REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 47505/2013

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

22/8/14
DATE

JUDGE LKE MATOJANE

In the matter between:

NETCARE HOSPITALS (PTY) LTD	Applicant
And	
KPMG SERVICES (PTY) LTD	1st Respondent
THE COMPETITION COMMISSION OF SOUTH AFRICA	2nd Respondent

DRAFT JUDGMENT

MATOJANE J

Introduction

[1] In this matter, the Applicant, Netcare Hospitals (PTY) Ltd *("Netcare")* seeks interim relief from the Court that is aimed at, *inter alia,* interdicting the first respondent, KPMG Services (PTY) Ltd *("KPMG")* from acting as a service provider for the Competition Commission *("Commission")* in the course of the market inquiry into private health care that has been initiated by the Commission.

[2] Netcare contends that KPMG's conduct in tendering, negotiating terms and / or accepting an appointment to act as the Commission's service provider, while being employed by Netcare in respect of the same subject matter and being privy to confidential information at the heart of Netcare's business that is clearly relevant to the market inquiry, constitutes a breach of its fiduciary duty of loyalty to Netcare and placed it in an untenable conflict of interest.

[3] Netcare contends that KPMG is in possession of information that is confidential to Netcare *("Netcare-information"),* that its confidential information remains at risk of disclosure or, has already been disclosed to KPMG's Commission team or to the Commission itself – or that its information has been or will be relied upon by KPMG's Commission team to the detriment of Netcare in the course of the market inquiry.

[4] According to KPMG its employees who worked for Netcare did not deal with the content of Netcare's information. They did not perform analysis or consulting functions, they are information technology professionals who dealt

with the digital reproduction and presentation of Netcare's own information using sophisticated software programmes to generate tables, models and other pictorial representation for Netcare's own internal consumption.

[5] The Commission for its part contends that the relief sought by Netcare, if granted, will have a direct impact on the ability of the Commission to discharge its constitutional and statutory mandate in relation to the conduct of the market inquiry. The Commission states that KPMG was the only firm that bid for the tender and it is unlikely that the Commission would be able to obtain a service provider with comparable expertise and resources that does not represent, or has never represented any other stakeholder in the market inquiry. The Commission further states that the delay in engaging KPMG's services will jeopardise the Commission ability to its published deadline as the Act requires the Commission to stipulate a deadline for the market inquiry in the Government Gazette, it has already published the deadline as 30 November 2015, two years from the date of publication of the terms of reference and has already undertaken preparatory work for the inquiry and has already lost more than seven months in which it ought to have been conducting the market inquiry as a result of this litigation.

The parties

[6] Netcare operates a private hospital network in South Africa, comprising 55 owned hospitals (including private facilities forming part of Public-Private partnerships). Netcare has 9266 registered hospital beds; approximately 338

operating theatres and 85 retail pharmacies.

[7] The first respondent, KPMG Services (PTY) Ltd (*"KPMG"),* is a multi-national firm of accountants, auditors and providers of business services. KPMG is a member firm of the KPMG network of independent firms affiliated with KPMG International Cooperative, a Swiss Entity. The KPMG network is one of the world's leading providers of audit, tax and advisory services. It operates in 152 countries.

[8] Domestically, KPMG is one of South Africa's largest professional advisory firms It has 11 offices around South Africa and employs a total of 3 300 professionals. Separate units such as KPMG BIU and the KPMG healthcare unit have separate income statements and budgets.

[9] KPMG was the only bidder to render specialist expertise in health economics, health System and actuarial services to the commission in the healthcare enquiry. The KPMG healthcare unit has partnered with the University of Witwatersrand, NMG Benefits Actuaries, Competition law practitioners and healthcare economic advisors to render services to the Commission.

[10] The second respondent is the Competition Commission of South Africa (*"Commission"*). It is a statutory body constituted in terms of the Competition Act, No 89 of 1998 and is empowered to investigate, control and evaluate restrictive business practices, abuse of dominant positions and mergers in order to achieve

equity and efficiency in the South African economy. The Commission is cited as a party to this action and it has made common cause with KPMG in opposing the relief sought by Netcare.

Background

[11] On 28 November 2013, the Commission gave notice in the Government Gazette[1] that it intended to conduct a "*market inquiry*" into the private healthcare sector in terms of Chapter 4A of the Competition Act 89 of 1998 (*"the Act"*) and section 27(2) of the Constitution. The inquiry commenced on the 6th January 2014. The Commission has chosen to conduct the inquiry through an independent panel of experts chaired by former Chief Justice Ngcobo who is assisted by four eminent experts in the field. A team of Commission staff members and external consultants supports the panel. The services of KPMG were procured to provide expert, technical and administrative support to the Commission during the enquiry. Netcare seeks to bar KPMG from working for the Commission, because KPMG's Business Intelligence Unit (the *"BIU"*) provided IT services to Netcare between September 2010 and 26 September 2013 and gained access to Netcare's confidential information in doing so.

[12] Netcare launched the first urgent application on 18 October 2013 seeking *inter alia*:

"1. An interdict against KPMG to prevent it from disclosing to the Commission '*any*

[1] Gazette 3/1348.

of the information, data, reports, correspondence or any other material pertaining to or belonging to [Netcare] or work product generated by KPMG in the course of Netcare's engagement of KPMG, which is currently in the possession of KPMG....'.

2. Removal of Netcare's information from KPMG's IT System and sterilization of such information (or in the alternative, safeguarding and securing of the information).
3. Directing an IT firm to investigate KPMG's IT System in order to establish who within KPMG had had access to Netcare's information.
4. Directing KPMG to provide affidavits by the KPMG healthcare unit stating that they have not received and would not receive the Netcare information (or have any discussions with any KPMG employee who has the Netcare information)."

[13] On the 23 December 2013, as a result of an agreement between Netcare and KPMG, this Court made an Order, by consent, against KPMG *("the Consent Order")* interdicting KPMG, *inter alia* from disclosing or using any information which had come to it from its employment by Netcare in three separate engagements to provide certain services to the Commission. The Order further sets out a detailed procedure for the investigation of Netcare's information on KPMG information technology System. The investigation was to be carried out by an independent IT expert who was to establish which of KPMG's employees or contractors had had access to Netcare information.

[14] In terms of the Order, Netcare's information in electronic form was to be copied from KPMG's IT System, including those of its contractors, and returned to Netcare on a hard-drive or other form of electronic storage. That after the IT experts had accessed the IT System to determine which employees or contractors had had access to Netcare information on that IT System, KPMG

was required to delete the information form its System. The Order also required KPMG to obtain from its employees and contractors affidavits in certain defined forms containing confirmations about their knowledge of and access to Netcare information.

[15] Pursuant to the Order, Stroz Friedberg, an IT firm based in the United Kingdom, was appointed to carry out the IT forensic functions listed in the Order. It was nominated by Netcare and appointed by Werksmans Attorneys. It began its task on 11 November 2013 and completed the first phase of its work on 29 November 2013. What it was required by the Consent Order to do was:

- "Establish which KPMG employees, contractors or consultants had access to Netcare information or Norton's letter of 4 October 2013; and
- Draft an initial report which contains this information and the dates on which access was had, as well as the information which had been accessed."

[16] KPMG gave Stroz Friedberg unrestricted access to its IT System in line with the Order. On 12 November 2013, Stroz Friedberg asked KPMG for the names of persons *"connected with Netcare and KPMG's work with Netcare, pertinent to the Order"*. Stroz Friedberg chose to limit its investigation to those individuals and server locations identified by KPMG as being potentially relevant to the investigation.

[17] Stroz Friedberg did a keyword search on KPMG Systems and on the devices of all of the team members and came out with sixty thousand hits. The

hits could not tell whether any one of those documents constituted Netcare information as defined in the Order. The list included the names of all individuals identified by KPMG as having worked in those projects, others believed to have worked on Netcare matters, the names of selected Netcare entities and subsidiaries; the names of selected Netcare consultants; the names of selected Netcare staff and personnel teams. The documents so identified are the so-called *Responsive Documents* (because they responded to the keywords chosen by Stroz Friedberg). The responsive documents were listed on spreadsheets, which Stroz Friedberg called "logs" and sent to Werkmans, by secure file transfer. All documents which came from laptops, cellphones and memory sticks of individuals investigated by Stroz Friedberg were saved on a *"Responsive drive"* and handed to Werksmans for safe-keeping.

[18] Stroz Friedberg produced a preliminary report dated 29 November 2013. It stated in its report that it could not be sure that there were no other network locations, servers or individuals where Netcare information may be found. It further conceded that its approach would have resulted in *false positives*. Between 29 November 2013 and 5 December 2013, KPMG delivered the affidavits required by the order.

[19] On the 12 December the parties agreed that Stroz Friedberg should return to South Africa to identify Netcare information among the materials already produced by Stroz Friedberg. Stroz Friedberg arrived in South Africa on the 17 December 2013 and spent a week at Werkmans's offices where they gained

access to the responsive drive. On 9 January 2014 KPMG addressed a letter to Netcare recording its position that Stroz Friedberg had not done what was contemplated in the Order as the *"Deliverable hard drives"* provided by Stroz Friedberg after finishing at Werkmans offices included information which is confidential to KPMG, confidential to KPMG's other clients and in all probability, information created in respect of the health care inquiry.

[20] Stroz Friedberg issued another report on 14 January 2014 in which it confirmed that it has concluded its analysis for the purposes of 5.2.2 and 5.2.3 of the Order as far as it is able. The report stated that:

> "Stroz Friedberg does not have specific knowledge of the nature of the information that is the subject of the Order... Stroz Friedberg is not in a position to determine whether material responsive to Netcare keywords... is in fact *'Netcare information'*."

[21] On 15 January 2014 KPMG proposed that Netcare should furnish Stroz Friedberg with the list of Netcare's confidential documents, which Netcare mentioned in paragraph 35 of its founding affidavit for Stroz Friedberg to re-access the relevant drives with that information to better identify the "Netcare information. Netcare rejected the proposal and for the first time raised the argument that KPMG should have identified Netcare information. On 16 January 2014 KPMG told Netcare that it has no option but to remove and sterilize all *"Netcare related information"* from its IT system. It would stow the information so removed in a secure location. KPMG proposed to access the responsive drives and logs in order to carry out the proposed sterilization. Netcare objected to the

sterilization or removal of any Netcare information from the KPMG IT System.

[22] On 21 January 2014, KPMG invited Netcare's IT expert to monitor the sterilization process to satisfy itself that no metadata would be destroyed, Netcare rejected the proposal and stated that it would not allow KPMG to be provided with the passwords to the responsive drive and logs until KPMG confirms that it would not engage in the sterilization process. KPMG proceeded to appoint an independent expert (Cyanne) to oversee the sterilization process, which commenced on 29 January 2014.

The amended relief sought by Netcare

[23] Netcare contends that KPMG has failed to comply with the Order in any material respect and now seeks in its amended relief a range of final orders declaring that KPMG breached the Consent Order. It contends that an affidavit that does not accord exactly with paragraph 6.2 of the Consent Order is in breach of the Order (prayers 3.1 and 3.4). In prayer 3.5 Netcare contends that KPMG's breached paragraph 3 of the Consent Order by not *"furnishing Netcare's information"* to Werksmans within 20 days and paragraph 5.2 of the Consent Order by preventing and / or frustrating Stroz Friedberg from establishing which persons had access to Netcare information.

