

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: 04/CR/Jan02

In the matter between:

Anglo American Corporation Medical Scheme

Applicant

and

The Competition Commission of South Africa

First Respondent

Engen Medical Fund

Second Respondent

United South African Pharmacies

Third Respondent

Members of United South African Pharmacies

Fourth Respondent

In re:

The Competition Commission Of South Africa

Applicant

Anglo-American Corporation Medical Scheme

First Complainant

Engen Medical Fund

Second Complainant

And

United South African Pharmacies

First Respondent

Members Of United South African Pharmacies

Second Respondent

APPLICATION FOR INTERVENTION

The applicant in this matter seeks leave to intervene in complaint referral proceedings, which the Competition Commission ("Commission ") has instituted against the third and fourth respondents. The third respondent 1 ("USAP") opposes the application. I have to decide—

1 When I refer to the respondents I refer to them as cited in the intervention application not the complaint referral. To avoid confusion I have hereafter referred to the third respondent as USAP.

- i) whether the applicant has demonstrated an interest that is not adequately represented by the Commission; and if so
- ii) what the form of the applicant's intervention should take in order for its interest to be adequately represented.

Background

The applicant, a registered medical scheme, submitted a complaint against USAP and its members to the Competition Commission on 21 December 2000. On 9 May 2001 the second respondent Engen Medical Fund submitted a complaint to the Commission against USAP .

These two complaints formed the basis of a complaint referral, that the Commission has brought against USAP and its members, and which was filed with the Tribunal on 17 January 2002.

The Commission alleges that USAP and its members have been engaged in prohibited practices in contravention of sections 4(1)(a) and 4(1)(b) of the Act in that they are alleged to have been involved in a "group boycott" of the complainants in order to coerce them to concede to a standard discount scheme that USAP's members offer. The Commission seeks relief against the third and fourth respondents in the form of a declaratory order and the imposition of an administrative fine.

The third respondent has brought an exception to the Complaint referral, which has not yet been set down for determination. Neither the third respondent nor any of the firms falling within the class of the fourth respondent have filed answering affidavits.²

The applicant now seeks leave to intervene in these proceedings. The basis for its application is that it seeks relief not contemplated in the Complaint referral and that in order to found this relief it needs to make a number of allegations that are not contained in the referral.³ USAP has opposed the application on the grounds that the applicant has not shown ' a distinctive interest ' in the matter that would justify the applicant intervening.

The applicant alleges that if allowed to intervene it would seek an interdict and an order that the respondents supply or distribute goods and services on terms

² The fourth respondent, the second respondent in the complaint referral, is described as all the retail pharmacies that are members of USAP.

³ The applicant points out that its complaint was responsible for the referral and that its members are the " *the direct and primary victims of the respondents' ongoing anti-competitive conduct.*" (See applicant's heads of argument paragraph 2.1.6.)

reasonably required to end the prohibited practices.

Analysis

The legal regime that governs intervenor's rights is contained in section 53 of the Act and Rule 46 of the Tribunal rules.

In terms of section 53(1)(a)(ii)(bb)

53. The following persons 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:

- a) if the hearing is in terms of Part C - ...
 - (i)....*
 - (ii) the complainant if – ...
 - (aa)...*
 - (bb)in the opinion of the presiding member of the Competition Tribunal, the complainant's interest is not adequately represented by another participant, and then only to the extent required for the complainant's interest to be adequately represented;"***

Rule 46 provides:

"Intervenors

- (a) At any time after an initiating document is filed with the Tribunal, any person who has a material interest in the relevant matter may apply to intervene in the Tribunal proceedings by filing a Notice of Motion in Form CT 6, which must –
 - (i) include a concise statement of the nature of the person's interest in the proceedings, and the matters in respect of which the person will make representations; and*
 - (b) be served on every other participant in the proceedings.**
- 2) No more than 10 business days after receiving a motion to intervene, a member of the Tribunal assigned by the Chairperson must either –*

i. make an order allowing the applicant to intervene, subject to any limitations –

- 1. necessary to ensure that the proceedings will be orderly and expeditious; or*
- 2. on the matters with respect to which the person may participate, or the form of their participation; or*

(b) deny the application, if the member concludes that the interests of the person are not within the scope of the Act, or are already represented by another participant in the proceeding.

