IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: 105/LM/Dec04

In the matter between: -

Community Healthcare Holdings (Pty) Ltd	**First Applicant**
Cornucopia (Pty) Ltd	**Second Applicant**
and	
The Competition Commission	**First Respondent**
Business Venture Investments No. 790 (Pty) Ltd	**Second Respondent**
Afrox Healthcare Ltd	**Third Respondent**
Brimstone Investment Corporation Ltd	**Fourth Respondent**
Mvelaphanda Strategic Investments (Pty) Ltd	**Fifth Respondent**
African Oxygen Ltd	**Sixth Respondent**

Reasons for Decision

INTRODUCTION

1. The applicants in this manner applied to intervene in the abovementioned merger proceedings. We heard the application on the 8th February 2005, and decided to dismiss the application. Our reasons for this decision follow.

THE PARTIES

2. The first applicant is Community Healthcare Holdings (Pty) Ltd ("Community Healthcare"), a company with limited liability duly registered and incorporated in accordance with the company laws of the Republic of South Africa. The first applicant holds a 43,75% interest in a group called Community Hospital Group (Pty) Ltd ("CHG"). Netcare also owns a 43,75% interest in CHG and the remaining shares are held by management. The first applicant is controlled by historically disadvantaged persons. CHG owns and

operates a number of smaller hospitals.[1] The first applicant also has other subsidiaries that operate in the health sector.
3. The second applicant is Cornucopia (Pty) Ltd ("Cornucopia"), a private company duly registered and incorporated in accordance with the company laws of the Republic of South Africa. The second applicant is a wholly owned subsidiary of CHG. In November 2004 the second applicant acquired shares in Ahealth. The second applicant also owns shares in the Wilgers hospital which is a hospital that is controlled by Ahealth.

4. The first respondent is the Competition Commission, which is cited for its interest in the matter. The Commission indicated that it would not oppose the application.

5. The second to the sixth respondents are the parties to the merger. For simplicity we refer to them collectively as the respondents. The respondents opposed the application.

BACKGROUND

6. On 5 December 2003, a large merger was filed with the Tribunal in terms of which a consortium of firms purchased the entire share capital of AHL. The transaction was made pursuant to a scheme of arrangement in terms of section 311 of the Companies Act, Act No. 61 of 1973.

7. The Tribunal commenced hearings in respect of this merger on 14 July 2004. Prior to the hearing the first applicant, along with several other firms, was recognised as an intervenor in those proceedings and was represented at the hearing by its legal representatives.[2] For convenience we will refer to these proceedings as the "prior proceedings".

8. In the prior proceedings the main issue of concern for the intervenors was the role of Medi Clinic in the prior transaction. Medi Clinic is a major competitor of Afrox and along with Netcare is one of the three major hospital groups in the country. Medi Clinic was 1) to have a 25% stake in the purchaser of Ahealth, called Bidco, 2) to be responsible for much of the financial risk and 3) had entered into a related transaction with Bidco, in terms of which the latter had agreed to sell 2500 of Ahealth's beds to it.

9. The prior proceedings hearings were adjourned in August 2004 and were

1 The transcript is inconsistent on this point, but it seems the number of hospitals is either five or six. Despite the discrepancy it is common cause that CHG is a small to medium sized operator in the hospital sector and considerably smaller than the big three Ahealth, Medi Clinic and Netcare whose operations are characterised by the fact that they enjoy a national footprint.
2 Note that the Tribunal did not have to determine the intervention application in these proceedings, as the merging parties did not oppose them. The intervenors were all represented at this hearing by the same legal team led by Netcare.

scheduled to recommence in September 2004. During the adjournment period various negotiations took place. Eventually the parties decided to reconstitute the scheme of arrangement with Afrox substituting itself for Medi Clinic in the scheme, the introduction of new institutional shareholders, changes to the funding structure, and the cancellation and disavowal of the disposal agreement.

10. During the course of these negotiations certain shareholders of Ahealth brought an application to the High Court alleging that the scheme of arrangement had lapsed. The initial applicants were joined in their application by certain intervenors amongst who was the second applicant in this matter, Cornucopia. All the other applicants and intervenors settled with the respondents in that case (the second, third and sixth respondents in this application) except for Cornucopia. Despite not settling Cornucopia did not pursue the High Court application for reasons that are not explained.

11. The settlement in the High Court applications involved the withdrawal of Medi Clinic from the prior transaction and certain guarantees around the termination and non-renewal of the disposal agreement. It is common cause that these applicants and intervenors in the High Court were funded by Netcare and represented by its attorneys. Again here Cornucopia was an exception and was represented by its own attorneys and counsel.