[24] In prayer 4 Netcare seeks a declaration that any person who fails to provide an affidavit as required by the Order cannot work on the inquiry as part of KPMG's Commission team. Prayers 5 to 10 provides for a verification process

under the order, this will entail a process whereby a further IT firm would scrutinize hard drives prepared by KPMG in order to determine whether there is any Netcare information in them. Netcare would also have immediate access to these hard drives. In addition, further hard drives would be prepared based on searches of the electronic devices of those persons whom Netcare contends should have provided affidavits as well as Professor Van den Heever.

[25] Paragraph 11 is for an interim barring out order preventing KPMG from acting for the Commission in the market inquiry. Prayer 12 seeks various orders for the further conduct of the case, it seeks an order that seven days after the verification process and after receiving the reports referred to in paragraph 6 to 8 Netcare should give notice to the Respondents stating whether the relief set out in PART B will be sought in motion proceedings on the present papers duly supplemented or whether Netcare intends to seek an order referring any limited issues to be determined by the hearing of oral evidence, and to specify those issues.

Relevant statutory framework

[26] Section 43B of the Competition Act, 1998 (*"the Act"*) empowers the Commission to initiate a market inquiry. A market inquiry is defined in section 43A of the Act as follows:

> "*'Market inquiry'* means a formal inquiry in respect of the general state of competition in a market for particular goods or services, without necessarily referring to the conduct or

activities of any particular named firm."

[27] Section 43B (1) of the Act empowers the Commission to conduct an inquiry on its own initiative or in response to a request from the Minister of Economic Development:

> "(i) if it has reason to believe that any feature or combination of features of a market for any goods or services prevents, distorts or restricts competition within that market; or
>
> (ii) to achieve the purposes of this Act."

[28] The constitution[2] in section 27 guarantee everyone access to healthcare. The state is obliged under section 27(2) to take measures to promote and fulfill that right of access to healthcare. The healthcare inquiry is such a constitutional measure. Section 3 of the Terms of Reference of the Inquiry states:

> "Access to health care services is enshrined in the Constitution of the Republic of South Africa as a fundamental human right. Section 27(2) imposes an obligation on the state to take reasonable measures to achieve the progressive realization of this right. Private healthcare provision takes place within the context of this constitutional commitment to the provision of universal healthcare services to all people in South Africa. One of the stated objectives of the Act[3] is to provide consumers with competitive prices and choices."

[29] The Terms of Reference set out the purpose of the market Inquiry as follows:

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[2] 1996 (Act No. 108 of 1996).

[3] Section 2(b).

- "To conduct an analysis of the interrelationship between various markets in the private healthcare sector, including examining the contractual relationships and interactions between and within the health service providers, the contribution of these dynamics to total private expenditure on healthcare, the nature of competition within and between these markets, and ways in which competition can be promoted;
- To assess the impact of Commission's interventions in private healthcare through enforcement action and merger regulation; including any impact this has had on prices, bargaining mechanisms consolidation and competition in the healthcare sector;
- To inquire into the nature of price determination in the private healthcare sector In South Africa; and
- To establish a factual basis for recommendations that support the achievement of accessible, affordable, high quality, and innovative private healthcare In South Africa."

[30] The main objectives of the market inquiry are evaluative in nature. The objectives are to:

- "Evaluate the nature of price determination in private healthcare with reference to;
  - the extent of competition between different categories of providers and funders;
  - the extent of countervailing bargaining power between different providers and funders; and the level and structure of prices of key services, including an assessment of profitability and costs;
- Evaluate and determine what factors have led to observed increases in private healthcare prices and expenditure In South Africa;
- Evaluate how consumers access and assess information about private healthcare providers, and how they exercise choice;
- Conduct a regulatory Impact assessment that reviews the current regulatory framework and identify gaps that might exist. Examples include the Interpretation of Prescribed Minimum Benefits (*'PMBs'),* the introduction of a risk equalization fund etc.;
- Make recommendations on appropriate policy and regulatory mechanism that would support the goal of achieving accessible, affordable, innovative and

quality private healthcare; and Make recommendations with regard to the role of competition policy and competition law In achieving pro-competitive outcomes in healthcare, given the possibly distinctive nature of the market."

[31] In explaining its rationale for holding the healthcare market inquiry, the Commission states in the terms of reference that:

"Access to health care services is enshrined in the Constitution of the Republic of South Africa as a fundamental human right. Section 27(2) imposes an obligation on the state to take reasonable measures to achieve the progressive realization of this right. Private healthcare provision takes place within the context of this constitutional commitment to the provision of universal healthcare services to all people in South Africa.

The latest CMS annual report indicates that 8.7 million South Africans were serviced by the private healthcare sector during 2012. The 2012 General Household Survey indicates that users of private healthcare facilities were largely satisfied with the service they receive in the private sector. However, prices in the private healthcare sector are at levels which only a minority of South Africans can afford, evidenced by the small share of the population with access to private healthcare. Various concerns have indeed been raised about the functioning of private healthcare markets in South Africa as a result Of the fact that healthcare expenditure and prices across key segments are rising above headline inflation. These increases in prices and expenditure frame the Commission's inquiry into the sector.

Various explanations have been put forward to explain the above-inflation increases in prices in private healthcare. These explanations range from information asymmetries and distorted incentives Inherent in healthcare markets, though varying degrees of market power at different levels of the value chain, to changes in utilization. Given the large number of possible explanations tor these Increases, there is a need to an inquiry into the factors that drive the observed increases in private healthcare expenditure and prices in South Africa. The market inquiry into private healthcare will evaluate the various explanations for cost, price and expenditure Increases In the private healthcare sector and will identify competitive dynamics at play, through this analysis, the inquiry aims to identify all factors that prevent, distort or restrict competition, Including any evidence of market failure, regulatory failure or competition concerns. This will provide a factual basis upon which the Commission can make evidence based recommendations that serve to promote

competition in the interest of a more affordable, accessible, innovative and good quality private heath-care."

[32] The scope of the inquiry includes the funders of healthcare, health professionals, hospital-based services, non-hospital based services, pharmaceuticals, medical devices and the regulatory framework. The legislature has granted the Commission broad powers of summons and subpoena in relation to market inquiries. Section 49B (3) of the Competition Act makes section 49A of the Competition Act applicable in the context of market inquiries. Section 49A of the Competition Acts states:

"(1) At any time during an investigation in terms of this Act, the Commissioner may summon any person who is believed to be able to furnish any information on the subject of the investigation, or to have possession or control of any book, document or other object that has a bearing on that subject—

(a) to appear before the Commissioner or a person authorised by the Commissioner, to be interrogated at a time and place specified in the summons; or

(b) at a time and place specified in the summons, to deliver or produce to the Commissioner, or a person authorised by the Commissioner, any book, document or other object specified in the summons.

(2) A person questioned by an inspector conducting an investigation, or by the Commissioner or other person in terms of subsection (1), must answer each question truthfully and to the best of that person's ability, but the person is not obliged to answer any question if the answer is self-incriminating.

(3) No self-incriminating answer given or statement made to a person exercising any power in terms of this section is admissible as evidence against the person who gave the answer or made the statement in criminal proceedings, except in criminal proceedings for perjury or in which that person is tried for an offence contemplated in section 72 or section 73 (2) (d), and then only to the extent that the answer or statement is relevant to prove the offence charged."

Section 43C (1) of the Act provides:

> "(1) Upon completing a market inquiry, the Competition Commission must publish a report of the inquiry in the Gazette, and must submit the report to the Minister with or without recommendations, which may include, but not limited to—
>
> (a) recommendations for new or amended policy, legislation or regulations; and
>
> (b) recommendations to other regulatory authorities in respect of competition matters."

[33] Section 43C(2) of the Act empowers the Commission to utilize any information that it obtains pursuant to a market inquiry to initiate a complaint against a subject of a market inquiry, or to refer a complaint directly to the Competition Tribunal for adjudication and the imposition of an administrative penalty.

The facts

[34] It is necessary to set out the facts in detail. Between March 2008 and September 2010 Lara Wayburne, an actuary who was then in the employ of Deloitte & Touché, provided services to the Hospital Association of South Africa (HASA). Between May 2010 and October 2010 Wayburne whilest in the employ of Deloitte also provided services to Netcare in relation to tariff modeling, in providing this services, she was furnished with confidential information by Netcare and by other four major hospital groups in South Africa.

[35] The information obtained from Netcare is relevant to the healthcare inquiry as it relates to Netcare's costs, margins and pricing. Upon leaving Deloitte,

Wayburne relinquished her laptop from which she accessed the information she received. She cannot recall any of the granular data about her engagements given its vastness and the time that has passed since that project and the many other data sets to which she has been exposed to since the project. The contract between HASA and Deloitte, which governed the relationship expressly, permitted Deloitte to perform work for competitors and conflicting parties.

[36] On 12 September 2010 Netcare's business intelligence unit (*"BUI"*) subcontracted FIOS (PTY) Ltd, a boutique IT services provider as well as software reseller to provide business intelligence services to Netcare. The FIOS team included Mr. Wayne Macmillan, Ms. Christa Smith and Mr. Serge Vika di Panzu. On 1 March 2011, KPMG purchased FIOS (PTY) Ltd and employed the FIOS employees who had been working on Netcare's projects. The former FIOS employees were located in a new unit formed within KPMG known as the Business Intelligence Unit (*"the BIU"*). The BIU employees are not management or strategy consultants; they are qualified in information technology. Netcare followed as a client and concluded a new consultancy agreement with KPMG on the 11 December 2012 in terms of which KPMG BIU was appointed to provide professional services to Netcare. Clause 2 of the agreement provides:

> "The objectives of this engagement are to assist Netcare Hospitals (Pty) Ltd (*'Netcare'*) to carry day to day business intelligence requirements. These requirements are provided by the various business modules within the company.
>
> The following tasks are to be performed:
>
> - IBM cognos: Create/Update Models, create/update cubes and Create

/update reports.

- Microsoft SQL: Create DTS packages to update data. Create SSRS reports and create Analysis services cubes.
- Ad Hoc queries: Analyse data and provide answers to ad-hoc business queries with a combination of SQL scripting and Excel outputs."

The scope of the engagement was to:

"a. Develop SQL scripts to retrieve your data stored in MS. SOL Server and SAP HANA for your further use in report generation;

b. Create DTS or SSIS packages in order [to] upload data from various sources, for reporting purposes;

c. To create or update reports using IBM Cognos' reporting tools; including cube and model creations;

d. To create or update reports using Microsoft SSRS; including cube and model creations."

Clause 10 limits the scope of the engagement, it provides:

"This agreement will not be performed by us in the capacity as a Registered Auditors and does not constitute an audit or review..."

[37] KPMG and Netcare concluded several formal engagement letters, all subject to KPMG's terms and conditions. In terms of KPMG's standard terms and conditions KPMG acknowledged in clause E8 that it might receive confidential information about Netcare's business in the scope of providing the services set out above. KPMG undertook not to disclose Netcare's confidential information to any third party. Clause E9 deals with the treatment of confidential information and provides:

"To improve our understanding of clients and their business, to develop our intellectual capital and for purposes of internal review and quality control, applicable professional standards and best practices, we shall be entitled to share all confidential information with KPMG International and its member firms. The party receiving this information will be obliged to comply with the Confidentiality obligations with respect to such information in accordance with Clause 8."

