competitiontribunal
SOUTH AFRICA

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No:IR257Feb19

In the application for interim relief:

CHARLNITA CASSIEM Applicant

And

GOVERNMENT EMPLOYEES MEDICAL SCHEME Respondent

Panel	: Enver Daniels (Presiding member)
	: Medi Mokuena (Tribunal member)
	: Andreas Wessels (Tribunal member)
Heard on	: 20 May 2019
Order issued on	: 27 May 2019
Reasons issued on	: 19 July 2019

REASONS FOR DECISION

Introduction

[1] The Applicant, Charlnita Cassiem, launched an application, under case number IR257Feb19. According to the Applicant:

> *"Part nr4.1(a),(b) i, ii of the Competition Act and thus seeking interim relief against the Respondent to remove its agreement between the Respondent and Clinical Technologist and Open Dialysis services to Registered Professional Nurses and declare such agreement anti-competitive with the sole intention to create a cartel relationship."*

[2] In addition, the Applicant seeks:

"Interim relief against the Respondent that the Respondent does not further make use of its dominance under section 8(d)(i) inducing customer to not deal with the Applicant by applying indirect payment on the Applicants practice which will result in that customers will use its competitors."

[3] The Applicant also seeks relief:

"That the Respondent settles in full all the Applicants claims submitted since 1 November 2018 till 5 March 2019 which has been approved and illegally withdrawn which will force the Applicant to close down its practice;

That interdicts the Respondent from not making use of its Dominance to compel customers not to make use of the Applicants service by placing the Applicants practice on indirect payment."

[4] The Application was heard on 20 May 2019 and an order dismissing the application was issued by the Tribunal on 27 May 2019.

[5] These are the reasons.

The Application

[6] The Applicant filed the papers herself and was assisted during the hearing by her husband, Mr Yusuf Cassiem, who also prepared the Applicant's Heads of Argument.

[7] Competition law is a specialised and complex field making it difficult for laypersons to formulate a proper case and to conduct the proceedings themselves.

[8] The Applicant is a registered nurse and midwife who, prior to starting her own dialysis practice, was employed as a unit manager at two dialysis clinics, which

she does not name, where she provided dialysis treatment to patients who need it.

[9] The Applicant appears to have identified an opportunity for herself in the market for the provision of dialysis treatment and set about establishing her practice in or about April 2018.

[10] She provides an invaluable home service to people who require dialysis in places which are far from hospitals and clinics.

[11] She approached the Government Employees Medical Scheme ("GEMS") for pre-authorisation for patients who are members of the Respondent, but her request was refused because the Respondent wrongly believed, apparently, that the Applicant required a nephrology certificate to perform dialysis.

[12] The Applicant, acting on the advice of her husband launched proceedings in this Tribunal which led to the Respondent entering into settlement talks with her.

[13] Those talks culminated, it seems, in the Respondent accepting that the Applicant had the necessary skill and expertise to perform dialysis.

[14] However, the Applicant continues to have a dispute with the Respondent about the claims which she submitted to the Respondent in respect of services which she provided to patients who are members of the Respondent.

[15] The Applicant is also unhappy about the fact that other dialysis treatment providers are, according to the Applicant, paid a more favourable rate than that paid to the Applicant.

[16] What has been extremely disconcerting to the Applicant was the Respondent's decision to pay the prescribed benefit amount directly to the patients and not to the Applicant.

[17] It is abundantly clear that the dispute between the Applicant and the Respondent concerns the commercial relationship between the two and not a competition issue.

[18] Much of what the Applicant states in her Founding Affidavit is difficult to discern.

[19] She alleges, it would appear, that the Applicant and the HPCSA (presumably the Health Professions Council of South Africa) are in a horizontal relationship which impacts negatively on her because the two have fixed prices between GEMS and clinical technologists which excluded nurses.

[20] We had great difficulty in following her various arguments and repeatedly asked her and her husband, who assisted her during the hearing, to explain the competition issues which were of concern to them, more specifically how the Respondent had contravened the Act by fixing prices and abusing its alleged dominant position.

[21] We did so to assist the Applicant who was not legally represented and to be as fair as we possibly could to her under the circumstances.

[22] Even undefended litigants have the right to approach the Tribunal for relief and must feel free to do so and the Tribunal must, where possible, provide such litigants with assistance and guidance, in accordance with our inquisitorial powers which are aimed at ensuring that justice is done.

[23] Regrettably, despite our numerous attempts, the Applicant could not explain which competition issues were in dispute.

[24] The Respondent answered the Applicant's case fully.