(b) Upon making an order in terms of sub-rule (2), the assigned member may make an appropriate order as to costs.

(4) If an application to intervene is granted –

(i) the registrar must send to the intervenor a list of all documents filed in the proceedings prior to the day on which the request for leave to intervene was granted; and

(b) access by an intervenor to a document filed or received in evidence is subject to any outstanding order of the Tribunal restricting access to the document.”

Counsel for the applicant points out correctly that section 53(1)(a)(ii)(bb) does not require the complainant to make a showing of its interest in the matter and in this respect Rule 46 should not be read to encroach upon a right granted by the statute. I agree with that proposition. Rule 46 is a general rule that applies to intervention in all forms of Tribunal proceedings and is not limited to complaint procedures.⁴ In order for a complainant to intervene in a complaint referral, it would satisfy the requirement of interest in Rule 46 by alleging that it was the complainant whose complaint had formed the basis or part of the basis for the complaint referral. This interpretation harmonises the section and the rule.

The applicant has made these allegations and accordingly I find that it has shown

⁴ Rule 46 applies to proceedings in which an ‘initiating document’ has been filed. An ‘*initiating document*’ is defined in the Rules to include complaint referrals, applications, appeals and merger proceedings.

that it has an interest in the matter.⁵

The next question is whether the applicant has demonstrated that its interest is not adequately represented by another participant. It is quite clear that the applicant seeks remedies that are not sought by the Commission, the only other ‘participant’ in the present complaint referral. If the Commission does not seek this relief, the complainant has no other remedy open to it. Even the applicant’s subsequent right to claim damages, in the event that the Tribunal were to find that there has been a restrictive practice, will not assist it in this respect. The relief that the applicant seeks is competent for us to grant and is *prima facie* related to addressing the effects of the prohibited practice should it be proven. The applicant in my view has therefore demonstrated an interest that is *“not adequately represented by another participant”*.

The final question is, to what extent does the applicant need to participate, in order for its interest to be adequately represented?

In this respect I should indicate that USAP during the course of argument offered two solutions. They argued that at best the applicant had made out a case for arguing for a ‘distinctive remedy’ as its case on the merits was in real terms, no different from that of the Commission. The fact that it might quibble over what allegations should form part of the Commission’s papers did not mean that it had established that its interest was not ‘adequately represented’

That being so, USAP argued that the merits and the remedy could be separated and that given an adverse finding on the merits, the applicant could then be permitted to intervene on remedies.

As an alternative, USAP also offered, by way of a tender, that if the Tribunal found against them and granted declaratory relief it would undertake to be bound by such a declarator as if it were interdicted from doing so.

The applicant criticised the adequacy of both these remedies. The former remedy might lead to practical problems if the applicant only became involved in the second round. By way of example, it might lead to the need to recall witnesses who had testified on the merits but whose evidence might also be relevant to remedies. This second round would create inevitable disputes if the witnesses appeared to be returning to the merits.

The latter remedy was also criticised. It was unheard of for a respondent to tender a remedy not sought and left the applicant with a feeling of discomfort.

⁵ As counsel for USAP did not seriously dispute this approach at the hearing I need not discuss it further.

It is difficult for an adjudicator to determine what procedural rights can be granted to an intervenor on an a priori basis without the risk of error. It would be dangerous for the Tribunal to form a view of what form of participation is adequate to found a case for the relief sought, at the commencement of proceedings, when the Tribunal lacks a full appreciation of the extent of the case. There is no obligation on the Commission, which is dominus litis in this matter, to traverse the type of evidence which might be relevant to the intervenor's relief but not that sought by the Commission.⁶

The applicant for this reason sought only an order that it be allowed to intervene.⁷ Applicant's counsel argued that the content of this right could then be determined at each procedural stage of the matter and the Tribunal could then at the appropriate moment decide whether the issue related to its interest and if so then it could be heard. This type of approach is in my view unsatisfactory. It leaves the ambit of the intervention uncertain throughout the course of proceedings. The Tribunal would then be required to spend much time adjudicating demarcation disputes at every procedural stage of the case. Such dissipation of time and energy to tangential issues is unwarranted.⁸