[38] In Clause 37 KPMG expressly reserved the right to share internally any confidential information received from Netcare, it provides that:

"We process your data and information using our communication, knowledge management and computer systems and our information technology facilities. Consequently, we might transfer your data and information, including confidential information, across national and international borders and process or store it electronically and in remote locations."

[39] Clauses 46 to 49 of the standard terms and conditions deals with potential conflicts of interest and confirms that KPMG would not be barred from serving *"conflicting"* parties on the basis of its receipt of confidential information. They provide:

"46. The Engagement team may know of information, either personally or from Colleagues, that is confidential to another client of KPMG. The Engagement team is not required to use or disclose that information to you.

47. KPMG people may be delivering or be approached to deliver services to other parties whose interests compete or conflict with yours ('*Conflicting parties*').

48. KPMG people are free to deliver services to Conflicting parties, except if prevented from doing so in terms of the Law. ['*Law*' is defined as the law of the Republic of South Africa, which is and will be the law that will govern all aspects of the Service contract (as defined below) and all aspects of the relationship between you and us.]"

[40] In July 2012 Van Der Avoort was seconded from KPMG in the

Netherlands to assist KPMG in the development of its then new healthcare unit. During November 2012 Van der Avoort filled in for a colleague at a KPMG business development meeting. In the course of this meeting Van der Avoort met Smith who was also attending the meeting. Smith informed him that she had previously been involved in providing business intelligence work at Netcare. Van der Avoort expressed interest in presenting to Netcare a reporting tool called Qlikview which had been developed for a Dutch hospital and in which he had had some involvement.

[41] Smith forwarded to Van der Avoort by email examples which she had available in her folder of the types of reporting done for Netcare. The examples were from 2011 or earlier as she stopped working for Netcare in 2011.

[42] On 12 November 2012 Smith, Van der Avoort and Byl met with Windell of Netcare for the purpose of discussing the Qlikview reporting tool. Windell contends that he shared particular types of information and projects that were important to Netcare's business with KPMG during this meeting. Neither Byl nor Van der Avoort recalls him having done so.

[43] Van der Avoort needed more information for purposes of understanding Netcare's business intelligence needs and therefore asked Smith whether there was anyone at KPMG presently doing work for Netcare to whom he could speak. Smith arranged for Van der Avoort to meet Vika di Panzu and they met on 22 March 2013. The meeting lasted for about 45 minutes. Van der Avoort and Vika

di Panzu discussed the kinds of reporting that Netcare required and whether Qlikview would be useful to Netcare. They did not discuss the actual data or the content of the reports, only the kinds of reports produced and the manner in which they were presented.

[44] Prior to October 2013, Christa Smith and Vika di Panzu provided business intelligence services to Netcare, which involve in the main, technical and information technology assistance regarding the digital reproduction and presentation of financial and operational information. Christa Smith is a certified developer of software known as IBM Cognos. Vika di Panzu's qualification is a National Diploma in Computer System and a Bachelor of Technology in Computer systems. They are both data software specialists and have no healthcare expertise; they have no involvement in the healthcare inquiry and their team is distinct and separate to the healthcare team. Christa Smith's involvement ended during October 2013 and Mr. Vika di Panzu was the only KPMG employee rendering services to Netcare. He was seconded to Netcare by KPMG for approximately two to three days a week; he had access to Netcare's offices by way of an access card that was given to him.

[45] Mr. Vika di Panzu performed technical functions for Netcare that required a very high level of technical expertise. He worked on his KPMG laptop at Netcare that he used to access raw data in Netcare's data repositories transform it and load it onto reports or "*dashboards*" using sophisticated software. Mr.Vika di Panzu saved work product for Netcare on his laptop. According to KPMG its

laptops are set up to prevent anything being saved from a client's system onto KPMG's servers. The only way in which Mr. Vika di Panzu's work was stored on KPMG servers was by way of backups of KPMG's email servers. All his emails to and from Netcare pass through KPMG e-mail server where they are stored and are access controlled.

[46] On the 30 April 2013, Netcare concluded a separate consultancy agreement with KPMG in relation to a project to perform an external quality assessment of the internal audit function of a company in the Netcare group. Mr. Paresh Lalla, a director of KPMG's internal audit unit based in Pretoria did the work assisted by three team members; the other KPMG personnel referred to in the application are located in Johannesburg. The scope of their engagement was, *inter alia to "Evaluate the internal audit department against ILA attribute standards. This will be done by utilization of the KPMG Methodology in analyzing the three core areas, being People, Positioning and Processes*[4]*".* Mr. Lalla's team did not have any access to business or financial information of Netcare. Their work product was their work papers and a report produced for Netcare. According to Netcare their auditing functions exposed them to confidential information pertaining to Netcare.

[47] On 10 May 2013 the Commission invited tenders to "*...assist the Commission with planning, data collection, technical analysis, compilation of issue statements, and drafting of recommendations and other reports that may*

[4] clause 3 Engagement letter for the External Quality Assurance of Review of Netcare dated 30 April 2013.

be required during the conduct of the market inquiry". The healthcare unit decided to assemble a team of in-house and outside experts in order to submit a bid in response to the tender invitation. Byl approached Wayburne to assist. Wayburne met with members of the healthcare unit on 17 May 2013 to consider the terms of reference, which had been published and assisted in formulating a bid proposal based on those terms of reference.

[48] At Netcare's request, on 26 July 2013, KPMG provided an addendum to the confidentiality provisions of the terms of engagement regulating the relationship between KPMG and Netcare. This addendum sought to raise the confidentiality obligations on the part of KPMG in view of the nature of the work it was performing for Netcare in relation to the market inquiry. KPMG accepted that the document it produces in relation to the market inquiry was to be market as legally privileged. Mr. Vika di Panzu was thereafter engaged to assist Netcare in preparations for the healthcare inquiry (in a project which Netcare code-named Project Kotov).

[49] According to Netcare, Vika di Panzu was in so doing, party to legally privileged, commercially and competitively sensitive and strategic discussions relating to the enquiry as well as Netcare's approach to and strategy for that inquiry. Netcare avers that KPMG agreed to this further engagement by Netcare without disclosing to Netcare that it was simultaneously applying to be appointed by the commission to inquire, *inter alia*, into Netcare. Netcare further avers that e-mails regarding Netcare's preparation for the inquiry sent or received by Mr.

Vika di Panzu caused Netcare-information to be stored on KPMG's servers. Vika di Panzu was the only KPMG employee who performed any work in relation to Project Kotov.

[50] In its founding affidavit, Netcare states that it became aware *"through rumors and a series of enquiries"* that KPMG would tender or was tendering for the assignment in the healthcare inquiry. On 26 August 2013 and 5 September 2013 Netcare wrote letters to KPMG in which it informed KPMG that it was aware that KPMG had tendered to serve the Commission in the upcoming healthcare inquiry and that this will give rise to a conflict of interest. KPMG respondent on 26 September 2013 that it wished to terminate its engagement with Netcare with immediate effect without giving the required 30 days notice. On 3 October 2013 Netcare indicated that it would not waive the 30 days notice period and recorded that *"it was evident even prior to KPMG purporting to terminate its current mandate with Netcare, KPMG was engaged in discussions and communications with the Competition Commission..."*

[51] As a result of Netcare's letter of 26 August 2013, KPMG wrote to the Commission on 28 August 2013 and advised it that Netcare perceived there to be a conflict of interest in KPMG acting for the Commission. On the same day KPMG replied to Netcare letter of the 26 August 2013 stating that it would ensure that there are appropriate mechanisms in place to facilitate the protection of each client's interest e.g. separate engagement teams, no sharing of any information between the teams whatsoever etc.

[52] On receipt of the Netcare's letter of the 26 August 2013 KPMG instructed the BIU not to share any information, which they may have received from Netcare with the healthcare unit or anyone else and the healthcare unit was also given similar instructions.

[53] On 4 September 2013 the Commission notified KPMG that its bid had been successful and on 5th September 2013 Netcare responded to KPMG's letter of 28 August and accused KPMG of *"switching sides"*, breaching fiduciary duties owed to Netcare and acting in conflict of Netcare's interest. Netcare demanded that KPMG withdraw its tender to the Commission.

[54] On 25 September 2013 KPMG in response to Netcare's concerns instructed Vika di Panzu to delete from his laptop computer any and all files and emails which related to his work for Netcare. KPMG removed from its servers, together with all backup tapes, all emails sent by or received by the BIU during the period when services were being rendered to Netcare.

[55] Netcare contends that in providing these services, KPMG employees, in particular Christa Smith and Serge Vika di Panzu were exposed to Netcare-information and this information has been transferred to the KPMG health-care inquiry team in the following circumstances:

"11.1 Mr. Van der Avoort, a member of the KPMG healthcare team had interactions

with Smith (by way of emails she sent him) and Vika di Panzu by way of a meeting in November 2012 and March 2013 respectively regarding the work they were doing for Netcare.

11.2 Mr. Byl, the head of the KPMG healthcare unit was present at certain meetings with Netcare where Netcare information was discussed. Mr. Byl will not work for the inquiry, since he has resigned from KPMG and has left its employ on 25 June 2014."

[56] It is important to note that all this possible disclosures pointed out by Netcare occurred before the Commission published the tender invitation on 10 May 2013 and before Mr. Vika di Panzu was appointed by Netcare to assist with Project Kotov in July 2013. But most importantly the disclosures were explicitly sanctioned by the contract[5] between Netcare and KPMG. The contracts do not have a restraint of trade in them and it leaves KPMG open to work with parties Netcare is in conflict with.

[57] Nothing that Mr. Van Der Avoort learnt from Ms. Smith could be said to be confidential to Netcare as the Commission is in possession of such information. In its supplementary affidavit that was made available to the Commission, Netcare describes in summary form all the emails that Ms. Smith sent to Mr. Van der Avoort. Mr. Van der Avoort could also not have leant anything about project Kotov, it had not begun when he spoke with Ms. Smith and met with Mr. Vika di Panzu

[58] With regard to the interactions between Mr. Vika di Panzu and Mr. Van der

[5] Clause 11 Standard Terms of Conditions permits such disclosures within KPMG for purposes of business development.

Avoort. Mr. Van Der Avoort stated under oath in his affidavit pursuant to paragraph 6.2 of the Consent Order that Ms. Smith provided him with examples by email of work done for Netcare, which may have included that of Mr. Vika di Panzu for purposes of business development endeavor. He stated that he wished to demonstrate the work he had done in the Netherlands in the health care area and to establish whether that would have any use for Netcare. He did not discuss these matters with anyone else and the Commission confirms that at no time did KPMG disclose to the Commission any information that is confidential to Netcare.

