



GOVERNMENT GAZETTE

OF THE

REPUBLIC OF NAMIBIA

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General Notice

NAMIBIAN COMPETITION COMMISSION

No. 434

2014

NOTICE OF ACTION TO BE TAKEN UNDER SECTION 38 COMPETITION ACT, 2003 (Section 41, Rule 18(1))

THE NAMIBIAN COMPETITION COMMISSION// NAMIBIAN ASSOCIATION OF MEDICAL AID FUNDS AND OTHERS, CASE NUMBER: 2010NOV09IINV AND NAMIBIA PRIVATE PRACTITIONERS FORUM (NPPF)//NAMIBIAN ASSOCIATION OF MEDICAL AID FUNDS (NAMAF) AND OTHERS CASE NUMBER 2011JUN0073COMP

1. The Commission initiated a complaint on 28 April 2011 and thereafter received a complaint on 27 June 2011 in relation to this matter. In terms of Rule 6 of the Rules of the Competition Act, 2003 (the Competition Act), the two cases were combined under a common investigation, case number 2011JUNE0073COMP as they concerned substantially the same conduct by the same undertakings. The Commission has given notice of its proposed decision on 19 May 2014.
2. **The Commission gives notice that it intends to take the following action under section 38:**

Following the investigation and considering of all written representation made in terms of section 36 and of all matters raised at the conference held in accordance with section 37, the

Commission has decided to institute proceedings in the Court against the Respondents for an order:

- 2.1 declaring that NAMAF and its members have contravened section 23(1), read with sections 23(2)(a) and 23(3)(a) of the Competition Act and ordering that they cease the conduct in question;
- 2.2 interdicting NAMAF from publishing tariffs (whether as guidelines, recommendations or otherwise) in a manner that infringes the Competition Act;
- 2.3 interdicting the members from participating or engaging in any process whereby such tariffs are determined, recommended or implemented in a manner that infringes the Competition Act;
- 2.4 stipulating a timeframe within which NAMAF and its members must ensure compliance with the Competition Act;
- 2.5 seeking an appropriate pecuniary penalty against NAMAF and the members in terms of section 53(1)(a) and 53(2) of the Competition Act, taking into account the factors in section 53(3) of the Competition Act;
- 2.6 ordering that NAMAF and its members pay the costs of the proceedings; and such further and/or alternative relief as the Court may consider appropriate.

It is also noteworthy that the order that the Commission will seek requests the Court to stipulate a timeframe within which NAMAF and its members must ensure compliance with the Competition Act in order to minimise undue disruption in the sector.

The Commission remains willing to engage with all stakeholders including NAMAF and its members with the objective of resolving matters and establishing alternative measures or structures (whether statutory or otherwise) reflective of representatives of all of the participants in the sector with the objective of formulating appropriate protocols for reimbursement and the measurements of the costs thereof within the Namibian health sector.

Furthermore, the Commission records that it is willing to engage with all respondents in an endeavour to settle this matter with the object of avoiding court proceedings. This remains an ongoing and open invitation on the part of the Commission.

Against:

The following undertakings, organisations or associations are listed as Respondents against which relief will be sought in terms of section 38:

- 2.7 NAMAF, an association and statutory body with juristic personality established in terms of Section 10 of the Medical Aid Funds Act, 1995 (Act No. 23 of 1995), situated at Suite 3C, 2nd floor Yang-Tze Village, 351 Sam Nujoma Drive, Windhoek, Namibia;
- 2.8 Namibia Medical Care Medical Aid Fund, a registered open medical aid fund managed by the NMC Board of Trustees and an appointed Principal Officer in accordance with the registered NMC Rules, the guidance of the Medical Aid Funds Act and other applicable legislation, situated at Methealth Office Park Maerua Park, Windhoek, Namibia;
- 2.9 Namibia Health Plan Medical Aid Fund, a registered open medical aid fund, situated at Hidas Centre, 1st Floor, Nelson Mandela Avenue, Klein Windhoek, Namibia;