12. On 6 December 2004, at a pre-hearing in connection with the prior transaction, we were advised that the deal had been restructured, and that at the insistence of the Commission, the deal would be re-notified even though the parties viewed this as unnecessary. The intervenors in the prior proceedings represented by their erstwhile attorneys withdrew.

13. On 11 December 2004, the respondents filed a new merger notification with the Competition Commission. This filing has led to the current proceedings before us today.

14. In terms of this filing the shareholding of the buying entity Bidco is as follows:

- BEECo (comprising Brimstone and Mvelephanda in equal shares) as to 50.2%;
- AOL (the sixth respondent) as to 20.1%;
- Rand Merchant Bank (RMB) as to 10.1%;[3]
- Old Mutual Assurance Co. (South Africa) (OMLACSA) as to 10.1%;
- Industrial Development Corporation (IDC) as to 4.5%; and
- Management as to 5%.

15. At a pre-hearing conference on 25 January 2005 we directed that the

3 Rand Merchant Bank in fact holds this equity through various entities that it controls.

hearing in respect of the present filing proceed on the 10th February 2005. The applicants brought their application on 28 January 2005, and we heard it on the 8 February 2005, in order that the intervention could be determined prior to the commencement of the hearing, since a decision to allow the intervention would have had a bearing on the conduct, and date of commencement of the hearings. During the course of argument we allowed oral testimony from a Mr Dewald Dempers who was the deponent to the founding affidavit on behalf of both the applicants.

GROUNDS FOR THE APPLICATION

16. The applicants have advanced three grounds in support of their application:

> **16.1** The first is that the current proceedings before us are essentially a continuation of the Medi Clinic proceedings and since in respect of the first applicant it had been recognised as a participant then it must be regarded as continuing to be one now.

16.2 The second is that even if the current proceedings are not regarded as part of the original proceedings, they should be regarded nevertheless as a sequel to them, and on that basis again, the first applicant has a sufficient interest to be recognised as a participant.

> **16.3** In the third place it is contended on behalf of both applicants that they have established a sufficient interest to be recognised by the tribunal as a participant in terms of section 53(1)(c)(v) of the Act.

17. We examine each of these grounds separately.

First Ground – In respect of the first applicant that it is already a participant

18. The first applicant has contended in its founding affidavit that:

> "the current proceedings are not in fact fresh proceedings but are a continuation of the proceedings referred to more fully above [the prior proceedings] and *that such proceedings have never been withdrawn and I verily believe and have been so advised, constitute part of the instant proceedings as well."*[4]

19. The first applicant contends that this allegation has not been denied by the respondents. It relies for this on the fact that the respondents had not conceded that they needed to make a new filing.

4 See paragraph 3.18.

20. The fact is that the respondents did and they say so in their affidavits. Once they had made a new filing we have a new merger and the respondents' views on whether they needed to do so are now academic. The new filing created a new jurisdictional fact, one of the consequences of which was that the first applicant would have to bring a new application to intervene.[5] Nor is this just a point of procedure or as applicants' counsel seemed to suggest a mere allocation of new case numbers. The respondents fulfilled the requirements of a new filing in conformity with the Act, including inter alia the filing of a competitiveness report. The Commission investigated the filing and prepared a new recommendation for the Tribunal. Thus both the formalities and substance of a new filing have been met.

21. The current proceedings are therefore not a continuation of the prior proceedings and the first applicant must apply for intervention *de novo*.

Second Ground - In respect of the first applicant that the proceedings now are a sequel to the prior proceedings.

22. In its second ground the first applicant contends that the current proceedings are *"unquestionably a sequel"* to the first. It relies on the fact that the restructured transaction, which is the subject of the current proceedings, is result of the respondents' attempts to mitigate the competition objections in respect of the first proceedings. It argues that since it was an intervenor in the prior proceedings, in which it had raised the very objections which the restructuring seeks to cure, it is entitled to be recognised as an intervenor in these proceedings to satisfy itself that its objections have indeed been met and not been replaced by new ones.

23. In our view if the applicant has these concerns then it must make out a case for intervention based on the necessary factual or legal issues. It cannot rely on history to circumvent the founding of a proper case for intervention. The fact that the current proceedings have a history in the prior proceedings does not obviate the need for the first applicant to make out a case for intervention in terms of section 53(1(c)(v). It would appear that it is precisely because the applicants' case for intervention is so weak that they have relied on the first applicant's alleged inherited rights as laid out in these first two grounds for intervention.