Factual information and submissions

[59] Netcare in its heads of argument and in public pronouncements sees itself as defending itself against price regulation and speculates on the possible actions that may or not be taken by the Commission or by the Government. In its heads of argument paragraph 144.7.5 and 144.7.6 Netcare states:

> "The Commission has confirmed publicly that it is desirous of utilizing the market inquiry to introduce regulation over the private healthcare sector – including, presumably, hospitals. For present purposes, the key point is the following: recommendations of regulatory intervention in the private healthcare sector, particularly regulations in relation to pricing, will in all probability be adverse to Netcare's interests.
>
> As we have set out above, government intervention and increased regulation are not the only potential outcome of the market inquiry. Section 43C (3) avails the Commission of a wide-ranging set of powers that may be utilized in a manner severely prejudicial to participants' rights, let alone their interests insofar as *'information obtained'* by the Commission during a market inquiry can be utilized by the Commission to initiate a complaint against a subject of the investigation, or refer a complaint directly to the

Competition Tribunal."

[60] It seeks to impugn the integrity of the Commission and the inquiry in this application by stating in paragraph 247 that:

> "As a result, the remainder of the KPMG Commission team and members of the Commission itself may well have been tainted by their interactions with Mr. van der Avoort and Mr. Byl."

[61] In October 2013, Mr. Anthony Norton, Netcare lead attorney in this matter, spoke at the annual conference of the Hospital Association of South Africa in Cape Town. He stated that price regulation and competition did not go hand-in-hand. He characterized it as a *"contradiction in terms"* that the Commission, given its mandate of pursuing free and fair competition in markets, would intervene in markets through price setting. In addition to this assumption that the outcome of the healthcare inquiry would be inevitable price regulation, Mr. Norton is quoted in the Business Day report of 30 October 2013 as having expressed concern about the perceived partiality of the Competition Commission. He is quoted as having said that it was hugely important that the commission was not only perceived to be discharging its mandate independently, but that it in fact remained independent.

[62] In an article in *Business Day* published on 2 December 2013, Mr. Norton, who is stated in the article to be representing Netcare, characterized the healthcare inquiry as *"absurd"* and *"an inordinate waste of money"*.

[63] Similar remarks were attributed to Netcare's CEO, Dr. Richard Friedland, in a Business day report on 24 November 2013. He is quoted as having said that the Government had *"an ideological objection"* to private healthcare. The following quotation is attributed to Dr. Richard Friedland in the report:

> "If you are not happy with the private sector, please use the public sector, if you think our costs are extortionate, why don't you go and use a public sector hospital? Why don't you ask the average medical aid patient why they don't want to use public sector hospitals? Of course, a huge amount of hypocrisy is attached to government complaints about private healthcare prices and profits."

[64] In paragraph 53.3 of its supplementary heads of argument, Netcare conflates the role of Government, the Commission and the panel, it states that:

> "The Government has already indicated its desire and willingness to regulate the private healthcare market, and indeed has called for an Inquiry precisely for this purpose. It is therefore naïve to suggest, as KPMG and the Commission do, that the Inquiry can only make recommendations, and itself creates no adverse or prejudicial consequences for businesses in the private healthcare market such as Netcare. Netcare's interests and those of the Commission are plainly not aligned and at the very least potentially adverse."

[65] Netcare bases its fears on statements by officials of the Commission and government as to why a decision was taken to launch the healthcare inquiry. The inquiry is being conducted by an eminent retired judge of the Constitutional Court who is assisted by a panel of independent experts in law / or economics. The panel will form its own conclusions based on evidence it will receive in the course of the inquiry and it will bring its independent judgment to bear on the recommendations to be made. There is not suggestion, nor could there be that

the panel is biased one way or the other.

[66] The fears by Netcare that the Commission may make recommendations to parliament about for example, future regulations, particularly regulations in relation to pricing are a distant future possibility, contingent on many imponderables, as the inquiry might not result in the recommendation of any new policies or regulations and if it does so, it is unclear what such policy or regulation will entail. It cannot be said that the outcome of the healthcare enquiry, which is presided by a panel of five independent experts, is a foregone conclusion.

[67] Mr. Unterhalter SC, who appeared together with Mr Brian Doctor QC duly assisted by their juniors on behalf of Netcare submitted in their heads of argument and in Court that once KPMG accepted its appointment as the Commission's service provider (and therefore its agent), it assumed the same constitutional and statutory obligations that would attach to the Commission, as an organ of state, in the conduct of the market inquiry.[6] In short, Mr. Unterhalter invoked the provisions of section 195 of the Constitution which obliges organs of state to promote and maintain *"a high standard of professional ethics"*, to act transparently and accountably, and to provide services fairly, impartially, equitably and without bias.[7] It is also required, under section 20(1) of the

[6] Section 239 of the Constitution. That has recently been confirmed by the Constitutional Court in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (2)* [2014] ZACC 12 (17 April 2014) at paras 51-55.

[7] Section 195 of the Constitution pertinently provides:

Competition Act, he submitted to act independently and without fear, favour or prejudice. These obligations must include a duty to protect the integrity of the market inquiry, to deal with interested and affected parties to the market inquiry honestly, fairly, transparently, in an even-handed manner and to act in good faith. Mr. Unterhalter contended that the Commission also bore these duties. It was incumbent on it, he argued, from the time that it appointed KPMG and in these proceedings, to monitor KPMG's conduct and to ensure that it was, and continued to be, an appropriate service provider to it. Instead of doing so, he argued, it has aligned itself wholesale with KPMG's case.[8]

[68] In my respectful view, the belated points taken by Netcare against the Commission and KPMG falls to be dismissed for the following reasons: Firstly, at no stage were the respondents called upon to meet a challenge on non-

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"*Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:*

(a) A high standard of professional ethics must be promoted and maintained.
(b) Efficient, economic and effective use of resources must be promoted.
(c) Public administration must be development-oriented.
(d) Services must be provided impartially, fairly, equitably and without bias.
(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
(f) Public administration must be accountable.
(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

(2) The above principles apply to –

(a) administration in every sphere of government;
(b) organs of state; and
(c) public enterprises."

[8] See *Esorfranki Pipelines (Pty) Ltd and Another v Mopani District Municipality and Others* [2014] ZASCA 21 (28 March 2014).

compliance with section 165 and 195 of the Constitution. There is no constitutional cause pleaded which itself is a bar to raising it now. There is further no relief sought by Netcare against the Commission in these proceedings.

Secondly, KPMG does not exercise public power or performs public functions in terms of legislation. In **Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others**[9] the Constitutional Court concluded that Cashpay Master Services (the name under which the appellant traded) (CPS) attracted constitutional duties on the basis that although it may be independent from SASSA's control, the function that it performs – the country-wide administration of the payment of social grants – is fundamentally public in nature. Unlike in the present matter, the court found that the contract between SASSA and Cash Paymaster also makes it clear that the latter undertook constitutional obligations. CPS was contracted by way of a tender to take over the entire social grant system. In paragraph 54 the court stated:

> "SASSA must administer social assistance in terms of the Assistance Act. It is legislation that seeks to give effect to the right of access to social security in terms of section 27(1)(c) and (2) of the Constitution. SASSA may enter into an agreement with any person *'to ensure effective payments to beneficiaries'* in terms of section 4(2)(a) of the Agency Act. In terms of the agreement between SASSA and Cash Paymaster the latter administers the payment of social grants on SASSA's behalf. In doing so, Cash Paymaster exercises a public power and performs a public function in terms the Agency Act, enacted to give effect to the right to social security."

[69] Mr. Unterhalter SC referred the court to selected extracts from the

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[9] Supra.

Commissions affidavits, which he argued makes it clear that according to the Commission, KPMG is an *"integral part"* of the Commission team and will provide *"essential"* technical support to the healthcare inquiry and the panel. He argued that statements made by the Commission in their affidavits unequivocally indicate that the Commission regards KPMG as an essential component of the healthcare inquiry. Netcare submit in its heads of argument that KPMG will, effectively, conduct the enquiry on behalf of the Commission, including drafting the inquiry report. It submits that KPMG is largely to play the evidence leader, at least up to the point of drafting the final report and that, the fact that its role is merely advisory is, as a matter of law, sufficient to conflict it.

[70] The Commission in its affidavit responded as set out below:

> "66. Mr. Norton takes the proposal that was presented to the Commission during the tender process entitled *'How will we support you the Commission'* and triumphantly proclaims this to be evidence of KPMG's 'pivotal role' in the inquiry.
>
> 67. The tender specifications required bidders to construct a project plan indicating how they would plan and the various phases of the inquiry. This was simply a requirement of the tender process, designed to ascertain the project management, technical and conceptual capabilities of the bidders. This document is not relevant to anything other than the procurement process. KPMG was demonstrating their credentials and capacity to assist in a project of this nature.
>
> 68. I deny that the proposal that was submitted by KPMG constitutes the services that the Commission eventually contracted KPMG to provide."

[71] In the KPMG engagement letter of the 27 September 2013 it is recorded that the Commission accepts the engagement of KPMG based on KPMG's

proposals, the proposal includes involvement in expert hearings; reflection and analysis; compiling a report and recommendations to the panel, this in my view, does not devolve the constitutional function of the Commission to KPMG and make KPMG an organ of state for purposes of the healthcare inquiry as in the SASSA matter. It is the distinguished panel that must bring its independent judgment to bear on the information evidence presented before it by KPMG and decide which procedure to be followed.

Interim Interdict

[72] In prayer 11 Netcare seeks the barring out of KPMG either on interim or a final basis. In prayer 4 it seeks an order on final basis barring out certain individuals (including Messrs. Byl, Van der Avoort and Ms. Wayburne. Netcare makes the following submission based on the English decision of **Prince Jefri Bolkiah v KPMG**[10] (*"Bolkiah"*), which in my respectful view; incorrectly state our law regarding interdicts:

> "In the circumstances, our law makes clear that the Court must intervene and interdict KPMG from acting for the Commission unless it is satisfied that there is no risk (even if not substantial) of disclosure. The only basis for KPMG to avoid such an interdict is for it to discharge what the case law describes as *'the heavy burden'* to prove to the Court that despite its possession of relevant confidential information there is no risk that it will be disclosed directly or indirectly during the course of its working for the Commission in relation to the market inquiry."

[73] The classic formulation of the requirements for an interim interdict, which

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[10] [1999] 2 AC 222 [1999] 2 WLR 215 [1999] 2 W.L.R. 215 [1999] C.L.C. 175 [1999] P.N.L.R. 220.

was set out in the case of **Setlogelo v Setlogelo,** [11] is well established in our law. These requirements are:

> "(i) Firstly, there must be a *prima facie* right on the part of the applicant; [12]
>
> (ii) Secondly, there must be a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief sought by the applicant is eventually granted; [13]
>
> (iii) Thirdly, the balance of convenience must favour the granting of the interim relief; and
>
> (iv) Fourthly, there must be no other ordinary remedy to give adequate redress to the applicant."

[74] In **National Treasury and others v Opposition to Urban Tolling Alliance and others (*"OUTA"*)** the constitutional court reaffirmed what has been the law in the past ninety-three years. Moseneke DCJ cautioned:

> "It seems to me that it is unnecessary to fashion a new test for the grant of an interim interdict. The Setlogelo test, as adapted by case law, continues to be a handy and ready guide to the bench and practitioners alike in the grant of interdicts in busy Magistrates' Courts and High Courts. However, now the test must be applied cognizant of the normative scheme and democratic principles that underpin our Constitution. This means that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution."