- 2.10 Renaissance Health Medical Aid Fund, a registered open medical aid fund administered by Prosperity Health, situated at Unit 2 Jan Jonker Heights Office Park, Windhoek, Namibia;
- 2.11 NAMMED Medical Aid Fund, a registered open medical aid fund, situated at 1 John Ludwig Street, Corner of John Ludwig and Sam Nujoma Street, Klein Windhoek, Namibia;
- 2.12 Bankmed Medical Aid Scheme, a registered open medical aid fund, registration number 96/015, administered by Methealth Namibia, situated at Methealth Office Park, Maerua Park, Windhoek;
- 2.13 Namdeb Medical Aid Scheme, a registered closed medical aid fund administered by Prosperity Health, with registered address - P0 Box 833, Oranjemund, Namibia;
- 2.14 Napotel Medical Aid Scheme, a registered closed medical aid fund, registration number MA 012, situated at Telecom Head Office, Windhoek, Namibia;
- 2.15 Woermann and Brock Medical Aid Scheme, a registered closed medical aid fund, registration number 93/279, situated at Woerman Brock Head Office, 165 Paul Van Harte Street, Khomasdal, Windhoek, Namibia;
- 2.16 Roads Contractors Company Medical Scheme, a registered closed medical aid fund, administered by Prosperity Health, situated at RCC Head Office, 140 Lazarett Street, Southern Industrial, Windhoek, Namibia.

3. The nature of the conduct that is the subject of the action is:

- 3.1 The Commission's investigations and the submissions received indicate that the conduct of NAMAF and its members has caused harm with the object and effect of preventing and substantially lessening competition. The evidence is that the conduct harmed consumer or patient choice and inhibited innovation in the Namibian healthcare sector (including in the provision of hospital services, medical services, pharmaceuticals and similar medical products or services).
- 3.2 As part of the activities of NAMAF (particularly through committees under the auspices of NAMAF), the members of NAMAF participated in a process for the determination and annual review of what are described as "benchmark tariffs". These tariffs are agreed by members, and adopted and published by NAMAF, as benchmark and/or recommended tariffs or prices for medical products and services provided to consumers and/or patients. The evidence is that the members of NAMAF applied the tariffs in interactions with medical service providers as the rates at which products and services would be reimbursed or paid.
- 3.3 The conduct of NAMAF and its members falls within that prohibited by the Competition Act as agreements or concerted practices between the members of NAMAF (as undertakings in a horizontal relationship) and decisions of NAMAF (as an association) which directly or indirectly fix purchase or selling prices within the meaning of section 23 of the Competition Act. The conduct is of the nature of cartel conduct recognised as the most serious and harmful under competition law.
- 3.4 The Commission also considered legal submissions that its jurisdiction was excluded by the provisions of the Medical Aid Funds Act, 23 of 1995 ("the MAF Act") and the regulations thereto, whether the Competition Act applies to the activities of NAMAF and its members on the grounds that the member medical aid funds are not 'undertakings' as defined in section 1 of the Competition Act and whether the conduct

constitutes concerted conduct designed to achieve a non-commercial socio-economic objective in terms of section 3(1)(b) of the Competition Act.

- 3.5** The Commission was not persuaded by the submissions. While the Competition Act applies to the activities of statutory bodies except insofar as those activities are authorised by law (section 3(3)), the powers of NAMAFA do not exclude the statutory entitlement of the Commission to investigate and refer conduct on the part of NAMAFA and/or its members to the extent that the conduct contravenes the Competition Act and harms competition. The powers of NAMAFA under the MAF Act and/or its regulations do not sanction or authorize unlawful conduct in contravention of the Competition Act and, in addition, there are no provisions that authorize NAMAFA and its members to engage in the anticompetitive conduct that is the subject of the Commission's investigation. NAMAFA and its members do not need to engage in anticompetitive conduct in contravention of the Competition Act to achieve the objectives of NAMAFA under the MAF Act.
- 3.6** The members of NAMAFA are 'undertakings' as defined in the Competition Act and compete for the business of, and receive payment from, consumers. Indeed, the MAF Act describes the members of NAMAFA as a 'business' and the members of NAMAFA receive commercial or material benefit or advantage different from that related to non-commercial socio-economic objectives (which a charitable, humanitarian or other non-profit organization may seek to achieve). The members of NAMAFA provide their services in exchange for money, in the form of premiums paid by consumers.
- 3.7** The conduct has endured since the coming into operation of the Competition Act.
- 3.8** No exemption has been sought in terms of Part III of the Competition Act in this matter.

F. HANGULA
CHAIRPERSON
NAMIBIAN COMPETITION COMMISSION