Third Ground - In respect of the first and second applicants that they are entitled to be recognised as participants in terms of section 53(1(c)(v) of the Act.

5 There was some controversy during our hearing as to whether the first applicant had withdrawn as an intervenor at the pre-hearing in December 2004. Whatever the true position is this is irrelevant given the current filing. Even if the applicant had not withdrawn in the prior proceedings this would not afford it locus standi as a participant in respect of the new filing. The prior proceedings have been abandoned and with them any right of participation.

24. This is the applicants' third ground for intervention and is relied upon by both applicants, unlike the first two.

25. Section 53(1)(c)(v) states:

> "*(1) 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:*
>
> *(c) if the hearing is in terms of Chapter 3-*
>
> *(v) any other person whom the Tribunal recognised as a participant."*

26. This section needs to be considered in the light of Rule 46, the Tribunal rule that regulates intervention application. For present purposes we will consider Rule 46(1), which states:

> "**Intervenors**
>
> 1) *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 –*
>
> *a) 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."* (Our emphasis)

27. For convenience we deal with the second applicant's argument first.

The second applicant

28. The second applicant is a shareholder of Ahealth. Curiously it acquired its shareholding in Ahealth in November 2004 after the court had sanctioned the Scheme of Arrangement. This means that the second applicant had purchased its shares in the knowledge that if the conditions to the Scheme were met its shares would be expropriated and it would receive cash instead. It was also after the conclusion of our first hearings into the prior transaction. For this reason we put to Mr Dempers in his testimony that it appeared that

the reason for the shares being purchased appeared to be 'tactical' and he conceded that it did.[6]

29. Counsel contended that the second applicant as a shareholder was thus similarly situated to the IDC, which was recognised as a participant in terms of this section of the Act in a merger in terms of which Anglo American Ltd acquired control of Kumba Resources.[7]

30. In that case, which was the subject of three decisions all of which recognised the IDC's right to participate, the crucial facts were that the IDC, although a minority shareholder in Kumba, the target firm, undertook its investments pursuant to certain statutory goals that are consonant with certain of the concerns that the Tribunal looks at when it considers a merger in terms of section 12A.[8]

31. In addition the IDC had advanced concerns it had with the merger and the economic theories of the merging parties, which it met with a critique from its own experts.

32. The second applicant has failed to make out a case of this quality; in short it has failed to indicate either why the merger if consummated should have an adverse effect on it or on what value it can bring to our proceedings if allowed to intervene. The second applicant then seeks to rely on the case made out by the first applicant in terms of the section. We find that not only is it not similarly situated to the first applicant to rely on these grounds, but also, even if we are wrong on this, given the first applicant's failure to make out a case for participation, the second applicant must fail on the same grounds.

33. Finally the second applicant raised certain issues in correspondence with the Tribunal and the respondents' attorneys.[9] As this correspondence shows these issues relate almost entirely to the Scheme of Arrangement and not to any concern in terms of the Competition Act. They cannot found a basis for the second applicant to intervene.

The first applicant

34. We have found that the first applicant has not made out a case that it is a

6 See Transcript page 68. The explanation for the share purchase appeared to be the not wholly convincing contention that as a shareholder, the second applicant, which has a minor stake in an Ahealth owned hospital, would be able to receive financial reports that it would not otherwise receive. Perhaps the more probable tactical rationale was that as a shareholder the second applicant had the locus standi to oppose the Scheme of Arrangement a course of action that as we have seen earlier the second applicant actively pursued when it became an intervenor in the High Court proceedings to set aside the Scheme.

7 Case No.: 46/LM/Jun02.

8 See CAC decision page 22.

9 See letter to the Tribunal and Commission dated 20 January 2005 and annexure DD4 to the founding affidavit.

credible intervenor and secondly that it will be able to provide any value or assistance to the Tribunal in its deliberations.

35. Although we have evaluated these considerations separately they form part and parcel of the same conclusion when we ask the ultimate question, should we recognise the applicants as participants in these proceedings?

36. The legal approach to intervention applications in mergers has been authoritatively pronounced upon by the Competition Appeal Court (CAC) in the case of Anglo South African Capital (Pty) Ltd and others v Industrial Development Corporation of South Africa and the Competition Commission *CAC Case No.: 26/CAC/Dec02*.

