

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case No: 11647/18

In the matter between:

INDEPENDENT COMMUNITY PHARMACY ASSOCIATION

Applicant

And

MINISTER OF HEALTH

First Respondent

CHAIRPERSON OF THE SECTION 22(11)

APPEAL COMMITTEE

Second Respondent

DIRECTOR-GENERAL OF THE DEPARTMENT OF HEALTH

Third Respondent

THE CLICKS GROUP LTD

Fourth Respondent

NEW CLICKS SOUTH AFRICA (PTY) LTD

Fifth Respondent

UNICORN PHARMACEUTICALS (PTY) LTD

Sixth Respondent

CLICKS INVESTMENTS (PTY) LTD

Seventh Respondent

CLICKS RETAILERS (PTY) LTD

Eighth Respondent

JUDGMENT DELIVERED ON 3 JUNE 2020

SIEVERS AJ

INTRODUCTION

[1] The applicant is the Independent Community Pharmacy Association (“ICPA”), a registered non-profit company who represents members comprising more than 1 000 independently owned community pharmacies. They employ approximately 2 500 pharmacists and 20 000 supportive health care personnel.

[2] On 6 May 2016 the applicant lodged a complaint with the Department of Health alleging that the sixth and eighth respondents were contravening the provisions of section 22A of the Pharmacy Act, 53 of 1974 (“the Act”) read with regulation 6. This relates to the ownership and licencing of pharmacies. In terms of Regulation 6 the first respondent (“the Minister”) has prescribed as a condition of ownership that a person who owns, or has a beneficial interest in, a community pharmacy is prohibited from being the owner or the holder of any direct or indirect beneficial interest in a manufacturing pharmacy.

[3] The complaint was rejected by the Deputy-Director General, acting on delegated authority from the third respondent (“the DG”) on 19 January 2017. The applicant lodged an appeal against the decision in terms of section 22(11) of the Act on 17 February 2017. The appeal was set down by the Second Respondent (“the Chairperson”) for 29 November 2017. It was heard on that date and dismissed on 15 January 2018.

[4] The applicant asks for an order reviewing and setting aside both the decision of the DG on 19 January 2017 as well as the decision of the Chairperson’s appeal committee on 15 January 2018.

[5] The applicant further asks for a declaration that the fourth to eighth respondents (“the Clicks Entities”) have contravened the Act and regulations and that the issue of the sanction to be imposed be remitted to the Chairperson, alternatively to the DG, for consideration.

[6] In the alternative, the applicant asks that section 22A of the Act be declared to be contrary to sections 1(c) and 27, of the Constitution and accordingly invalid.

THE CLICKS ENTITIES

[7] The Clicks Group Limited (“Clicks Group”), the fourth respondent, is the holding company at the top of the corporate structure.

[8] Clicks Group is a 100% shareholder of New Clicks South Africa (Pty) Ltd (“New Clicks”), the fifth respondent.

[9] New Clicks owns all the shares of both Unicorn Pharmaceuticals (Pty) Ltd (Unicorn), the sixth respondent, and Clicks Investments (Pty) Ltd (“Investments”), the seventh respondent.

[10] Investments holds all the shares of Clicks Retailers (Pty) Ltd (“Retailers”), the eighth respondent.

[11] Unicorn owns a manufacturing pharmacy while Retailers owns and operates approximately 470 community pharmacies, with 1830 pharmacists, 1430 pharmacist assistants and 315 nursing practitioners.

THE STATUTORY PROVISIONS

[12] Section 22A of the Act provides as follows:

“22A Ownership of pharmacies. -

The Minister may prescribe who may own a pharmacy, the conditions under which such person may own such pharmacy, and the conditions upon which such authority may be withdrawn.”

[13] This section of the Act is to be read with Regulation 6 which provides as follows:

“6 Ownership of community pharmacies

Any person may, subject to the provisions of regulation 7, own or have a beneficial interest in a community pharmacy in the Republic, on condition that such a person or in the case of a body corporate, the shareholder, director, trustee, beneficiary or member, as the case may be, of such body corporate-

(d) is not the owner or the holder of any direct or indirect beneficial interest in a manufacturing pharmacy.”

[14] In order to interpret Regulation 6(d), one must assess the text, context and purpose of the provision. See **Cloete and Another v S; Sekgala v Nedbank** 2019 (4) SA 268 (CC), at par 28, referencing **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA).

[15] As the SCA stated in **Smyth v Investec Bank** 2018 (1) SA 494 (SCA) at [29]:

“... the logical point of departure is the language of the provision itself read in the context of the overall scheme of the Act, having regard to the purpose of the provision and against the background to the production of the relevant statute”.

[16] It is common cause that the decisions of the DD-G and the Appeal Committee in respect of the applicant’s complaint constitute administrative action within the meaning of that term in the

Promotion of Administrative Justice Act, 3 of 2000, which renders them susceptible of review in terms of that Act.