[75] Netcare claims to have a right to interdict KPMG from acting for the commission because KPMG is under a fiduciary duty to avoid an "*untenable*

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[11] 1914 AD 221 at 227.

[12] Clayden J in *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189 accepted that a prima facie right may be established though it is open to 'some doubt'.

[13] If the applicant can establish a clear right his apprehension of irreparable harm need not be established. The test for irreparable harm is an objective one as set out in cases such as *Minister of Law and Order v Nordien* 1987 (2) SA 894 (A) at 896G-I and *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) at 347B-E.

conflict of interest" and not to disclose Netcare's confidential information. In order to succeed Netcare must pass the test for the grant of an interdict as laid down in **Setlogelo v Setlogelo**[14] namely:

A. **A prima facie right, although open to some doubt.**

[76] Netcare and KPMG have expressly agreed in clause 47 of KPMG's standard terms and conditions that KPMG could act for conflicting parties. KPMG has thus attracted duties of confidentiality as a consequence of the engagement but not fiduciary duties. It is common cause that KPMG terminated its engagement with Netcare on 26 September 2013. KPMG was only appointed to the healthcare inquiry on 2 October 2013. Therefore, there is no fiduciary duty owed by KPMG to Netcare[15] as the termination of the retainer between a professional and a client brings to an end any fiduciary relationship based on that retainer and if there is no fiduciary duty, The only duty with KPMG retained to Netcare after 26 October 2013 was the duty to keep Netcare's confidential information confidential. Lord Millett, delivering the unanimous judgment of the House of Lords in Bolkiah said the following:

> "Where the court's intervention is sought by a former client, however, the position is entirely different. The court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the

[14] Supra.

[15] Charles Hollander QC and Simon Salzedo QC Conflict of interest 4th (2011) at 2-3.

former client which survives the termination of the client relationship is a continuity duty to preserve the confidentiality of information imparted during its subsistence."

In paragraph 109 of its heads of argument Netcare relying on English law states:

"The obligation to protect the confidential information of a former client is an aspect of the law of confidentiality, and does not derive from the law of privilege. The duty is an incident of the nature of the relationship, and not a result of the identity of the actors involved. It means that the obligation arises in respect of any confidential relationship, and not only where the relationship is between a lawyer and his or her client. Congruent with that, foreign jurisdictions have recognized that the former client confidentiality obligation also binds other professionals, such as accountants, for instance where they have provided forensic accountancy services, litigation support services, and professional advisory services to their former clients."

[77] In **Shulz v Butt**[16] the then Appellate Division stated that the equitable cause of action based on breach of confidence that is available in England does not exist in our law. There is therefore no source of obligations called "*the law of confidentiality*" as contended for by Netcare in South Africa. In **Wishart and others v Blieden NO and others**[17] the source of the obligations to respect the confidentiality of information received in confidence was explained as follows:

"The starting point for the legal position on fiduciary relationships in general has been carefully and cogently dealt with by Stegmann Jin Meter Systems Holdings Ltd v Venter and Another. This case dealt with unlawful competition. It is to the following effect:

'Our law recognises fiduciary relationships which, as a matter of law, give rise to an obligation to respect the confidentiality of information imparted or received in confidence, and to refrain from using or disclosing such information otherwise

[16] 1986 (3) SA 667 (A) at 679.

[17] 2013 (6) SA 59 (KZP).

than as permitted by law or contract.'

This obligation, or legal duty, arises within one of two contexts, contract or delict. Within the law of contract, such a legal duty is implied by law as a term of the contract. The legal duty so implied can, however, be limited by agreement. When it is not founded in contract, it is necessary to look at the law of delict, and in particular to the principles of Aquilian liability, in order to ascertain the extent of the legal duty to respect the confidentiality of information imparted or received in confidence."

[78] It follows therefore that Netcare must not only establish a contractual or delictual right against KPMG not to disclose information imparted or received in confidence, it must also show that this right gives rise to the remedy to disqualify KPMG form acting for the Commission even after the relationship between Netcare and KPMG has terminated.

[79] The three formal engagement letters concluded by Netcare and KPMG, all subject to KPMG's standard terms and conditions do not provide for any *"barring out"* relief or restraint of trade. The contracts explicitly permit KPMG to work for conflicting parties and to transfer Netcare data and information, including confidential information, across national and international borders and process or store the information electronically and in remote locations.

[80] Accordingly Netcare can only rely on the breach of confidentiality and not conflict of interest. Netcare has not established a breach of contract actually committed or an impending breach of contract. Even if it succeeded in proving the breach of contract its only remedy is an interdict against disclosure of its confidential information not disqualifying KPMG from participating in the

healthcare inquiry.

[81] Netcare relies on the Bolkiah, as it has ostensibly been applied in South African law as setting out the grounds on which it is entitled to an order disqualifying KPMG from working for KPMG. In Bolkiah, the House of Lords granted *"Barring out"* relief against a firm of accountants providing litigation support services. Netcare contend that the Bolkiah principles are applicable outside of an attorney and quasi-attorney context and in an inquisitorial context as in the present case.

[82] The question whether Bolkiah has been accepted in our law, seems to me to be the appropriate point to start in deciding whether it is open to this court to grant the *"barring out"* remedy as claimed by Netcare both as a temporary order and as a permanent order. Before discussing Bolkiah in detail perhaps the starting point should be the controlling authority in English law, namely, **Rakusen v Ellis Munday & Clarke**[18]. The case is authority for two propositions: firstly that there is no absolute rule of law in England that a solicitor may not act in litigation against a former client; and secondly, that the solicitor may be restrained from acting if such a restriction is necessary to avoid a significant risk of the disclosure or misuse of confidential information belonging to the former client. Cozens-Hardy M.R explained that solicitors have special duties that do not extend to employees, he stated:

[18] [1912] 1 Ch 831, [1911 – 1913] All ER Rep 813 at *Prince Jefri Bolkiah v KPMG* [1999] 1 All ER 517 (HL) at 527.

"We expect and indeed we exact from solicitors, who are our officers, a higher standard of conduct than we can enforce against those who are not our officers. A solicitor can be restrained as a matter of absolute obligation and as a general principle from disclosing any secrets, which are confidentially reposed in him. In that respect it does not very much differ from the position of any confidential agent who is employed by a principal."

Fletcher Moulton LJ went on to set out the justification for barring out of solicitors by stating:

"the employment of a solicitor by a client was a *'special case'* in which the court would not merely order a solicitor not to use or disclose a former client's confidential information but actually restrain him from acting against the client if there was a substantial risk that he would, consciously or subconsciously, intentionally or accidentally, use or divulge such information."

[83] That barring out is a special remedy against solicitors was reaffirmed in **PCCW HKT Telephone Ltd v Aitken**[19] where Hoffman NPJ said:

"The principle... is a branch of the law of confidence, not the law of privilege. It is a special remedy against solicitors and the like which the courts have devised to protect the confidentiality of communications between solicitor and client, or between either of them and third parties, for the purpose of enabling the solicitor to advise or otherwise act for the client... One of the reasons why the law of confidence provides this special remedy against solicitors is... the policy of encouraging free communication between client and solicitor in the interests of justice. But that does not enable one to transfer features of the law of privilege into the law of confidence."

"There is a very considerable difference between the position of a solicitor and an employee, even though the confidential information which they have obtained may be the same. The solicitor will normally have many clients and will not be dependent upon one for

[19] [2009] H.K.C.U. 198 at 61-63.

his livelihood. Even if the new client is important to him, he does not have to act for him in a matter in which he previously acted for the other side. The employee can have only one employer at a time and, in the nature of things, his new employer is likely to be in the same line of business and therefore in competition with the previous one. I therefore see no reason of logic or policy which requires the special remedy against solicitors to be extended to employees who have information... . ...In the absence of an enforceable covenant, the courts do not interfere with the new activities of former employees. There is no case in which they have done so. Former solicitors (or forensic accountants) are different ..."

[84] Wessels JA as he then was in **Robinson v Van Hulsteyn Feltham and Ford**[20] adopted the reasoning in Rakusen and the test for disqualification as stated by Cozens-Hardy MR and said:

"If a solicitor who in the course of advising a client had become possessed of his client's secrets is engaged by another person to act against his former client, his knowledge of the latter's secrets may be of great advantage to his client's opponent. Although the solicitor may conscientiously endeavor to do his duty to his new client without revealing the secrets of his old client, yet he may find himself in an invidious position and his knowledge of the secrets of his former client may unconsciously affect him in doing his duty towards the other. In order to avoid such a dilemma the Court will restrain a solicitor in whom confidences have been reposed by a client from acting against such client where it is made clear to the Court in the words of COZENS- HARDY, M.R., *'that real mischief and prejudice will in all human probability result if the solicitor is allowed to act'*."

[85] Netcare submitted in its heads of argument and in court that the "*Robinson test has been updated in our law on account of comparative foreign law on former clients conflicts of interest*". Netcare contended that the Rakusen test

[20] 1925 AD 12 at 21-22.

relied upon by our then appellate division in Robinson decision has been departed from in the United Kingdom because in Bolkiah barring out interdict was granted against auditors. This would of course entail, counsel submitted, that we should adapt our jurisprudence on barring out by extending it to other professionals, in particular to auditors as it was done in Bolkiah.

[86] The difficulty with this submission is, firstly, that it interferes with the principle of *stare decisis.* The Robinson decision, which is dispositive of the issue in South African law, is binding on any judge of a lower court and this court is not at liberty to depart from it. Mr. Trengove SC, on behalf of KPMG, correctly in my respectful view, submitted that Robinson binds this court and the debate about its appropriateness is out of place in this court. It seems to me with respect, to be the exclusive prerogative of the Supreme Court of Appeal or perhaps the Constitutional court to bring about development or adaptation of the law that may be called for. The constitutional court in **Camps Bay Ratepayers and Residents Association and another v Harrison and another**[21] reaffirmed the importance of precedent and *stare decisis.* The court stated that the doctrine was not only binding on lower courts but also binding courts of final jurisdiction to their own decisions and was a manifestation of a rule of law, which is a founding value our Constitution.

[87] Secondly, the South African case law on the duty not to disclose confidential information makes it clear that barring out relief apply to confidential

[21] 2011 (4) SA 42.

information conveyed to a lawyer and the information is or may be relevant to a subsequent adverse representation. Contrary to the submission by Netcare in its heads of argument, the under-mentioned reported decisions of our courts have not followed Bolkiah, in one of them ANSAC Davis JP did not find it necessary to the basis upon which Bolkiah could be incorporated into South African Law. The three decisions discussed below do not have any bearing on the case such as the present.

[88] **American Natural Soda Ash Corporation and others v Botswana Ash (PTY) Ltd and others**[22] ***("ANSAC")*** was an appeal against a decision of the Competition Tribunal which dismissed an application for the disqualification of an attorney from representing Botswana Ash in complaint proceedings that had been brought to the Tribunal by the Competition Commission. The attorney had previously been employed by the Competition Commission and had been present during settlement negotiations between applicant and the Commission. Applicant's complaint was that the attorney has obtained confidential information and insights during settlement negotiations, which could be used to first respondent's advantage. The court, per Davis JP, considered the approach adopted in Bolkiah and distinguished the case on the facts. The court found that the attorney did not act at any time for ANSAC and no information was communicated to the attorney pursuant to his having so acted. The court found that ANSAC had not provided a sufficient factual basis for the approach adopted in Bolkiah to be applied to the dispute between the parties. The court never

[22] [2007] 1 CPLR 1 (CAC).

discussed whether Bolkiah accords with out common law.

