object of the Constitution. The respondents countered and contended that the Constitutional Court had no jurisdiction in the matter as the application raised no constitutional issue or arguable points of law of general public importance which ought to be considered by the Court and, as a result, leave to appeal should not be granted. In the alternative, the respondents argued that the applicant's contention that the Competition Appeal Court did not consider the constitutional implications of the merger had no basis. Finally, they submitted that the Competition Appeal Court was correct in approving the merger.

In a majority judgment penned by Mogoeng CJ (with Jafta J, Majiedt J, Mhlantla J, Pillay AJ, Tlaletsi AJ and Tshiqi J concurring), the crux of the matter before the Court was identified as:

(a) whether the Competition Appeal Court was entitled, in law, to interfere with the findings and remedy of the Tribunal;
(b) the proper interpretation of section 12A(1)(b) and (3) of the Competition Act 89 of 1998 (the Act) which seeks to determine whether a merger can be justified on substantial public interest grounds;
(c) whether the right to access healthcare services in section 27 of the Constitution of the Republic of South Africa, 1996 ought to be considered as a "substantial public interest" ground in terms of the Act. and
(d) whether the Competition Appeal Court interpreted section 12A of the Act in a manner that promotes the spirit, purport and objects of section 27 of the Constitution.

The majority found that interference with factual findings by appellate courts can only be justified in the event of a misdirection or a clearly wrong decision. And this is to be done for the sole purpose of achieving justice. The reversal of the Tribunal's factual findings and decision on remedy is not a consequence of a rigorous test and examination of its justifications with due deference to the expertise of its members demanded of the Competition Appeal Court by its *Imerys South Africa (Pty) Ltd v The Competition Commission* [2017] ZACAC 1 and *Schumann Sasol (SA) (Pty) Ltd v Price's Daelite (Pty) Ltd* [2002] ZACAC 2 decisions. It is more of an imposition of that Court's conception of what is right and a consequential replacement of the Tribunal's factual findings and discretionary decision on remedy with its own preference. Therefore, the Court found that the Appeal Court was not entitled in law to interfere with the Tribunal's findings.

The majority further held that all that section 12A requires in this regard is that a determination be made whether there is a substantial prevention or lessening of competition. And this is ordinarily measured with reference to a potential increase in price. It does not lay down the "enhancement of market power" as the test or provide any basis for a court to do so. It follows that the majority departed from the wording of the Act which is the point of departure in statutory interpretation. The Court held further that the point of departure to achieve a proper and thorough interpretation and application of section 12A of the Act is construing the section through the prism of constitutional provisions from which section 12A draws life, the most significant being section 27(1) of the Constitution, the right to health care. This approach, the Court reasoned, advances and promotes the injunction of sections 7(2) and 39(2) of the Constitution.

Therefore, the Court upheld the appeal and set aside the decision of the Competition Appeal Court with no order as to costs.

The second judgment, penned by Theron J (with Khampepe J concurring), would have dismissed the appeal on the basis that it failed to engage the Court's jurisdiction and that, in any event, the interests of justice militated against granting leave.

In respect of jurisdiction, the second judgment held that, at its core, the appeal turned on a factual dispute as to the relevant market and the likely effects of the merger. The second judgment emphasised that in terms of the Court's jurisprudence, even where factual disputes implicate constitutional rights, they do not engage the Court's jurisdiction.

The second judgment held further that the various legal questions which the Commission alleged were in issue were, in fact, attributable to remarks the Competition Appeal Court made *obiter dictum* (in passing) and were therefore insufficient to engage the Court's jurisdiction. In particular, contrary to the Commission's allegations, the Competition Appeal Court had made no binding decision that price increases are irrelevant to an assessment of whether a merger is likely to substantially lessen or prevent competition. This was because the Competition Appeal Court had held that the merger was likely to cause prices at the target hospitals to decrease. The second judgment also found that the Competition Appeal Court did not decide that merging parties do not bear an onus within

the context of the public interest inquiry where no substantial prevention or lessening of competition has been shown. Instead, the Competition Appeal Court expressly found that the merging parties had adduced sufficient evidence to demonstrate that there was no public interest concern which justified the prohibition of the merger.

The second judgment held that the Court's jurisdiction was not engaged by the question whether the Competition Appeal Court had erroneously interfered with the factual and remedial findings of the Tribunal. On the basis of the Court's decision in *General Council of the Bar v Jiba*, the second judgment held that such a question is factual, and therefore does not engage the Court's jurisdiction. It reasoned that even if the question is not purely factual, it would in any event concern the application of a settled legal test and, for this reason too, would fail to engage the Court's jurisdiction.

Finally, the second judgment held that even if the Court's jurisdiction was engaged, the interests of justice militated against granting leave to appeal. This was because the Competition Appeal Court is a specialist court, statutorily empowered to make factual determinations in merger proceedings. The second judgment therefore held that in this appeal, which fundamentally concerns the factual determinations of the Competition Appeal Court, the interests of justice demanded that the Court should defer to the findings of the Appeal Court, and refuse leave to appeal.