37. In that case Jali JA had to deal with the nature of the Tribunals' discretion to allow a party to participate. The Court held that the test for an applicant to have a "*material interest in the relevant matter"*, the test laid down in Rule 46 of the Tribunal's rules, was not a test required by the Act. The Court pointed out that the ordinary language of the section set out no threshold of interest for a party to participate. In this respect we agree with applicant's counsels' summation of the legal position. This does not mean however that the Court left the Tribunal with an unfettered discretion to allow a party to intervene. To the contrary the Court made it clear that

> *" The discretion must be exercised judicially or according to the rules of reason and justice"* [10]
>
> 38. Thus although the decision appears to recognise an intervention regime in mergers that is more liberal than that provided for in Rule 46(1), that does not mean that the Tribunal is obliged to let in any party who knocks on its door seeking to intervene.

39. The Tribunal must enquire into the question of whether the party applying to intervene will assist it in its inquiry in terms of section 12A. This can be assessed in a variety of ways, which need not all be adumbrated here. The Tribunal must take into account the likelihood of assistance balanced against the consequences of the intervention in terms of the expedition and resolution of the proceeding. If the likelihood of the prospective intervenor assisting the Tribunal's enquiry is doubtful, while the impact of the intervention is more than likely to impact on the expedition of the proceedings, then the Tribunal should decline intervention or curtail its extent.

40. In this application the applicants seek the fullest possible rights of intervention so curtailment has not been possible to consider. This is because the application is contingent on the applicants seeking access to the full record and enjoying rights of further discovery.

10 See CAC decision supra page 25.

41. As Counsel for the applicants expressed it in closing argument:

> "The tender, Mr Chairman and members of the Tribunal, for the first and second applicants to adduce evidence in the proceedings is a hollow one. *With respect, you saw the difficulty that Mr Dempers has in dealing with questions pertaining to the nitty-gritty of the transaction, because he simply doesn't have access to the necessary information and documents. It's a hollow offer to do basically just what Mr Dempers managed to do today and, with respect, would not be proper participation*" [11]

42. The application is thus flawed in its basic premise. It seeks intervention not by establishing the value of the applicants' participation, but to see if they can found a basis to intervene.

43. The entire history of the intervention thus far indicates the applicants' slender and tenuous basis to claim the right to participate.

44. When the merger was noted in December 2004, the Commission approached the first applicant for comment. The first applicant and this was confirmed by Mr Dempers in his oral testimony, indicated that unless they were afforded access to the respondents filings over which claims for confidentiality had been made they were unable to comment.
45. After the Commission had filed their recommendation with the Tribunal the applicants' attorney wrote to the Commission and Tribunal on 20 January 2005, to express concerns about the merger. But these concerns relate primarily to the Scheme of Arrangement - issues that have no bearing on the Competition Act. Significantly the letter was written only on behalf of the second applicant, and no mention is made of the first applicant and its prior history as an intervenor in the first proceeding, a matter made much of when the application was argued before us.

46. At the pre-hearing on 25 January 2005, the applicants' attorney was present and announced that he appeared on behalf of the second applicant. Again no mention was made of the first applicant. On the following day the applicants' attorneys wrote to the respondents attorneys. Once again they write in the name of the second applicant albeit that it is described as a subsidiary of the first. The letter, which contains a series of interrogatories to the respondents' attorneys, again raises no concerns relevant to the Competition Act.[12]

47. Only when the application is brought does the interest of the first applicant manifest itself. When asked about this anomaly Mr Dempers said that there

11 See transcript page 104.
12 See Annexure DD4 to the founding affidavit.

might have been confusion with issues that were being raised with the SRP where only the second applicant had locus standi. Whether this is so or not is hard to fathom, but it does illustrate that the applicants have either failed to properly apply their mind to the question of what their Competition Act concerns are or that as the respondents suggest that they have an ulterior commercial purpose for their application.

48. Nor is the application even with the inclusion of the first applicant any more enlightening. As the respondents have pointed out the application is in large part a verbatim repetition of the intervention application it made during the first proceeding. That proceeding was premised on concerns over the role of Medi Clinic in the transaction. Given its stated absence in the present one, the applicants have not succeeded in applying their minds to the changed circumstances. Where in the few parts the present application contains some original material it goes no further than repeating stock phrases in the Act without explaining why they are relevant to the case for intervention it seeks to make.

49. The applicant cannot invoke the machinery of the Act merely by parroting its phrases.

50. Given the vagueness of the founding affidavit and the unsatisfactory replying affidavit, which did nothing to address the serious criticisms raised by the respondents in their answering papers we allowed the applicants chief executive officer Mr Dempers, who was the deponent in the papers, to give oral testimony.