[89] In **Wishart and Others v Blieden NO and Others**[23] the three applicants sought to interdict three advocates from examining them in an enquiry convened under s417 of the Companies Act 61 of 1973. The applicants contended that the advocates were subject to a conflict of interest and were privy to confidential information disclosed to them during consultations. Gorven J held that in order to grant an interdict sought by the applicants not to be examined by the advocates, they will need to show that:

> "1. The applicants had a previous attorney-client contract with the respondents; Confidential information of the applicants was imparted or received in confidence as a result of that contract;
> 2. That information remains confidential;
> 3. That information is relevant to the matter at hand; and
> 4. The interests of the present client of the respondents are adverse to those of the former clients."

[90] In **Monsanto South Africa (Pty) Ltd and Another v Bowman Gillfilian and others**[24] (*"Mosanto"*) an erstwhile client of the firm of attorneys, a rival firm of the merging parties brought an application to stay merger proceedings then before the Competition Tribunal. The appellant contended, on the basis of five cases which were the only material averments about confidentiality that had been set out in their papers, that information had been imparted in confidence in the

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[23] Supra.

[24] (109/CAC/JUN11) [2011] ZACAC 5

course of a fiduciary relationship and, if this information came into the possession of a third party, it could potentially be used to the disadvantage of appellants. Accordingly appellants had a right to be protected, sufficient to justify the relief sought. The court per Davis JP without reference to Bolkiah held:

> "In summary, on this component of the case, this court is confronted with a relationship between a former attorney and a client in circumstances where the proceedings sought to be stayed, are not those in which the former client is a party. Further, in none of the five examples given (which represent the entire case presented to this court as contained in the papers), is there any indication which may be gleaned, on a reasonable basis, why the information remains confidential."

[91] The Bolkiah decision is central to Netcare's case, as a result it is necessary to set out the facts in greater detail so as to assess Netcare's contentions. In that case KPMG performed an annual audit of the core funds of the Brunei Investment Agency (BIA) from its inception in 1983. The BIA was formed, in part, to hold and manage the General Reserve Fund of the Government of Brunei, and was valued at billions of dollars. Prince Jefri Bolkiah, a brother of the Sultan of Brunei, was a chairperson of the BIA for many years. While he held this position, a number of large capital transfers were made out of the core funds, and the board of the BIA including Prince Jefri, directed KPMG not to audit these transfers.

[92] For 18 months between 1996 and 1998, one of Prince Jefri's other companies retained KPMG to undertake an investigation relating to litigation in which Prince Jefri was involved. The investigation was code named Project Lucy

and involved KPMG's London forensic accounting department. That department provided extensive litigation support services and performed a number of tasks usually undertaken by solicitors such as interviewing witnesses. In the course of Project Lucy, KPMG acquired extensive confidential information about Prince Jefri's assets and financial affairs. The project was discontinued on 14 May 1998.

[93] In June 1998, following fallout between Prince Jefri and the Sultan, the Government of Brunei appointed a Financial Task Force to conduct an investigation into the BIA. In July of that year, the BIA instructed KPMG to investigate the destination and present location of the special transfers. KPMG accepted the instructions without contacting Prince Jefri. This investigation was code named Project Gemma and it was clear that it might lead to civil or criminal proceedings against Prince Jefri.

[94] Prince Jefri sought a "*barring out*" before Pumfrey J in the High Court of Chancery to restrain KPMG from continuing to work on Project Gemma. KPMG offered a voluntary undertaking not to use or disclose any confidential information acquired in the course of Project Lucy and stated that only a limited number of firms possessed the necessary skills and resources to perform such an investigation. Pumfrey J first considered the nature of the work performed by KPMG's forensic accounting department. He stated that in relation to forensic services at least, accountants were subject to the same obligations as solicitors He decided the question as follows:

"In relation to the supply of forensic services; in relation to the performance of tasks which can be and often are undertaken by solicitors; and in relation to the giving and receiving of advice, in relation to the conduct of litigation or threatened litigation, I can find no rational basis for drawing any distinction between the duty owed by an accountant to his client and that owed by his solicitor or counsel."

[95] The court recognized that it is the substance of the service performed, rather than who performs it, that determines the obligations imposed. Pumfrey J granted the *"barring out"* relief against KPMG, because KPMG could not satisfy him that there was no real risk of disclosure of Prince Jefri's confidential information.

[96] The majority of the Court of Appeal (Lord Woolf MR and Otton LJ) preferred the approach of the Court of Appeal in New Zealand in **Russell McVeagh McKenzie Bartlett & Co v Tower Corporation**[25] to that of Pumfrey J in the High Court. Drawing heavily on the New Zealand judgment, the majority identified three issues for consideration:

"1. Whether there was confidential information which if disclosed was likely to affect Prince Jefri's interests adversely;

2. Whether there was a *'real or appreciable risk'* that the confidential information would be disclosed; and

3. Whether the nature and importance of the former fiduciary relationship meant that the confidential information should be protected by an order of the kind sought".

[25] [1998] 3 NZLR 64:1.

[97] In view of the undertaking offered by KPMG, the majority held that continuation of the injunction would *"set an unrealistic standard for the protection of confidential information"* which would create unjustified impediments in the way large professional firms conduct their business.

[98] On appeal, the House of Lords confirmed the findings made by Pumfrey J. Lord Millet, in the leading judgment, set out the essence of question before the House of Lords, namely:

> "Whether, and if so in what circumstances, a firm of accounts which has provided litigation support services to a former client and in consequence has in its possession information which is confidential to him can undertake work for another client with an adverse interest."

Lord Millet considered the decision of Rakusen and indicated that:

> "Like most of the later authorities, the case was concerned with the duties of a solicitor. The duties of an accountant cannot be greater than those of a solicitor, and may be less, for information relating to his client's affairs which is in the possession of a solicitor is usually privileged as well as confidential. In the present case, however, some of the information obtained by KPMG is likely to have attracted litigation privilege, though not solicitor-client privilege, and it is conceded by KPMG that an accountant who provides litigation support services of the kind which they provided to Prince Jefri must be treated for present purposes in the same way as a solicitor."

[99] In a concurring judgment, Lord Hope of Craighead made it clear those accountants who were essentially occupying the same position as solicitors should be excluded from acting for their opponents in litigation. He stated:

> "I consider that the nature of the work which a firm of accountants undertakes in the provision of litigation support services requires the court to exercise the same jurisdiction to intervene on behalf of a former client of the firm as it exercises in the case of a solicitor. The basis of that jurisdiction is to be found in the principles which apply to all forms of employment where the relationship between the client and the person with whom he does business is a confidential one. A solicitor is under a duty not to communicate to others any information in his possession which is confidential to the former client. But the duty extends well beyond that of refraining from deliberate disclosure. It is the solicitor's duty to ensure that the former client is not put at risk that confidential information which the solicitor has obtained from that relationship may be used against him in any circumstances."

[100] In paragraph 337 of its heads of argument, Netcare makes the following, in my respectful view, incorrect articulation of the English law:

> "It should be recalled that the House of Lords, in Bolkiah, indicated that in relation to proof that the professional firm (in that case KPMG) is in possession of relevant confidential information, it held that *'it is incumbent on a plaintiff who seeks to restrain his former solicitor [or other professional firm] from acting in a matter for another client to establish (i) that the solicitor [or accountant] is in possession of information which is confidential to him and to the disclosure of which he has not consented and (ii) that the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own. Although the burden of proof is on the plaintiff, it is not a heavy one. The former may readily be inferred; the latter will often be obvious'*." (My emphasis)

[101] Bolkiah decision never equated a "*solicitor*" with other "*professional firms*" or "*accountants*" as Netcare seems to suggest. Bolkiah specifically dealt with "*accountants providing litigation support services*" *where* the relationship gives rise to an adverse interest. On the facts of that case, the court found that KPMG which provided litigation support services had not discharged the heavy burden of showing that there was no risk that information in their possession which was

confidential to Bolkiah and which they obtained in the course of a formal client relationship might inadvertently come to the notice of members of the KPMG working for the government of Brunei.

[102] In **Meat Corporation of Namibia Ltd v Dawn Meats (UK) Ltd**[26] Meat Corporation applied to the court to have Mrs. Burt-Thwaites's expert evidence excluded on the grounds that she had received confidential and privileged information from Meat Corporation and had changed sides and was now acting as a consultant for Dawn Meats. Meat Corporation sought to rely on the law as laid down in Bolkiah, likening the position of Mrs. Burt-Thwaites to KPMG in that case.

[103] The court distinguished Bolkiah on its *"striking"* facts; the court held that In Bolkiah the accountants had acted like solicitors and that the relationship between Mrs. Burt-Thwaites and Meat Corporation was very different from the relationship of solicitor and client. It also found that, unlike KPMG, Meat Corporation had not yet engaged Mrs. Burt-Thwaites - the terms of her retainer with Meat Corporation had not yet been determined. Furthermore, unlike in Bolkiah where the privileged information was extremely damaging to Bolkiah, the nature of the privileged information disclosed to Mrs. Burt-Thwaites had been reviewed by the court and was found to be fundamentally uninteresting to Dawn Meats.

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[26] [2011] EWHC 474 (Ch).

[104] The court went on to say:

> "The relationship between Meat Company and Mrs. Burt-Thwaites was not of that order and it is not apparent to me that she should be equated with a solicitor for these purposes. True it is that she received privileged information, but various people outside a solicitor/client (or quasi-solicitor/client) relationship might receive privileged information, and it is neither necessary nor appropriate to treat them for all purposes as if they were in the same position as solicitors."

[105] **In Generics (UK) Ltd (trading as Mylan) v Yeda Research and Development Co Ltd and another**[27] an in-house patent attorney left her firm to work for another firm that was engaged in patent litigation with her former firm.

> "82. Fourthly, so far as concerns a barring orders, there is no good reason to import into the employment field and to place on the former employee the Bolkiah evidential burden of proving the absence of any real risk of disclosure. On the contrary, there are good reasons not to do so. There is a long-established line of authority that, if an employer wishes to restrict the activities of an employee after termination of the employment that should be done by a legally valid restrictive covenant...
>
> 83. That is not to say that a barring order can never be made against a former employee if the former employer proves that trade or business secrets (or, in the case of a legally valid express term, other confidential information), which are subject to continuing contractual and fiduciary duties after termination of the employment, are likely to be disclosed or wrongly used by the former employee. For the reasons I have just given, however, in the absence of a restrictive covenant that can only be in a most exceptional case. Depending on the precise facts, it might apply in the type of case to which Ribeiro PJ referred in the

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27 [2013] Bus. L.R. 777; [2012] C.P. Rep. 39; [2013] F.S.R. 13.

> PCCW- HKT Telephone Ltd v Aitken case 12 HKCFAR 114, such as an employed solicitor acting in a sensitive and confidential role for the employer on a currently contentious matter and then taking up a position in a similar capacity working for the other side on the same contentious matter."

[106] It is clear that under English law the Bolkiah principles apply in an attorney and quasi-attorney relationship where the interest of the present client are adverse to those of the former client. Netcare has therefore failed to show that it has a *prima facie* right, which is required to found an interdict.