DOES THE STRUCTURE OF THE CLICKS ENTITIES OFFEND AGAINST THE PROVISIONS OF THE ACT READ WITH THE REGULATION?

[17] New Clicks holds 100% of the shareholding of Unicorn which owns the manufacturing pharmacy.

[18] It would be artificial to contend that a company which owns 100% of the shares in a company does not have a direct or indirect beneficial interest in the business owned and operated by that company. The shareholder appoints directors to the company's board. The board determines what dividend is declared, which is then paid to the shareholder from the funds generated by the business. The proceeds of the winding up of the company go to its shareholder. The shareholder thus clearly has a beneficial interest in the business owned by the company.

[19] New Clicks is thus the holder of a beneficial interest in a manufacturing pharmacy.

[20] The next question is whether New Clicks is a beneficiary of the juristic person which owns the community pharmacies (i.e. Retailers). New Clicks is the sole shareholder of the company (i.e. Investments) which holds all of the shares of the juristic person which owns the community pharmacies (i.e. Retailers).

[21] On the above reasoning Investments is a beneficiary of Retailers and so is its shareholder in turn. New Clicks will profit from Retailers through Investments.

[22] The Clicks Entities submit that a shareholder in a company does not have a beneficial interest in the company's assets. Accordingly, they submit that when Regulation 6 (d) speaks of

someone who owns or has a beneficial interest in a pharmacy, it means someone who is the legal owner of the pharmacy business or is legally entitled to the benefits of ownership of the pharmacy.

[23] Retailers owns all the community pharmacies. It is submitted that as its shareholder, Investments, does not own the pharmacies and does not have any rights to the benefits of ownership of the pharmacies, Investments does not have any beneficial interest in the pharmacies.

[24] The Clicks Entities further submit that this interpretation accords with the empowering provision in section 22A of the Act which only permits the Minister to prescribe who may own a pharmacy or hold the legal rights to the benefits of its ownership.

[25] Lastly, the Clicks Entities submit that the applicant's complaints do not avail the applicant because they do not affect the validity of the licences issued to Unicorn and Retailers. It being argued that the complaint that their holding companies contravene the Regulations would not invalidate the licences held by Unicorn and Retailers.

[26] This argument cannot be upheld. Unicorn and Retailers hold their licences subject to the conditions set out in the Regulations. Where there is a condition breached there is a prohibition on ownership.

[27] To interpret these conditions in the manner contended for by the Clicks Entities, namely that to be a beneficiary or to have a direct or indirect beneficial interest relates only to the benefits of ownership of the pharmacies would emasculate and frustrate the purpose of the prohibition.

[28] The regulations recognise that where a community pharmacy is owned by an entity other than pharmacists themselves, it is undesirable for there to be a direct or indirect beneficial interest in both such a community pharmacy and a manufacturing pharmacy.

[29] An entity having interests in both types of pharmacies would gain financially if the manufacturing pharmacy's products are promoted by the pharmacists in the community pharmacies over others. This could result in consumers not getting the best quality product at the best price. Products which are not strictly needed might be recommended and sold.

[30] The conflict of interest could also result in the manufacturing pharmacy favouring community pharmacies belonging to the same group above outside or independent pharmacies. This might affect the availability of products to customers.

[31] These dangers are present in the corporate structure of the Clicks Entities.

[32] The corporate structure thus contravenes the prohibition contained in Regulation 6.

[33] There is no attack on the validity of the Regulations. The Regulations prohibit not only the ownership of both manufacturing and community pharmacies but also prohibit an entity from being a beneficiary of the one and holding a direct or indirect beneficial interest in the other, which are wider concepts than the benefits of ownership.

[34] The DD-G's view that Investments and Unicorn are "fellow subsidiaries" and "associated companies" and that the Regulation does not preclude associated companies from owning a community and manufacturing pharmacy does not recognise that it is the corporate structure which constitutes the contravention.

[35] The appeal committee's acceptance of the argument that section 22A of the Act merely confers a power to the Minister to determine who may own a pharmacy and that the Regulations must accordingly be interpreted to avoid rendering them *intra vires* the Act by reading them as dealing only with the ownership of pharmacies, is incorrect. The plain wording of the concepts of

“a beneficiary of” and “a direct or indirect beneficial interest” cannot be ignored, nor can the context or purpose of the provision.

[36] To do so would undermine completely the aim of the legislative scheme which is ultimately to protect the best interests of patients. It would otherwise be possible to circumvent and frustrate the purpose of the prohibition merely by interposing a juristic entity.

[37] Section 22A expressly empowers the Minister to prescribe the conditions under which a person may own a pharmacy and the conditions upon which such authority may be withdrawn.

[38] The concept of a beneficial interest is of wide import. The Appeal Board’s acceptance that, since the assets of a company do not belong to the shareholders but to the company itself, even a 100% shareholding in a company does not translate into a beneficial interest in the company, is incorrect. This is a material error in law and falls to be reviewed and set aside.

[39] A shareholder, without owning the assets of the company, has a beneficial interest in the operations and profits of the company’s business, i.e. in this case the pharmacy.