51. Essentially he addressed two grounds of concern.
52. The first was that the applicant as an empowerment firm in health sector and a small business was uniquely situated to make a contribution to the hearing. But when pressed as to what harm the merger had for empowerment Mr Dempers was forced to concede that if Afrox was considered an empowerment firm that would hurt the first applicant, as it would lose the competitive advantage of its empowerment credentials.

" Mr Dempers: *The only reason which made it possible for us up to now to survive, was the fact that the bulk of the small independents at the moment had all enjoyed empowerment status and that gave us a competitive advantage…Should the Bidco transaction happen, I don't think our empowerment status will be a competitive advantage to us anymore and it will be difficult for us to compete going forward. So it can lead to the demise of the small and medium players in the industry."*[13]

53. It is later on put to him pertinently in cross-examination that the real threat to the first applicant was that there would be another empowerment entity

13 Transcript page 64

entering the market. His answer is:

Mr Dempers: "*Sir again, just a new empowerment entrant into the market of their size is definitely going to be a threat. I will consent to that. So that's why it is important for us to ensure that that is the only advantage and the only benefit that that participant will enjoy in the market and no other benefits or relationships or control or influence and that's basically why we are here.*"[14]

54. This, as Mr Subel for the respondents points out is not a concern for a genuine interest in terms of the Competition Act, but is about the first applicant's own commercial interests. The Act in section 12A(3)(c) states, (the relevant public interest that the first applicant invokes) that the Tribunal must have regard to the effect the merger will have on the ability of firms controlled or owned by historically disadvantaged persons to become competitive. It does not require the competition authorities to insulate them from competition from other firms that can claim to be owned or controlled by historically disadvantaged persons.

55. The second ground was the relationship of Medi Clinic to the present merger. Here Mr Dempers contended that it was possible that Medi Clinic still had some interest in the present transaction by way of a common shareholder Remgro. It is common cause that Remgro control Medi-Clinic through a 52% holding and also have a 10% stake in the First Rand Group. First Rand subsidiaries, through RMB, will hold about 10% of the equity in Ahealth in the present transaction. However, when it was put to him by Mr Subel that Medi Clinic was entirely excluded from the transaction, Mr Dempers conceded that if that were the case, he would not have a problem with the transaction. He persisted however, in saying that the real decisions are not made at the Medi Clinic level, but higher up the ladder. Mr Dempers when further pressed was not able to elaborate on what this might be, but insisted that he be allowed to be part of those investigations.

56. Mr Dempers' evidence in no way bolstered the application; rather it demonstrated that when sweeping claims were probed the applicants could offer no more than speculation.

57. Unlike in the IDC case the applicants have neither showed that they have useful information about the transaction, indeed their knowledge in many instances was deficient, nor any useful areas of enquiry nor a theory of competition or public interest harm. At best the applicants raise issues that the

14 See transcript page 66.

Tribunal is in as good a position to probe (such as those that relate to the public interest), or are issues that are relevant to the structure of the market as a whole and are unrelated to the present merger. Expressed differently the applicants' problems with the market are as relevant to the market pre-merger as they are post merger and hence not being merger specific, are not relevant to the case in *casu*.

58. For this reason the applicants have not made out a case for why they should be recognised as participants. If we were to recognise them it would not be on the basis that they would prove of assistance, but only that perchance they might discover some gem that has thus far eluded all others. This is not a sufficient basis to allow the application especially when weighed against the prejudice to the respondents who on the eve of their hearing have an expectation that it will proceed.

59. The application is dismissed.

COSTS

60. We have decided not make an order of costs. Given the importance we attach to the need for parties to intervene it would be counterproductive to make an adverse costs award, as this would chill intervention. If on the other hand an applicant is shown to be male fide or vexatious we may consider otherwise.

61. Although the history of this matter shows that the applicants may have other objectives in seeking intervention, and the respondents have cast doubt on their true motives, we would need much greater proof before we could make a finding of bad faith.[15]

_____ **16 February 2005**

Norman Manoim **Date**

Concurring: ***David Lewis and Thandi Orleyn***

For the Intervenors:	Adv. Allan Nelson SC and Adv. Allan Coetzee instructed by *Rothbart Inc*.

For the 2nd to the 6th Respondents:	Adv. Arnold Subel SC and Adv.

15 In the answering affidavit Mr Hogben the Chief Executive Officer of AOL describes the application as " – an opportunistic attempt by a competitor to thwart a transaction which it recognises will render the relevant market not less but more competitive. (Page 52 of the Record)

RM	Pearse instructed by Edward Nathan Corporate Law Advisers.