B. A well-grounded apprehension of irreparable harm if the interim relief is not granted.

[107] Netcare, as correctly pointed out by Mr. Marcus SC on behalf of the Commission has not accurately stated the South African law regarding the requirement for an interdict in their reliance on Bolkiah. They contend in paragraph 121 of their heads of argument that:

> "The test for intervention has thus been held to be a strict one. Once a former client has established that the advisor holds its confidential information, the onus is on the defendant to prove that there is no appreciable risk of disclosure of such information, in order to persuade a court not to interfere."

[108] The test in regard to the second requirement for an interdict is objective and the question is whether a reasonable man, confronted by the facts, would

apprehend the probability of harm[28]. Applied to the facts of this case, KPMG is under contractual obligation to keep the information confidential, which may be enforced by way of court proceedings in the event of unauthorized disclosure. Netcare has also removed and sterilized all Netcare related information from the relevant parts of its IT systems and the information so removed has been stowed in a secure location. The Commission has also given an undertaking that it will not request KPMG to divulge confidential information. If Netcare has information, which is relevant to the market inquiry and it is unwilling to have that information disclosed to the Commission the Commission is entitled to subpoena that information and Netcare will be obliged as a matter of law to produce that information.

[109] Netcare seems to fear that KPMG may identify Netcare documents that might reveal the truth in assisting the Commission when it frames the subpoena. Netcare in paragraph 59 of the it's Heads of argument states:

> "Netcare has been preparing for the market inquiry, and will produce any documentation that the Commission lawfully calls for (subject to appropriate protections of its confidentiality and legally privileged documentation).
>
> 59.2. But Netcare remains entitled to have both the existence and contents of its confidential information protected from disclosure, directly or indirectly, by KPMG. The Commission has no right to be assisted in framing its requests (and the focus of the inquiry) by an advisor who has prior knowledge of, or access to, Netcare's confidential information."

[28] National Council of Societies for the Prevention of Cruelty to Animals v Openshaw (462/07) [2008] ZASCA. 78; [2008] 4 All SA 225 (SCA); 2008 (5) SA 339 (SCA) (30 May 2008) 2008 (5) SA 339 SCA 21.

[110] Mr. Marcus SC argued, correctly in my respectful view that it seems Netcare will keep secret and withhold from the Commission relevant documentation if it is not identified by KPMG instead of voluntarily disclosing the information. The only irreparable harm that Netcare, it seems might suffer is that the truth might leak out irregularly as opposed to regularly through a subpoena. This court is loath to come to Netcare's assistance in this regard as Netcare is obliged by law to disclose any information that is relevant to the market inquiry voluntarily and in a candid manner. This information can in any event be obtained by subpoena. For these reasons I am of the view that Netcare has not established a well-grounded apprehension of irreparable harm if the interdict is not granted. That being so, there is no basis for the grant of the interim interdict on this ground alone.

C. The balance of convenience must favour the granting of the interim relief.

[111] The court is required to weigh the prejudice Netcare will suffer if the interim interdict is not granted against the prejudice KPMG and the Commission will suffer if it is granted. In this case, the broader public interest and not only the interest of litigating parties must be placed in the scales when weighing where the balance of convenience lies[29]. It is common cause that KPMG was the only firm that bid for the tender, if the interdict is granted the Commission will have to

[29] Cipla Medpro (Pty) Ltd v Aventis Pharma SA and another (2013) ZASCA 108.

re-open the procurement process with the hope of finding an alternative service provider with comparable resources who has never represented any other stakeholder in the market inquiry within the stipulated deadline for the market inquiry of two years published in the Government Gazette.

[112] Netcare submits that KPMG is not entitled to put Netcare to the risk of the disclosure of its confidential information and argue that KPMG cannot continue servicing the Commission while it is in breach of the Consent Order. Moseneke DCJ in **National Treasury and Others v Opposition of Urban Tolling Alliance and Others**[30] cautions:

> "A court must carefully consider whether the grant of the temporary restraining order pending a review will cut across or prevent the proper exercise of a power or duty that the law has vested in the authority to be interdicted. Thus courts are obliged to recognize and assess the impact of temporary restraining orders when dealing with those matters pertaining to the best application, operation and dissemination of public resources. What this means is that a court is obliged to ask itself not whether an interim interdict against an authorised state functionary is competent but rather whether it is constitutionally appropriate to grant the interdict."

At paragraph 67 he stated:

> "When it evaluates where the balance of convenience rests, a court must recognise that it is invited to restrain the exercise of statutory power within the exclusive terrain of the Executive or Legislative branches of Government. It must assess carefully how and to what extent its interdict will disrupt executive or legislative functions conferred by the law and thus whether its restraining order will implicate the tenet of division of powers. Whilst a court has the power to grant a restraining order of that kind, it does not readily do so except when a proper and strong case has been made out for the relief and, even so, only in the

[30] 2012 (6) 223 par 66.

clearest of cases."

The balance of convenience clearly lies in the Commissions favour.

D. There must be no other ordinary remedy to give adequate redress to the applicant.

[113] The requirement that a party seeking an interim interdict must show that it has no other remedy is trite. If there are other remedies the application for an interim interdict must fail.

[114] As I have already pointed out, apart from the fact that Netcare has no basis in law for an interdict, there are at least two factual bases that render an interim interdict an inappropriate remedy in this matter. The first is that there is no reason to believe that there is a real risk that KPMG will disclose Netcare's confidential information to the Commission. The two and a half months during which KPMG undertook work for the Commission provided ample opportunity for KPMG to have disclosed this information. It is a proven fact that KPMG did not do so. This is borne out by the Rule 35(12) record that includes every piece of correspondence between KPMG and the Commission.

[115] The second basis is that the interdict will not protect the information from the Commission. If necessary the Commission can subpoena information relevant to the market inquiry. As we set out earlier, the Act imposes strict requirements of full disclosure on any person who is summoned to provide

information to the inquiry.

Breach of the consent order

[116] Netcare contend that Netcare breached paragraph 3 of the Consent Order by failing to *"furnish"* Netcare's information to Werksmans within 20 days of the Consent Order. (Prayer 3.1) and paragraph 5.2 of the Consent Order by "Preventing and /or frustrating Stroz Friedberg" from establishing which persons have had access to Netcare's information (Prayer 3.6.)

Mr. Norton states in the replying affidavit:

> "The clear purpose of the Court order was that Netcare's information ...had to be identified and, under paragraph 3, furnished by KPMG to Werksmans within 20 days of the Court order. ....the identification of Netcare's information was not Stroz Friedberg's responsibility. ....KPMG bore the primary responsibility under the Court order to identify Netcare's information, with a concomitant right afforded to Netcare to inspect that information. ....As it turned out, when Stroz Friedberg arrived it was not provided with any identification by KPMG of Netcare's information. That was the case, even when Stroz Friedberg specifically sought assistance from KPMG in this identification process."

Paragraph 3 of Consent Order reads:

> 3. "KPMG agrees, within twenty (20) days of the date hereof, to furnish Netcare's information (whether it exists in the form of physical or electronic documents) to Werkmans Attorneys for safeguarding until any engagement by KPMG to the Commission has terminated."

[117] In my respectful view, It is not correct as contended by Netcare that the provision of paragraph 3 imposed a duty on KPMG to identify the Netcare

information on its system in advance of handing it over to Werksmans attorneys. The order simply does not say so. KPMG merely agreed within 20 days of the order to furnish Netcare information to Werksmans after Stroz Friedberg had completed its 15-day investigation. There is no suggestion that the handing over of Netcare information was to be done forthwith. In terms of paragraph 4, KPMG had to give immediate access to Stroz Friedberg, the Order did not allow time for KPMG to search for Netcare information on its IT system. KPMG was also under strict obligation not to amend, erase or otherwise tamper with any of Netcare's information. Paragraph 4 reads:

> "KPMG agrees, with effect from the conclusion of this agreement, not to allow any of its directors, employees and/or contractors (including but not limited to IT service providers) to amend, erase or otherwise tamper with any of Netcare's information which currently resides on KPMG's servers or laptops or other computers utilized by KPMG's personnel or to which KPMG employees, directors and/or contractors may have access ('KPMG's information technology systems') and immediately on the grant of this order to permit the IT firm (as defined below) to have unrestricted access to KPMG's information technology systems (subject to the provisions of paragraph 5 mutatis mutandis) to perform the analysis provided for in paragraphs 5.2.2 and 5.2.3 and, thereafter, that KPMG will within twenty (20) days of the date hereof, take all necessary steps to remove and/or sterilize all of Netcare's information which currently resides on KPMG 's information technology systems."

[118] Netcare in its founding affidavit expressly state that it is Stroz Friedberg that has to identify Netcare documents on the KPMG systems:

238.5. "Netcare accordingly required Stroz Friedberg to complete the assignment contemplated in paragraph 5.2, as read with paragraph 5.3, of the Court order in terms of which it needs to identify the nature of the documents and data which emanated from the devices held by KPMG's Commission Team and which are accessible on KPMG's servers to

KPMG's Commission Team, in order to determine to what extent KPMG's Commission Team has already had access to *"Netcare's information"*.

[119] Paragraph 5.2 of the Consent Order, which KPMG has allegedly breached, required KPMG to provide Stroz Friedberg with unrestricted access to KPMG's systems for purposes of its investigations. It is not in dispute that KPMG did so between 11 November 2013 and 29 November 2013. Stroz Friedberg records that "KPMG made a variety of hardware and electronic material available for analysis" Paragraph 5 reads:

5. In addition, KPMG agrees to provide access to its information technology systems to such independent firm specializing in forensic investigations of information technology systems as is appointed by Werksmans ....

2. "The IT firm shall use its access solely to:

5.2.I Confirm that KPMG complied with the provisions of paragraph 4 above; and

5.2.2 Establish which KPMG employees, contractors and/or consultants have had access either to Netcare's information or to the 3 October letter; and

5.2.3 Compile a report to KPMG and Netcare specifying (a) which KPMG employees, contractors or consultants have had access to Netcare's information and the 3 October letter; (b) the dates on which they had access; and (c) what the particular information is to which they had access on the relevant dates.

[120] Stroz Friedberg in their preliminary report states that it asked KPMG for a list of *"all individuals ... connected with Netcare and KPMG's work with Netcare pertinent to the Order (at paragraph 5) and a list of those involved in the with the*

the inquiry" (paragraph 6) they requested KPMG to inform them which "custodians" to focus on, Stroz Friedberg did not understand the order to mean that KPMG would identify and point out the information on their system.

> "This report has focused primarily on KPMG based material and teams related to Netcare. To facilitate this investigation Stroz Friedberg requested from KPMG a list of individuals ('custodians') connected with Netcare and KPMG's work with Netcare, pertinent to the Order. This group (the Netcare Team') has been the primary focus of this analysis. "....Where relevant to the Order, Stroz Friedberg also investigated the KPMG employees, contractors or consultants identified by KPMG as being involved with [the healthcare inquiry('the Competition Commission Team')."