[40] Accordingly, both the decisions of the DD-G and the Appeal Committee fall to be set aside.

[41] The first to third respondents have elected to abide the outcome of this application.

[42] A number of procedural and *in limine* points were taken by the Clicks Entities at the appeal hearing. These were dealt with and dismissed by the Appeal Committee and the dismissal of these points was not formally challenged. It is accordingly not necessary for this court to revisit them.

[43] The Clicks Entities further submit that the assessment of the question as to whether the DG and Appeal Committee lawfully dismissed the applicant’s complaint must involve an analysis of

the complaint itself. It is argued that it is only if the complaint itself was incorrectly decided that the decisions can be set aside.

[44] The complaint, read with annexure A thereto (being an extract from Clicks Group's annual financial statements) reflects under 'Trading' that the said holding company directly holds New Clicks and indirectly holds Unicorn and Retailers.

[45] Thus, whilst the complaint before the DG incorrectly stated that Retailers and Unicorn "clearly have direct or indirect beneficial interests in each other", the complaint read with the annexure reflected that these entities were both held by The Clicks Group through New Clicks. The true mischief was accordingly reflected in and exposed by the contents of the complaint. New Clicks has the interests prohibited in respect of both the community pharmacies and the manufacturing pharmacy.

[46] The regulations are intended to prevent a conflict of interest not only at the ownership level. This is a purpose consonant with s22A. The section imposes conditions in respect of the ownership of community pharmacies. The Regulations do not merely prohibit beneficial ownership but specify that a beneficial interest is prohibited.

[47] This was argued before the Appeal Committee.

[48] The gravamen of this complaint was specifically considered in the appeal with the Decision of the Appeal Committee recording that:

"20.2 Appellant in the circumstances submitted to the Appeal Committee that the corporate structure of the Clicks Group of companies as explained above contravenes Licencing regulation 6 and in a way manages to circumvent the very same mischief that the licencing regulation seeks to address and consequently prevents."

and

“45. As pointed out above the main issue in this appeal stems from the Appellant’s complaint that Clicks Group and New Clicks have a beneficial interest in both Retailers and Unicorn because Retailers owns and operates community pharmacies and Unicorn on the other hand is a manufacturing pharmacy. Appellant’s contention is that the corporate structure of Clicks Group of companies contravenes Licencing Regulation 6(d).”

[49] It to be noted that the appeal to the Appeal Committee was an appeal in the wide sense. (See **Meyer v Iscor Pension Fund** 2003 (2) SA 715 (SCA) para 8). The appeal committee accordingly considered afresh if there was a contravention of the Regulations. The crux of the complaint was substantially the same, the essence being the corporate structure through which the group held both retail and manufacturing pharmacies.

[50] The finding by the Appeal Committee that the corporate structure of the Clicks Entities does not offend against the regulation is incorrect.

[51] As a result this conclusion the constitutional challenge falls away.

[52] The Clicks entities further submitted that section 22 did not grant a power to revoke licences as had been requested in the complaint. Section 22(10) empowers the closure of a pharmacy which is being conducted in contravention of the Act or the licencing conditions.

[53] It is accordingly ordered that:

1. The decision of the Director-General of the Department of Health on 19 January 2017 rejecting the Applicant’s complaint dated 6 May 2016 pertaining to contraventions of the provisions of the Pharmacy Act 53 of 1974 (“the Act”) read

with the Regulations relating to ownership and the licencing of pharmacies of 25 April 2003 (“the Regulations”) is reviewed and set aside.

2. The decision of the First Respondent’s appeal committee constituted in terms of section 22(11) of the Act, on 15 January 2018 dismissing the Applicant’s appeal against Third Respondent’s decision is reviewed and set aside.
3. In substitution for the decisions referred to in paragraphs 1 and 2 above, it is declared that Fourth to Eighth Respondents contravened section 22A of the Act read with Regulation 6, in that:

3.1 Seventh Respondent has a beneficial interest in community pharmacies through its 100% shareholding of Eighth Respondent, which owns community pharmacies, and the shareholder of Seventh Respondent, being the Fifth Respondent, has a direct or indirect beneficial interest in the form of shareholding in Sixth Respondent, which owns a manufacturing pharmacy.

3.2 Fifth Respondent has a beneficial interest in community pharmacies through its 100% shareholding in Seventh Respondent which, in turn, has a 100% shareholding in Eighth Respondent, which owns community pharmacies, and its direct or indirect beneficial interest in the form of shareholding in Sixth Respondent, a manufacturing pharmacy.

4. The issue of the sanction to be imposed in respect of the above contraventions is remitted to Second, alternatively Third, Respondent for consideration.

5. The Fourth to Eighth Respondents shall pay the Applicant's costs, jointly and severally, with such costs to include the costs of two counsel.

A handwritten signature in black ink, appearing to read "H.K. Sievers", written over a horizontal line.

SIEVERS AJ

JUDGE OF THE HIGH COURT