It is also important from a point of fairness that the third and fourth respondents know on what basis the intervenor founds its relief in order for them to meet that case. If the intervenor's case only unravels in the course of proceedings without being ascertainable from the outset, then the respondents are worse off than would be the case if the intervenor had been a co-plaintiff, as they would lose the benefit of having a complaint referral setting out the case. It might be that the intervenor's case once pleaded is less distinct from that of the Commission once it has been stated, but it would be better to err on the side of granting them that latitude than the alternative.⁹ The risk of denying an intervenor adequate representation could mean that it might be unable to establish its case for relief, not because it is unable to prove it, but because of some pre-established stricture limiting its rights. The risk to the respondents, on the other hand is more one of expense and inconvenience. The

⁶ The intervenor went to great length in its papers to illustrate the type of allegations that the Commission ought to have made in the referral. I need not comment on this aspect except to illustrate the danger in once recognising a right to seek relief, to confine an intervenor to arguing its case off the other parties papers where the *lis* between the latter does not contemplate the interest of the intervenor.

⁷ Prayer 1 in the Notice of Motion. In argument this was expanded on to include intervention in respect of all those matters referred to in section 53.

⁸ During the course of argument I debated with counsel a via media between full right of participation and one that could allow the intervenor to adequately represent its interest. It seemed that on the facts of this case, such a solution was not possible without leading again to demarcation disputes.

⁹ In The Competition Commission and Others v American Natural Soda Ash Corporation and Others No: 49/CRApr00 and 87/CR/Sep00; 30 November 2001 the Tribunal held that the legislature's policy was to encourage as much participation in deliberations as possible as *"this is considered to be healthy for arriving at optimal decisions"*

cost issue can be obviated by a costs order - the inconvenience is an unfortunate consequence of litigation. There is also a practical benefit of having an intervenor with its own set of pleadings as it means that demarcation disputes are less likely as one knows a priori what the intervenor's case is.

The Commission neither opposed nor supported the application. Although invited to make submissions the Commission's representative declined to do so. In the absence of any opposition from the Commission there seems to be no policy reason for limiting the applicant's right to intervene.

For this reason I am allowing the applicant full rights of intervention provided that it is limited to seeking the relief it has made out in its papers.

I make the following order –

1. The applicant is granted leave to intervene in this matter in terms of Rule 46(2) subject to the following conditions:
 - 1.1. The applicant must file a statement of intervenor's particulars within 10 business days of this order. The intervenor's particulars must comply with the requirements for a complaint referral in terms of rule 15 subject to the necessary changes required by context. The respondents will be entitled to file an answer to the intervenor's particulars and the applicant's to file a reply. The time periods and format set out in Rules 16-17, will apply subject to the necessary changes required by context
 - 1.2. The applicant's relief will be confined to seeking an order contemplated by sub-sections 58(1)(a)(i) and 58(1)(a) (ii) of the Act.
 - 1.3. The intervening particulars do not constitute a separate cause of action and are contingent on the continuance of and the validity of the Complaint referral. Accordingly the intervenor has an interest in the validity of the complaint referral and will be entitled to participate in any proceeding concerning objections to the Complaint referral.
 - 1.4. The intervenor will be liable for the costs of the respondent if the intervention is unsuccessful.
2. The applicant's right to intervene subject to paragraph one above, includes:
 - 2.1. adducing evidence and argument in support of the relief it seeks; and
 - 2.2. taking all said steps as are reasonably necessary to advance the case to be

made in favour of the relief sought by it including:

2.2.1 the cross-examination of witnesses;

2.2.2 the production of documents;

2.2.3 the attendance of pre-hearing conferences;

2.2.4 the participation in any interlocutory applications which affect the relief sought by the First Complainant.

3. Costs of this application are awarded to the intervenor including the costs of an additional legal representative.

Norman Manoim

Presiding Member

Date 4 June 2002.