[121] Netcare insisted on the appointment of an independent IT expert of its choice to identify Netcare information because it did not trust KPMG. It explained the reason for insisting that its attorneys had to perform the task of looking for Netcare information on KPMG's systems as follows:

> "Simply put, and based on KPMG's conduct to date, Netcare is unable to trust KPMG to properly undertake the task of identifying Netcare information from the log files. This task can only properly be conducted by Netcare's legal representatives ... "

[122] Nortons in their letter of the 12 December22 October 2013 addressed to Bowman Gilfilian subscribes to KPMG's interpretation of the Consent Order when it stated:

> "The IT expert must have access to the KPMG system prior to the information being removed from the KPMG system in order to perform the analysis provided for in the draft agreement with became the Consent Order"

[123] After Stroz Friedberg had rendered its preliminary report, the parties agreed that Stroz Friedberg would return to South Africa to complete its task of identifying Netcare information. In an email from Netcare's attorneys to KPMG's attorneys dated 17 December 2013 Norton's expressly records the agreed upon purposes of Stroz Friedberg's return, namely (1) identifying "Netcare confidential material on the responsive drive, and (ii) preparing a list of the relevant documents. Netcare was, at that time, of the view that Stroz Friedberg had to return to South Africa to complete their assignment. In Nortons' letter of 12 December 2013 ("SW42"). Nortons states there *"Accordingly, our client requires Stroz Friedberg to complete the assignment contemplated in paragraph 5.2, as read with paragraph 5.3, of the Order..."*

[124] There is accordingly no basis to contend as Netcare does that KPMG had to identify Netcare information in advance of handing it over to Werksmans.

[125] Netcare information is defined as information that Netcare gave to Di Panzu or Lalla or any member of their team. Any other information pertaining to Netcare is not "Netcare information" as defined. Clause 2.1 defines Netcare information as:

> "any of the information, data, reports, correspondence or any other material pertaining to or belonging to Netcare which was handed to or otherwise made available to KPMG in the course of the engagements by Mr. Serge Vika di Panzu (*'Vika di Panzu'*) and/or Mr. Paresh Lalla (*'Lalla'*) (or anyone working with them) or any work product generated by KPMG in the course of such engagements (*'Netcare's information'*)."

[126] Stroz Friedberg state in their final report that they are not in a position to determine whether material responsive to Netcare Keywords or otherwise identified by the analysis they conducted, is in fact "Netcare's information" as defined by the Order. Because they could not determine who had access to Netcare's information the agreed process could not proceed further, accordingly, it cannot be said that KPMG has breached paragraph 3 of the Order as its obligation could not arise before Netcare information is identified.

[127] On the plain language of paragraph 3 and 4 read together, KPMG agreed to allow Stroz Friedberg access to its IT system to do an investigation specified in 5.2.2 and 5.2.3 (Identify Netcare information on the IT system to determine whether anybody has had access to it) and then produce a report in 15 days and giving KPMG 5 days to furnish Netcare information on its system to Werksmans. During that period KPMG was under an obligation not to temper with Netcare information.

[128] In prayers 3.1, 3.2 and 3.3 of the amended relief, Netcare requests declaratory orders (on a final basis) that KPMG breached the Consent Order in two different respects. First, certain of the affidavits provided by KPMG do not comply with the requirements of paragraphs 6.1 and 6.2 of the Order; Second, KPMG has not furnished and refuses to furnish affidavits from persons in respect of whom the Order requires affidavits to be provided.

[129] As a result of the above alleged breaches of the Consent Order, Netcare

seeks three further sets of final orders, namely:

> 129.1 An order that KPMG must procure from all of the omitted persons, as well as Professor van den Heever, the electronic devices on which they worked "in connection with [their] employment or engagement by KPMG during 2011 - 2013". The sterilization process - i.e. deleting all documents containing the keyword "Netcare" in its title, body or metadata - must then be carried out on such devices; and the results would be subject to further electronic discovery and investigations.
>
> 129.2 An order that each of the omitted persons must deliver an affidavit "in the terms of paragraph 6.2 of the Court Order" if they can "depose thereto in precisely those terms".
>
> 129.3 An order that "any person who is a KPMG director, employee or contractor or any other party contracted by KPMG and who has not provided Netcare with an affidavit in the precise terms, without reservation or exception, set out in paragraph 6.2 of the Court Order may not perform or render, or assist those performing or rendering, services to the Commission in the market inquiry'. In addition, anyone who is obliged to render their electronic devices for the sterilization process, but who fails to do so, must be treated as if they had failed to provide this affidavit and accordingly be barred from assisting in the healthcare inquiry.

[130] A convenient point to start is to set out the facts regarding the interactions between Smith and Van der Avoort and Byl. Their respective affidavits make clear what transpired during their interactions. Van der Avoort had been involved in several healthcare related projects and business development initiatives on behalf of KPMG. He did not know that KPMG was doing any work for Netcare until he met Smith at a monthly development meeting held among staff of KPMG where he was filling for a colleague at the time. When Smith met Van der Avoort

in November 2012, she had stopped doing any work for Netcare in 2011. When Van der Avoort learnt that Smith had in the past been involved in doing some business intelligence work for Netcare, He expressed an interest in presenting a reporting tool called Qlikview to Netcare which was developed for a Dutch hospital.

[131] In order to enable Van der Avoort to assess whether the tool might be of any use to Netcare, Smith forwarded to Van der Avoort examples she had in her folder of reporting done for Netcare, The examples all dated from 2011 or earlier. Smith did not forward any of the information she sent to Van der Avoort to Byl or any other person. Van der Avoort was only interested in what kinds of reporting tools Netcare was using, he was not interested in the contents of the reports.

[132] Van der Avoort, Smith and Byl met with Netcare in November 2012 where Van der Avoort presented the tool, which had been used in Netherlands. Neither Smith nor Van der Avoort had any discussions with Byl regarding the work done by KPMG for Netcare. Smith arranged, in preparation for the second meeting with Netcare for Van der Avoort to speak with Vika di Panzu directly about the work he had done for Netcare. Van der Avoort met with Vika di Panzu on 22 March 2013. Smith did not participate in this discussion.

[133] In terms of the Consent Order, KPMG agreed to procure an affidavit from:

> "Any KPMG director, employee or contractor or any other party contracted by KPMG who will perform or render services to the Commission in relation to the market inquiry stating

that s/he has not and will not:

1. 6.2.1 Have any contact or discussions with Vika di Panzu and/or Lalla (or anyone working with them) relating to the work which they have performed for Netcare;
2. 6.2.2 Have any form of access or insight into the data, documents or information to which Vika di Panzu and/or Lalla (or anyone working with them) had access while performing services for Netcare or the work product generated by them;
3. 6.2.3 Have sight of any documents prepared by Netcare or its legal advisers which set out or otherwise disclose the nature and content of the work performed by Vika di Panzu and/or Lalla for Netcare; and
4. 6.2.4 Have any discussions with KPMG's internal legal advisers or other legal representatives disclosing the nature or content of the work and services performed by Vika di Panzu and/or Lalla for Netcare.

[134] KPMG in compliance with paragraph 6.2 provided an affidavit deposed to by Smith in which she confirms that she provided Van der Avoort with "*work done for Netcare which may have included that of di Panzu*" and that she had a "*number of discussions*" with Van der Avoort. The affidavit deposed by Van der Avoort corroborates the statements made by Smith. Byl in his affidavit states that he never had any discussions with di Panzu relating to the work which they have performed for Netcare.

[135] Netcare contend that KPMG was obliged in terms of paragraph 6.2 of the Order to ensure that the KPMG personnel who have been or who will be part of the market inquiry on behalf of the Commission provided an affidavit stating, *inter alia*, they had no contact or discussions with Messrs Panzu or Lalla relating to the work which they performed for Netcare. Netcare submit that KPMG is in

breach because it provided an affidavit from Van der Avoort which stated that he had indeed had discussions and contact with Panzu and Smith relating to work which they performed for Netcare. Netcare also submit that neither Vika di Panzu nor Smith's affidavit is in the form required by paragraph 6.1 of the Order, since both of them do not, confirm that they have had no contact with persons who may form part of KPMG's Commission team.

[136] Netcare submit in its heads of argument and in Court that the breaches arise entirely because of KPMG's insistence in including Van der Avoort in its Inquiry team. If he is omitted from the team, Netcare argues, KPMG would be under no obligation to procure an affidavit from him. The difficulty with this submission is that Netcare contend that KPMG was required to furnish affidavits under paragraph 6.2 of the Consent Order for each individual named in the tender to the Commission. Van der Avoort is mentioned in the tender to the Commission, if KPMG does not furnish his affidavit, then Netcare will rightfully complain that KPMG has dishonestly prevented Netcare from knowing about the interactions between the Netcare team and the Commission team. To complicate matters Netcare in paragraph 4 of the amended relief seeks a declaration that any person who fails to provide an affidavit as required by the Order cannot work on the inquiry as part of the Commission team.

[137] I respectfully agree with Mr. Trengvove SC that Netcare contend for an unsustainable interpretation of the Order, which was not within the contemplation of the parties at the time the Order was taken. A court order can never compel an

individual to lie on oath and neither can it compel their employer to procure untruthful affidavits from them. Accordingly, KPMG cannot be in breach of an order because it procured truthful affidavits from Vika di Panzu, Smith and Van der Avoort.

[138] It is clear that the Consent Order has become impossible to perform and is susceptible to being set aside[31]. In MEC **for Economic Affairs, Environment and Tourism v Kruisenga**[32] the court held that a consent judgment was founded on contract and that defects such as fraud and error would entitle an innocent party to avoid the agreement. KPMG did not know when the order was taken by consent that Van der Voort had interactions with Smith and Di Panzu and Netcare initially never sought disqualification of any person.

[139] In relation to prayer 3.4 KPMG did not breach paragraph 6.2 of the Order by failing to provide affidavits from those persons in Annexure A to the notice of motion. The Court order makes it clear that persons contracted by KPMG who will or may work on the market inquiry must provide an affidavit in which necessary assurances are given. The required affidavit, in my view, will only become necessary when persons listed in Annexure A, or any others, are to provide services to the Commission.

As stated previously, the only remedy available to Netcare is the enforcement of

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[31] Rossouw v Haumann 1949 (4) SA 796 (C)

[32] 2008(6) SA 264 at par 37

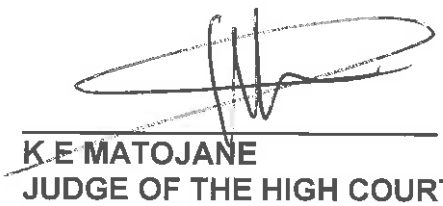
its contractual claim against KPMG to the protection of its confidential information in the event of breach. In light of the view I take of the matter, Netcare is not entitled to the rest of the cluster of relief in prayers 5 to 11.

[140] It follows that the applicant has failed to establish its case. The application must therefore be dismissed. The matter was of exceptional importance to all three parties concerned and intricate questions of law had to be resolved. The respondents each employed a senior counsel with three juniors. In the light of the extraordinary nature of this case the precaution taken by each respondent of briefing four counsels was justified.

Order

[141] Based on the aforegoing, the following order is made:

1. The application is dismissed with costs.
2. The costs are to include the costs arising from the employment of one senior counsel and three junior counsels by First Respondent and Second Respondent respectively.



K E MATOJANE
JUDGE OF THE HIGH COURT