[25] According to the Respondent, the Applicant and the Respondent are not competitors and are not in a horizontal relationship. This fact was not contested by the Applicant.

[26] Furthermore, the Respondent argued that it doesn't have dominance or market power in any relevant market which is capable of abuse.

[27] The Respondent is a medical scheme registered in terms of the Medical Schemes Act, 1998 (Act No. 131 of 1998) for the benefit of its members and its object is not to generate profits.

[28] According to the Respondent, the Applicant was at all relevant times focussed on making substantial profits in her professional capacity as a nurse, predominantly by charging her patients excessive amounts in excess of R80 000 for each session lasting a few hours for equipment hire in relation to the dialysis equipment used by the Applicant.

[29] According to the Respondent, the Applicant ceased to practice on 13 March 2019, but had during the period April 2018 to February 2019, submitted claims totalling R9,9 million in respect of only three patients who are members of the Respondent.

[30] The Respondent also states that on 27 October 2018, the Applicant submitted three claims of R70 000 each, totalling R210 000 for equipment hire for that day.

[31] According to the Respondent, the amounts charged by the Applicant are not in accordance with its tariffs and the Respondent is not liable for those amounts.

[32] In fact, the Respondent alleges that it had inadvertently overpaid the Applicant in excess of R1,2 million, which it is trying to recover.

[33] From this it is evident that the real dispute between the parties relates to the amounts (whatever they may be) allegedly due to the Applicant by the Respondent. As already mentioned, that is not a competition issue.

[34] The Respondent also makes the point that the Applicant has not led any evidence to demonstrate any abuse of dominance or restrictive horizontal practices on the part of the Respondent.

[35] It is unnecessary to deal any further with the allegations and counter allegations, except to say that the Applicant has not been able to show, on a balance of probabilities, that the Respondent was engaged in either an abuse of dominance or restrictive horizontal practices.

[36] It goes without saying that we do not have jurisdiction to hear commercial disputes relating to the payment of charges which may be due to the Applicant by the Respondent.

[37] The Applicant has also condemned the conduct of various other parties who have not been joined.

[38] However, even in respect of those criticisms, we have not been able to fully understand either the nature of the complaint or the competition issue alleged by the Applicant.

[39] We have already mentioned that during the hearing, we gave the Applicant many opportunities to fully explain and to substantiate the competition issues, but she was unable to do so.

[40] We have examined the evidence before us and have concluded that no case has been made out for interim relief.

[41] For that reason, the application must be dismissed.

[42] The Respondent has asked us to order the Applicant to pay the costs.

[43] We have declined to do so.

[44] In terms of section 57(2), we have a discretion to award costs.

[45] The Applicant provides a very important, lifesaving service to patients who require dialysis.

[46] The Applicant's dispute with the Respondent is essentially a commercial one relating to the way in which the Respondent compensates the Applicant for the services which she renders to her patients.

[47] The Applicant makes a number of allegations, which include competition related allegations which she was unable to sustain in these proceedings, against the Respondent.

[48] The Applicant has however also lodged a complaint against the Respondent with the Competition Commission.

[49] The Tribunal must be accessible to everyone, particularly to those people who cannot afford the costs of engaging the services of lawyers to represent them.

[50] Sections 9 and 34 of the Constitution provide as follows:

> *"9. Equality. — (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.*
>
> *34. Access to courts. — Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."*

[51] The Applicant is entitled to the benefits of these two sections and has the right to approach the Tribunal to adjudicate on her dispute with the Respondent, even though she has been unsuccessful. We have also taken into account the fact that the Applicant operates a small business, through which she renders a lifesaving service to patients and that she had no legal representation.

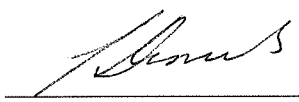
[52] We would be failing in our duty if we awarded costs against the Applicant in this case without considering the above factors, as it could discourage other persons who may have legitimate competition concerns, but who are unable to afford the costs of litigation, from approaching the Tribunal to have those concerns decided by the Tribunal.

[53] The Respondent provides medical aid to its members and administers public funds. It should also attempt to resolve, as far as possible, in the interests of its members, disputes between itself and service providers such as the Applicant in the most cost-effective ways.

The following order is made:

[1] The application is dismissed.

[2] No order is made as to costs.



Mr Enver Daniels

19 July 2019

Date

Mrs Medi Mokuena and Mr Andreas Wessels concurring.

Tribunal Case Managers	:	Ndumiso Ndlovu and Andiswa Nyathi
For the Applicant	:	Y Cassiem
For the Respondent	:	E Kromhout instructed by Gildenhuys Malatji Attorneys